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## Only Presumed Unreliable: Proving Confrontation Forfeiture with Hearsay

### Keywords

Forfeiture, Hearsay, States

## ONLY PRESUMED UNRELIABLE: PROVING CONFRONTATION FORFEITURE WITH HEARSAY

TIM DONALDSON\*

A criminal defendant may forfeit the right to confront a prosecution witness at trial if the defendant has purposefully prevented the witness from testifying.<sup>1</sup> This doctrine was recognized by the United States Supreme Court in 1878 but remained largely undeveloped until the 1970s.<sup>2</sup> After its use for many years by lower federal courts, the Supreme Court added a hearsay exception to the Federal Rules of Evidence in 1997 that admits into evidence “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”<sup>3</sup> The rule “codifies the forfeiture doctrine . . . .”<sup>4</sup>

The Supreme Court reconfirmed its acceptance of the forfeiture-by-wrongdoing doctrine in *Crawford v. Washington* without significant discussion.<sup>5</sup> It has officially taken “no position on the standards necessary to demonstrate such forfeiture . . . .”<sup>6</sup> However, the Court commented in *Davis v. Washington* that state courts have considered “hearsay evidence, including the unavailable witness’s out-of-court statements” when making forfeiture determinations.<sup>7</sup> The Colorado Supreme Court succinctly explained the rationale relied upon by state courts in *Vasquez v. People*.<sup>8</sup> The *Vasquez* court reasoned that the forfeiture-by-wrongdoing doctrine presents a preliminary question as to the admissibility of evidence; therefore, under regular evidentiary procedures, “the determination shall not be bound by the rules of evidence except those with respect to privileges. Thus,

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1. *Giles v. California*, 554 U.S. 353, 359-68 (2008); *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

2. See generally Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the “Forfeiture by Wrongdoing” Confrontation Exception Resurrected by the Supreme Court in Crawford and Davis*, 44 IDAHO L. REV. 643, 653-61 (2008) (tracing the development of the doctrine in the United States).

3. Order Amending the FED. R. EVID., 520 U.S. 1323, 1328 (1997) (codified as amended at FED. R. EVID. 804(b)(6)).

4. *Davis v. Washington*, 547 U.S. 813, 833 (2006); see also *Giles*, 554 U.S. at 367.

5. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

6. *Davis*, 547 U.S. at 833.

7. *Id.* (quoting *Commonwealth v. Edwards*, 830 N.E.2d 158, 174 (Mass. 2005)).

8. *Vasquez v. People*, 173 P.3d 1099 (Colo. 2007).

hearsay evidence, including the unavailable witness's out-of-court statements, will be admissible."<sup>9</sup>

Many courts have ruled that hearsay may be used to prove forfeiture-by-wrongdoing.<sup>10</sup> A federal district court observed that "successful witness intimidation would often not be provable at all if hearsay were not permitted."<sup>11</sup> Some courts have nonetheless held that forfeiture-by-wrongdoing may not be proven solely by inadmissible evidence.<sup>12</sup> The Supreme Court of Utah wrote in *State v. Poole* that the right of confrontation is a significant constitutional protection that should not be easily forfeited.<sup>13</sup> Courts in that state therefore "may not consider hearsay evidence in evaluating the admission of out-of-court statements on the basis of forfeiture by wrongdoing."<sup>14</sup>

This article examines whether hearsay may be relied upon for purposes of the forfeiture-by-wrongdoing doctrine to prove that a criminal defendant tampered with a witness.

## I. DEVELOPMENT OF THE RULE ALLOWING RELIANCE ON HEARSAY

Two of the early circuit court decisions resurrecting the forfeiture-by-wrongdoing doctrine commented, with apparent approval, that the trial courts in those cases had relied upon hearsay evidence to determine the admissibility of statements made by unavailable witnesses.<sup>15</sup> By the time those cases were decided, Federal Rule of Evidence 104 ("Rule 104") had been adopted stating that trial judges are "not bound by the rules of evidence except those with respect to

9. *Id.* at 1105.

10. *See, e.g.*, *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997) ("We thus join all the other courts to have addressed the matter in approving at least partial reliance on hearsay."); *Jenkins v. United States*, 80 A.3d 978, 996 n.47 (D.C. 2013) (citing cases); *State v. Pickens*, 25 N.E.3d 1023, 1058 (Ohio 2014) (same); *see also* *People v. Perkins*, 691 N.Y.S.2d 273, 274-75 (N.Y. Sup. Ct. 1999) (listing multiple New York and federal cases that allow use of hearsay to make forfeiture determinations).

11. *Geraci v. Senkowski*, 23 F. Supp. 2d 246, 258 (E.D.N.Y. 1998), *aff'd* 211 F.3d 6 (2d Cir. 2000).

12. California has held that the prosecution cannot rely solely upon an out-of-court statement made by a missing witness to prove forfeiture and must also "present independent corroborative evidence supporting the forfeiture finding. The prosecution also must show the unavailable witness's prior statement falls within a recognized hearsay exception and the probative value of the proffered evidence outweighs its prejudicial effect." *People v. Osorio*, 81 Cal. Rptr. 3d 167, 173 (Cal. Ct. App. 2008); *see also* *People v. Giles*, 152 P.3d 433, 446 (Cal. 2007), *vacated on other grounds by* *Giles v. California*, 554 U.S. 353 (2008). Kentucky also appears to require at least some admissible evidence to support a forfeiture-by-wrongdoing finding. *Hammond v. Commonwealth*, 366 S.W.3d 425, 432-33 (Ky. 2012).

13. *State v. Poole*, 232 P.3d 519, 527 (Utah 2010).

14. *Id.* at 526.

15. *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979) (recounting testimony given by an FBI agent about what the agent had been told by a witness regarding his reasons for not wanting to testify), *abrogated on other grounds by* *Richardson v. United States*, 468 U.S. 317, 325-26 (1984), *as recognized in* *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000); *United States v. Carlson*, 547 F.2d 1346, 1353 (8th Cir. 1976) (noting that the trial court heard testimony from DEA agents who relayed hearsay statements made by a witness about why he refused to testify).

privileges” when making preliminary determinations concerning the admissibility of evidence.<sup>16</sup> The Advisory Committee notes on Rule 104 assert that sound sense supported suspension of the exclusionary law of evidence in such situations, “and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.”<sup>17</sup> The Second Circuit Court of Appeals adopted the forfeiture-by-wrongdoing doctrine in *United States v. Mastrangelo*, because “[a]ny other result would mock the very system of justice the confrontation clause was designed to protect.”<sup>18</sup> The *Mastrangelo* court also expressly confirmed that a defendant’s possible waiver of his sixth amendment rights is a preliminary question going to the admissibility of evidence “governed by [Rule] 104(a), which states that the exclusionary rules, excepting privileges, do not apply to such proceedings.”<sup>19</sup>

Federal Rule of Evidence 804(b)(6) (“Rule 804(b)(6)”) regarding forfeiture-by-wrongdoing was adopted in early 1997.<sup>20</sup> The Advisory Committee note for the rule cites reasoning from *Mastrangelo* regarding the purpose behind the forfeiture-by-wrongdoing doctrine as justification for the rule.<sup>21</sup> The Advisory Committee note does not expressly address the use of hearsay when making forfeiture determinations, but it does imply that Rule 104 generally applies by stating that the “usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.”<sup>22</sup> Shortly after adoption of Rule 804(b)(6), the Circuit Court of Appeals for the District of Columbia in *United States v. White* explained the rationale for use of Rule 104(a) in the context of forfeiture-by-wrongdoing, writing that:

Because a judge, unlike a jury, can bring considerable experience and knowledge to bear on the issue of how much weight to give to the evidence, and because preliminary determinations must be made

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16. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1930 (establishing rules of evidence for certain courts and proceedings) (codified as amended at FED. R. EVID. 104(a)); *see also* FED. R. EVID. 1101(d)(1).

17. WARREN BURGER, COMMUNICATION FROM CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. NO. 93-46, at 48 (1973) [hereinafter H.R. DOC. NO. 93-46]; *see also* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 188 (1969).

18. *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

19. *Id.*; *see also* *Steele v. Taylor*, 684 F.2d 1193, 1202-03 (6th Cir. 1982) (commenting with citation to Rule 104(a) that a trial judge is not bound by the rules of evidence when making such determinations); *United States v. Mayhew*, 380 F. Supp. 2d 961, 968 n.9 (S.D. Ohio 2005) (quoting Rule 104(a) and noting that “[i]n making a preliminary determination, the trial court has at its disposal all the information in the record, except privileged information.”); *United States v. Houlihan*, 887 F. Supp. 352, 357 (D. Mass. 1995) (writing that “[p]ursuant to FED.R.EVID. 104(a), this Court was not bound by the rules of evidence in making its determination.”).

20. Order Amending the FED. R. EVID., 520 U.S. 1323, 1328 (1997).

21. WILLIAM REHNQUIST, COMMUNICATION FROM THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES, H.R. DOC. NO. 105-69, 22 (1997) [hereinafter H.R. DOC. NO. 105-69].

22. *Id.* at 23.

speedily, without unnecessary duplication of what is to occur at trial, it is within the judge's discretion to admit hearsay evidence that has at least some degree of reliability.<sup>23</sup>

The codification of the forfeiture-by-wrongdoing doctrine by Rule 804(b)(6) therefore bolstered the application of Rule 104 to forfeiture determinations. However, the suspension of normal evidentiary rules when making preliminary determinations on evidence admissibility was not universally endorsed before adoption of Rule 104. The Advisory Committee notes recognize that the authorities on the subject were "scattered and inconclusive."<sup>24</sup> One of the leading pre-rule cases was *Glasser v. United States*.<sup>25</sup> The Supreme Court held in *Glasser* that declarations made by an alleged co-conspirator in the absence of the person against whom they are offered would be admissible only if there was "proof *aliunde*" that such person was connected with the conspiracy.<sup>26</sup> The *Glasser* Court expressed concern that "[o]therwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."<sup>27</sup> This proof *aliunde* condition required substantial independent evidence of predicate facts establishing admissibility.<sup>28</sup>

Most of the U.S. Circuit Courts of Appeal initially held that *Glasser's* proof *aliunde* requirement survived adoption of Rule 104.<sup>29</sup> The Supreme Court ultimately held otherwise in *Bourjaily v. United States*.<sup>30</sup> The Court explained in *Bourjaily* that "[t]he Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege."<sup>31</sup> Noting that the rule is sufficiently clear, the Court held that it prevails over *Glasser*.<sup>32</sup> The Court wrote that "[t]o the extent that *Glasser* meant that courts could not look to hearsay statements themselves for any purpose, it has clearly been superseded by Rule

23. *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997).

24. H.R. DOC. NO. 93-46, *supra* note 17, at 48 (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 53, at 123-24 n.8 (1954)); *see also* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 188 (1969).

25. *Glasser v. United States*, 315 U.S. 60 (1942), *superseded by statute*, FED. R. EVID. 104(a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171, 181 (1987).

26. *Id.* at 74.

27. *Id.* at 75. *Glasser* dealt with the co-conspirator statement rule, however, concerns about bootstrapping have not been limited to that hearsay exception. *See, e.g.*, *State v. Young*, 161 P.3d 967, 976 ¶34 (Wash. 2007) (requiring some independent corroborative evidence that a startling event occurred to admit an excited utterance); *State v. Post*, 901 S.W.2d 231, 234-35 (Mo. Ct. App. 1995) (same); *Truck Ins. Exchange v. Michling*, 364 S.W.2d 172, 174-75 (Tex. 1963) (same).

28. *United States v. Nixon*, 418 U.S. 683, 701 n.14 (1974).

29. *United States v. Ammar*, 714 F.2d 238, 246 n.3 (3rd Cir. 1983); *see also* *United States v. Alvarez*, 584 F.2d 694, 696-97 (5th Cir. 1978); *but see* *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979) (adopting view that Rule 104(a) modified prior law to the contrary); *United States v. Martorano*, 561 F.2d 406, 408-09 (1st Cir. 1977) (questioning the continued vitality of *Glasser*).

30. *Bourjaily v. United States*, 483 U.S. 171 (1987), *superseded by statute*, FED. R. EVID. 801(d)(2), *as recognized in* *Wiest v. Lynch*, 15 F.Supp.3d 543, 563 n.14 (E.D. Pa. 2014).

31. *Id.* at 178.

32. *Id.* at 178-79.

104(a).”<sup>33</sup> The Court therefore held that a trial court “may examine the hearsay statements sought to be admitted” to make admissibility determinations under the co-conspirator exception to the hearsay rule.<sup>34</sup>

Cases allowing consideration of hearsay evidence when making determinations under the forfeiture-by-wrongdoing doctrine have relied on many rationales, but all are somehow rooted in relaxation of proof requirements by rule when making preliminary judicial determinations regarding evidence admissibility. Many have expressly relied on state evidence rules similar to Rule 104.<sup>35</sup> The Court of Appeals for the District of Columbia made analogy to the process endorsed by *Bourjaily* for making admissibility determinations under the co-conspirator statement rule.<sup>36</sup> The Massachusetts state court decision, cited by the U.S. Supreme Court in *Davis v. Washington* as an example of state practices, reasoned, along with citation to *Mastrangelo*, that a forfeiture hearing “is not intended to be a mini-trial, and accordingly, hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.”<sup>37</sup> The Illinois Supreme Court agreed that hearsay evidence could be considered when making forfeiture determinations, because the U.S. Supreme Court had referenced such state practices in *Davis* with apparent approval.<sup>38</sup> The United States District Court for the Southern District of Ohio ruled with citation to *Davis* that hearsay may be relied upon at a preliminary evidentiary hearing to make the showing required for forfeiture-by-wrongdoing.<sup>39</sup> All link back to Rule 104 in some way.

## II. LINGERING CONCERNS ABOUT RELIANCE ON HEARSAY

The Utah Supreme Court expressed concern in *State v. Poole* that “the rules of evidence, including the rules controlling the admission of hearsay evidence” should apply when making forfeiture determinations, because application of the doctrine deprives a criminal defendant of the significant

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33. *Id.* at 181.

34. *Id.*

35. *Vasquez v. People*, 173 P.3d 1099, 1105 (Colo. 2007); *State v. Magouirk*, 561 So.2d 801, 805-06 (La. Ct. App. 1990); *State v. Sheppard*, 484 A.2d 1330, 1346-47 (N.J. Super. Ct. Ch. Div. 1984); *People v. Sweeper*, 471 N.Y.S.2d 486, 487-88 (N.Y. Sup. Ct. 1984); *State v. Pickens*, 25 N.E.3d 1023, 1058 ¶ 171 (Ohio 2014).

36. *Jenkins v. United States*, 80 A.3d 978, 996 (D.C. 2013). The *Bourjaily* holding was, in turn, based on Rule 104. *See Bourjaily*, 483 U.S. at 178-81 (1987).

37. *Commonwealth v. Edwards*, 830 N.E.2d 158, 174 (Mass. 2005); *quoted in Davis v. Washington*, 547 U.S. 813, 833 (2006). The *Mastrangelo* holding was, in turn, based on Rule 104. *Mastrangelo*, 693 F.2d at 273. Other courts have also based their reasoning on *Mastrangelo*. *See, e.g., People v. Banks*, 551 N.Y.S.2d 1011, 1012 n.\* (N.Y. Sup. Ct. 1989); *La Torres v. Walker*, 216 F. Supp. 2d 157, 160 (S.D.N.Y. 2000).

38. *People v. Stechly*, 870 N.E.2d 333, 353 (Ill. 2007); *see also Ware v. Harry*, 636 F. Supp. 2d 575, 586 n.3 (E.D. Mich. 2008). The state practices mentioned by the Supreme Court in *Davis* were justified by *Mastrangelo* which was based on Rule 104. *Davis*, 547 U.S. at 833 (quoting *Edwards*, 830 N.E.2d at 174 (citing *Mastrangelo*, 693 F.2d at 273 (citing Rule 104))).

39. *United States v. Ledbetter*, 141 F. Supp.3d 786, 790 (S.D. Ohio 2015) (citing *Davis*, 547 U.S. at 833 (quoting *Edwards*, 830 N.E.2d at 174 (citing *Mastrangelo*, 693 F.2d at 273 (citing Rule 104))).

constitutional protection provided by confrontation.<sup>40</sup> The *Poole* court acknowledged that Utah's rules of evidence generally did not by their terms apply to preliminary questions regarding the admissibility of evidence.<sup>41</sup> The court explained, however, that this rule was not absolute, and it could still direct a trial court "to conduct its analysis within the confines of the Utah Rules of Evidence."<sup>42</sup> The court therefore reasoned that "[t]he question then is not the existence of the power to disregard the Rules, but rather when that power should be exercised."<sup>43</sup> Due to the importance of the right of confrontation, the *Poole* court concluded that "[t]his is one of those instances that demands that we disregard 104(a)'s general rule."<sup>44</sup> Forfeiture may therefore be proven in Utah only "through evidence admissible under the Utah Rules of Evidence."<sup>45</sup>

Some other jurisdictions have expressed the same concern raised in *Poole* that the right of confrontation should not be easily forfeited, but have addressed the concern differently.<sup>46</sup> For example, the Washington Supreme Court wrote in *State v. Mason* that forfeiture-by-wrongdoing could only be proven in Washington by clear-and-convincing evidence, because "the right of confrontation should not be easily deemed forfeited by an accused."<sup>47</sup> Despite sharing this concern, the *Poole* court rejected the clear-and-convincing evidence standard adopted by Washington in *Mason* and instead addressed it by limiting the type of evidence that may be used in Utah to prove forfeiture-by-wrongdoing under a preponderance of the evidence proof standard.<sup>48</sup>

It seems unlikely absent an abandonment of existing precedent that the U.S. Supreme Court would find that the importance of a right, standing alone, completely bars consideration of hearsay evidence when determining if the right has been lost. The Supreme Court held in *United States v. Matlock* that a trial court could rely on hearsay during a suppression hearing to determine if a search was

40. 232 P.3d 519, 527 (Utah 2010).

41. *Id.* at 526-27.

42. *Id.* at 527.

43. *Id.* (quoting *State v. Ordonez-Villanueva*, 908 P.2d 333, 338 n.9 (Or. App. Ct. 1995)).

44. *Poole*, 232 P.3d at 527.

45. *Id.* Federal courts in Utah appear to allow at least partial reliance on hearsay. Trentadue v. C.I.A., 95 Fed. R. Evid. Serv. 308, 310 (D. Utah 2014).

46. See generally Tim Donaldson, *Keeping the Balance True: Proof Requirements for Confrontation Forfeiture by Wrongdoing*, 31 T.M. COOLEY L. REV. 429, 432-36 (2014) (reviewing jurisdictions that have adopted a clear-and-convincing evidence standard of proof for forfeiture determinations and their reasons for doing so).

47. *State v. Mason*, 162 P.3d 396, 404-05, ¶ 30 (Wash. 2007); see also *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. 1982) ("[B]ecause confrontation rights are so integral to the accuracy of the fact-finding process and the search for truth, in contrast to the exclusionary rule, we conclude that the trial court was correct in requiring clear and convincing evidence of a waiver of this right."), *superseded by rule*, FED. R. EVID. 804(b)(6), as recognized in *United States v. Nelson*, 242 Fed. Appx. 164, 171 (5th Cir. 2007); *People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995) (adopting a clear-and-convincing evidence standard, writing: "Obviously, a defendant's loss of the valued Sixth Amendment confrontation right constitutes a substantial deprivation.").

48. *State v. Poole*, 232 P.3d 519, 525-27, ¶¶ 22-27 (Utah 2010).



consensual, and a defendant had thereby lost his Fourth Amendment right against unreasonable searches and seizures to have evidence from the search excluded at trial.<sup>49</sup> The Court recognized in *Matlock* that it had distinguished between the rules governing trials and those applicable to whether evidence was admissible at trial.<sup>50</sup> The Court noted that Rule 104(a) had recently been proposed and transmitted to Congress.<sup>51</sup> It further asserted that “[t]he Rules in this respect reflect the general views of various authorities on evidence.”<sup>52</sup> The Court went on to explain that:

There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel. However that may be, certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings . . . .<sup>53</sup>

The U.S. Supreme Court reached a similar conclusion in *Bourjaily v. United States*.<sup>54</sup> The *Bourjaily* Court reasoned that hearsay is not completely devoid of value. “[O]ut-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof.”<sup>55</sup> Therefore, trial courts should be allowed to evaluate the evidentiary worth of out-of-court statements as revealed by the particular circumstances in a given case.<sup>56</sup> The Court recognized that:

Courts often act as factfinders, and there is no reason to believe that courts are any less able to properly recognize the probative value of evidence in this particular area. The party opposing admission has an adequate incentive to point out the shortcomings in such evidence before the trial court finds the preliminary facts. If the opposing party is unsuccessful in keeping the evidence from the factfinder, he still has the opportunity to attack the probative value of the evidence as it relates to the substantive issue in the case.<sup>57</sup>

The *Bourjaily* Court held that evidence was properly admitted at trial utilizing hearsay in part to determine admissibility and agreed that the requirements for admission under the co-conspirator statement rule “are identical to the

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49. *United States v. Matlock*, 415 U.S. 164, 172-77 (1974).

50. *Id.* at 172-73 (citing *Brinegar v. United States*, 338 U.S. 160, 173 (1949)).

51. *Id.* at 173-74.

52. *Id.* at 174.

53. *Id.* at 175; *see also* *United States v. Raddatz*, 447 U.S. 667, 679 (1980) (“At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial.”).

54. *Bourjaily v. United States*, 483 U.S. 171, 178 (1987).

55. *Id.* at 179.

56. *Id.* at 180-81.

57. *Id.* at 180.

requirements of the Confrontation Clause, and since the statements were admissible under the Rule, there was no constitutional problem.”<sup>58</sup>

### III. CONCLUSIVENESS OF RULE 104?

The concerns raised by the Utah Supreme Court in *Poole* about usage of hearsay when making evidence admissibility determinations nonetheless merit consideration.<sup>59</sup> Rule 104(a) did not codify a universally acclaimed evidentiary procedure. The relaxation of evidentiary rules was “one of the few radical changes in the pre-existing law the Advisory Committee succeeded in carrying off.”<sup>60</sup> Only New Jersey had previously adopted a similar rule.<sup>61</sup> “Though scholars had supported this change for some time, the courts generally held that the rules of evidence applied to preliminary fact determinations.”<sup>62</sup> Many jurisdictions had no common law cases supporting the committee’s view and resisted the change.<sup>63</sup>

The Advisory Committee’s rationale for the rule rested primarily upon the differentiation between the roles of judges and jurors with respect to evidentiary matters coupled with practical necessity. Advisory Committee notes rely upon *McCormick on Evidence* to explain with respect to the process for making admissibility determinations:

The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are “scattered and inconclusive,” and observes:

“Should the exclusionary law of evidence, ‘the child of the jury system’ in Thayer’s phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.”

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence.<sup>64</sup>

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58. *Id.* at 182. It should however be noted that it could now be argued that confrontation rights were not actually at stake in *Bourjaily*. See *Giles v. California*, 554 U.S. 353, 374-75 n.6 (2008) (plurality opinion).

59. See *State v. Poole*, 232 P.3d 519, 526-27, ¶ 26 (Utah 2010).

60. 21A CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5055, at 163 (2d. ed. 2005).

61. *State v. Cardone*, 368 A.2d 952, 955 (N.J. Super. Ct. App. Div. 1976); see also H.R. DOC. NO. 93-46, *supra* note 17, at 49 (discussing development of state rules in California and New Jersey); Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 189 (1969) (same).

62. WRIGHT & GRAHAM, *supra* note 60, at 163 (footnote omitted).

63. *Id.* at 164-65; e.g., *State v. Davis*, 227 S.E.2d 97, 115-16 (N.C. 1976).

64. H.R. DOC. NO. 93-46, *supra* note 17, at 48 (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 53, at 123-24 n.8 (1954)); see also Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 188 (1969).

The passage from McCormick on Evidence quoted by the Committee goes on to say that “Wigmore states this as the law without citing supporting authority.”<sup>65</sup>

The reasoning of McCormick and the Advisory Committee is derived from a famous passage in *A Preliminary Treatise on Evidence* where Professor James Thayer concluded that evidentiary rules which reject probative evidence on one or another practical ground are “the child of the jury system.”<sup>66</sup> In Thayer’s view, all logically probative evidence should be admissible unless excluded by some rule or principle of law.<sup>67</sup> He asserted that exclusionary rules are an offshoot of the development of the modern jury trial.<sup>68</sup> According to Thayer, it must be constantly kept in mind that the law of evidence is the product of “judicial oversight and control of the process of introducing evidence to the jury . . . .”<sup>69</sup> They provide a mechanism to prevent jurors from considering information that might be “misused or overestimated by that body . . . .”<sup>70</sup>

Thayer’s view was shared by the other preeminent scholar of his time on the subject of evidence.<sup>71</sup> Professor John Henry Wigmore agreed that “[a]ll facts having rational probative value are admissible unless some specific rule forbids.”<sup>72</sup> He reasoned that evidentiary rules could be ignored in interlocutory proceedings heard before a judge “partly because of the subsidiary and provisional nature of the inquiry, but chiefly because there is no jury, and the rules of evidence are, as rules, traditionally associated with a trial by jury.”<sup>73</sup> Wigmore also asserted that “[i]n preliminary rulings by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply.”<sup>74</sup>

Wigmore’s proposition that the rules of evidence do not apply to admissibility determinations was extensively examined in a well-researched article by Professor John Maguire and Mr. Charles Epstein.<sup>75</sup> They found some historical common law support for the view that evidentiary rules apply only when

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65. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 53, at 124 n.8 (1954). The Advisory Committee incompletely attributes to McCormick the view that authorities on the subject were “scattered and inconclusive.” McCormick more fully wrote that “American authorities are scattered and inconclusive but suggest that the judges trial and appellate give primacy here to habit rather than to practical adaptation to the situation, and tend to require the observance of jury-trial rules of evidence.” *Id.*

66. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (Boston, Little, Brown, and Company 1898).

67. *Id.* at 265.

68. *Id.* at 180.

69. *Id.* at 181.

70. *Id.* at 266.

71. See JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 9, at 31-32, § 10, at 34-35 (Boston, Little, Brown, and Company 1904) (quoting Thayer).

72. *Id.* § 10, at 34.

73. *Id.* § 4, at 14.

74. *Id.* § 1385(2), at 1726.

75. John MacArthur Maguire & Charles S. S. Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101 (1927).

presenting information to a jury, but they also found other authorities that could be read as requiring use of regular evidence when making certain types of admissibility determinations.<sup>76</sup> They also concluded that more recent English decisions “lend little support to the decided statement by Wigmore . . . .”<sup>77</sup> Maguire and Epstein similarly found that American decisions were few and mixed. Some supported Wigmore’s proposition, but many required proof of preliminary facts by admissible evidence.<sup>78</sup> On the basis of their research, the authors indicated “skepticism as to the judge’s exemption from most rules of evidence.”<sup>79</sup> They ultimately determined however that the results from their examination of Wigmore’s hypothesis were inconclusive. Maguire and Epstein concluded: “On the whole, then, it is perhaps wisest to think of the few reported cases as often being persuasive only, and to admit frankly that in this minor aspect we are unlikely to find a common law of evidence.”<sup>80</sup>

Historical sources dealing with the forfeiture-by-wrongdoing doctrine do not directly address the issue, but appear to have allowed consideration of hearsay for purposes of admissibility determinations. In the earliest appearance of the doctrine, the judges ruled in *Lord Morley’s Case* that a deposition of an absent witness could be used during a murder trial in the House of Lords “in case oath should be made that any witness . . . was detained by the means or procurement of the prisoner . . . .”<sup>81</sup> Maguire and Epstein commented that the reference to an “oath” in *Lord Morley’s Case* was ambiguous, and it was therefore not clear what type of preliminary proof might have been required for admissibility rulings.<sup>82</sup> The tribunal in that case did however consider double hearsay when making a determination, but it found the proof insufficient to implicate the forfeiture-by-wrongdoing doctrine.<sup>83</sup>

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76. *Id.* at 1103-12.

77. *Id.* at 1111.

78. *See id.* at 1112-25.

79. *Id.* at 1122.

80. *Id.* at 1125; *see also* Charles T. McCormick, *The Procedure of Admitting and Excluding Evidence*, 31 TEX. L. REV. 128, 144 n.81 (1952).

81. *Lord Morley’s Case* (1666) 84 Eng. Rep. 1079 (HL) 1080 ¶ 5, *reprinted in* 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 770, 770-71 para. 5 (London, T.C. Hansard 1816) [hereinafter *Lord Morley’s Case in HOWELL*].

82. Maguire & Epstein, *supra* note 75, at 1108-09.

83. *Lord Morley’s Case in HOWELL*, *supra* note 81, at 777 (considering what the employer of a missing witness was told by friends of the witness). The import of *Lord Morley’s Case* is also ambiguous, because the judges indicated that the forfeiture determination in that case should be made by the Lords as the fact finders in a proceeding against one of their peers, as opposed to the judges. *Id.* at 770-71. Hawkins later indicated in his influential treatise on pleas of the crown that forfeiture determinations in ordinary criminal cases during his time were made by the court; writing that the doctrine applied “if it be made out by Oath to the Satisfaction of the Court . . . .” 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS ch. 46, § 6, at 429 (Savoy, Eliz. Nutt & R. Gosling 1721). By the time of the American Constitution was adopted, the roles of the judge and jury

In another early case, a regular court of law held that prior testimony of a supposedly tampered witness might be used after “it was shewn to the Court that he was gone beyond sea . . . .”<sup>84</sup> The report for the case unfortunately does not otherwise indicate what type of proof was deemed satisfactory by the court. The same court in another case presumed tampering from circumstantial information, but the summary for that case does not detail the nature of the proof considered by the court.<sup>85</sup>

The court in *Henry Harrison’s Case* held that the prosecution could use depositions given by a missing witness against Harrison if it could “prove upon him, that he made him keep away.”<sup>86</sup> The court in that case accepted hearsay and circumstantial evidence as such proof. One witness testified that an unnamed gentleman attempted to bribe the missing witness to give evidence favorable to Harrison, and that the missing witness further said that the gentleman would have seized him if he had been given the opportunity.<sup>87</sup> Another witness testified about the suspicious circumstances surrounding the disappearance of the missing witness and was asked by the court if he had been told by the missing witness about the attempted bribe.<sup>88</sup> This proof was evidently enough to satisfy the court, because it allowed the prior testimony of the missing witness to be read.<sup>89</sup>

The House of Commons in *Fenwick’s Case* considered hearsay statements allegedly made by Fenwick’s solicitor when attempting to bribe someone to discredit a missing witness whose prior testimony was offered by the prosecution.<sup>90</sup> It likewise considered hearsay reportedly uttered by an accomplice of the defendant to determine whether the defendant was involved in an effort to bribe witnesses.<sup>91</sup> After considerable debate, a divided House voted in favor of

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with respect to determining the admissibility of hearsay were fairly well defined. *See, e.g.*, *United States v. Burr*, 25 F. Cas. 55, 179 (C.C.D. Va. 1807) (No. 14,693) (Chief Justice John Marshall concluding while presiding over a case as a Circuit Judge that “[i]t is of necessity the peculiar province of the court to judge of the admissibility of testimony.”); *see also* *Thomas John’s Case* (1790), reprinted in 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN ch. 5, § 124, at 358 (London, A. Strahan 1803).

84. *The Case of Thatcher and Waller* (1676), 84 Eng. Rep. 1143 (K.B.), T. Jones 53.

85. FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS, 243 (New York, Southwick & Hardcastle 1806) (summarizing a King’s Bench case entitled *Green v. Gatewick*).

86. 12 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 834, 851 (London, T.C. Hansard 1816) [hereinafter *Henry Harrison’s Case* in HOWELL].

87. *Id.*

88. *Id.* at 851-52.

89. *Id.* at 852-53.

90. 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, at 590-91 (London, T.C. Hansard 1816).

91. *Id.* at 588-89.

admitting prior testimony given by the missing witness.<sup>92</sup> The value of *Fenwick's Case* regarding the type of proof needed to establish forfeiture is highly questionable, however, because much of the debate concerned whether the House of Commons was bound in that attainder proceeding by any of the rules regularly applicable in court.<sup>93</sup>

The forfeiture-by-wrongdoing doctrine was codified by Parliament in a 1796 statute passed to deal with insurrections in Ireland.<sup>94</sup> A later statute regulating grand jury practice indicated that forfeiture could only be proven by “witnesses sworn, or other lawful Evidence . . .”<sup>95</sup> However, the statutes provide little guidance because they did not deal with how such issues could be decided by a judge. The statutes codifying the doctrine for Ireland all required and dealt only with forfeiture determinations made by juries.<sup>96</sup>

An early American case confirms recognition of a forfeiture-by-wrongdoing doctrine in this country, but it does not describe the nature of the proof used to support the court’s forfeiture determination.<sup>97</sup> The doctrine is mentioned in passing by another early decision, but it wasn’t pertinent to the holding in that case and is not further discussed.<sup>98</sup> Constitution signer Charles Pinckney wrote in a letter criticizing a 1799 extradition decision that certain statutorily authorized pre-trial examinations could “only be given in evidence before a jury, when the court is satisfied the witness is dead, unable to travel, or kept away by the means or procurements of the prisoner.” He did not, however, further indicate what type of proof was needed to satisfy a court.<sup>99</sup>

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92. *Id.* at 607 (voting 218-145 in favor of allowing the preliminary examination of the missing witness to be read), 622 (voting 180-102 to allow use of testimony given by the missing witness at an earlier trial).

93. *Id.* at 597-98 (speech by Sir Edw. Seymour), 599 (speech of Sir Robert Richard), 600 (speech of Lord Cutts) 603-04 (speech of Sir Joseph Williamson), 604-05 (speech of Mr. Chanc. of the Exchequer), 605-06 (speech of Sir Henry Hobart).

94. An act more effectually to suppress insurrections, and prevent the disturbances of the public peace, 1796, 36 Geo. 3, c. 20, § 12 (Ir.), reprinted in *THE STATUTES AT LARGE, PASSED IN THE PARLIAMENTS HELD IN IRELAND: FROM THE THIRD YEAR OF EDWARD THE SECOND, A.D. 1310, TO THE THIRTY-SIXTH YEAR OF GEORGE THE THIRD, A.D. 1796, INCLUSIVE*, at 982 (Dublin, George Grierson 1797). A similar statute was subsequently enacted in 1810. *See* An act for the more effectually preventing the administering and taking of unlawful oaths in Ireland; and for the protection of magistrates and witnesses in criminal cases, 1810, 50 Geo. 3, 102, § 5 (Eng.).

95. An act to regulate proceedings of grand juries in Ireland, upon bills of indictment, 1816, 56 Geo. 3, 87, § 3 (Eng.).

96. *See* An act to regulate proceedings of grand juries in Ireland, upon bills of indictment, 1816, 56 Geo. 3, 87, § 3 (Eng.) (providing a method for proving forfeiture to a grand jury); An act for the more effectually preventing the administering and taking of unlawful oaths in Ireland; and for the protection of magistrates and witnesses in criminal cases, 1810, 50 Geo. 3, 102, § 5 (Eng.) (making forfeiture a collateral issue to be put to a jury); An act more effectually to suppress insurrections, and prevent the disturbances of the public peace, 1796, 36 Geo. 3, c. 20, § 13 (Ir.) (same).

97. *Rex v. Barber*, 1 Root 76 (Conn. Super. Ct. 1775).

98. *Drayton v. Wells*, 10 S.C.L. (1 Nott. & McC.) 409, 411-12 (S.C. 1819).

99. *United States v. Robins*, 27 F. Cas. 825, 838 (D. S.C. 1799) (No. 16,175) (reprinting an Aug. 3, 1799 letter attributed to South Carolina Senator Charles Pinckney).

The U.S. Supreme Court adopted the forfeiture-by-wrongdoing doctrine in *Reynolds v. United States*.<sup>100</sup> The Court found that there was sufficient information to apply the doctrine in *Reynolds* where the defendant did not deny interference and was uncooperative with prosecution attempts to secure the attendance of the witness at trial.<sup>101</sup> The *Reynolds* Court did not expressly address whether the trial court had relied or could rely on otherwise inadmissible evidence, but it did generally indicate that a forfeiture-by-wrongdoing determination would be subject to only very limited appellate review, writing:

Such being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument, before secondary evidence of the contents of the instrument can be admitted. In *Lord Morley's Case (supra)*, it would seem to have been considered a question for the trial court alone, and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is, at least, to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest.<sup>102</sup>

Although not too much should be read into the *Reynolds* Court's above quoted comparison of the method for making forfeiture determinations to the process used for evidentiary rulings regarding loss of a written instrument, the Supreme Court had previously held in *Tayloe v. Riggs* that those preliminary determinations could be made on the basis of affidavits containing evidence that would normally be inadmissible.<sup>103</sup> In that situation, the Supreme Court had written that "we think the views of justice will be best promoted by allowing the affidavit, not as conclusive evidence, but as submitted to the consideration of the Court, to be weighed with the other circumstances of the case."<sup>104</sup>

The early application of the forfeiture-by-wrongdoing doctrine therefore supports Wigmore's hypothesis. Most of the cases, and in particular those reported in detail, demonstrate reliance on hearsay when making forfeiture determinations.<sup>105</sup> The Supreme Court's decision in *Reynolds* additionally implies, when it is read in conjunction with the court's earlier decision in *Tayloe*, that normally inadmissible evidence may be used by a judge when deciding the

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100. *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878).

101. *Id.* at 159-60.

102. *Id.* at 159.

103. *Tayloe v. Riggs*, 26 U.S. 591, 596-98 (1828).

104. *Id.* at 598.

105. *See, e.g.*, *Henry Harrison's Case* in HOWELL, *supra* note 86, at 851-52.

preliminary question of forfeiture-by-wrongdoing.<sup>106</sup> None, however, contain a direct holding on the issue, and are therefore inconclusive.

As recognized by Maguire and Epstein, “[p]oints of evidence in this field of preliminary controversy arise abruptly and are handled summarily.”<sup>107</sup> This is particularly true with respect to witness tampering. There are many recognized methods by which a trial judge may consider a forfeiture-by-wrongdoing question ranging from a preliminary hearing to conditional admission based upon proffers.<sup>108</sup> Misconduct, however, cannot be reasonably predicted, and questions regarding disappearance of a witness often arise mid-trial without warning and must, by necessity, be dealt with in a manner that minimizes disruption to the trial that is in progress. A separate mid-trial mini trial is clearly undesirable.<sup>109</sup> A judge caught in such a situation should therefore have the flexibility when making an admissibility determination to “receive the evidence and give it such weight as his judgment and experience counsel.”<sup>110</sup>

Rule 104(a) is based more on sound sense than it is on clear precedent.<sup>111</sup> As a practical matter, it is impossible for a judge to completely shield himself or herself from considering inadmissible evidence when determining admissibility. As the Advisory Committee that recommended Rule 104 pointed out, “the content of an asserted declaration against interest must be considered in ruling whether it is against interest.”<sup>112</sup> A trial judge must similarly consider the content of an excited utterance to determine whether it is a “statement relating to a startling event or condition . . .”<sup>113</sup> A forfeiture-by-wrongdoing claim based on spontaneous statements made by a scared missing witness that he or she had been threatened would therefore present a formalistic nightmare if rigid adherence to the rules of evidence was required. A trial judge would have to listen to the content of the hearsay to first decide whether it qualified as an excited utterance and could be considered legal proof for purposes of determining forfeiture, and then proceed to strike it entirely from his or her mind if it did not qualify. There is no reason to believe that this solution, which depends upon the presumed ability of a judge to compartmentalize information, is any better than simply recognizing that judges

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106. *Reynolds v. United States*, 98 U.S. 145, 159 (1878); *Taylor*, 26 U.S. at 598.

107. Maguire & Epstein, *supra* note 75, at 1125.

108. See Tim Donaldson, *A Reliable and Clear-Cut Determination: Is a Separate Hearing Required to Decide When Confrontation Forfeiture by Wrongdoing Applies?* 49 *NEW ENG. L. REV.* 167, 169-76 (2015) (discussing the various procedural alternatives available to resolve forfeiture-by-wrongdoing questions).

109. See *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997) (commenting that admissibility determinations need to be made speedily and without unnecessarily duplicating what will be presented during trial); *Commonwealth v. Edwards*, 830 N.E.2d 158, 174 (Mass. 2005) (noting that a forfeiture hearing is not meant to be a mini-trial).

110. *United States v. Matlock*, 415 U.S. 164, 175 (1974).

111. See H.R. DOC. NO. 93-46, *supra* note 17, at 48.

112. *Id.*

113. *FED. R. EVID.* 803(2).



are able to properly recognize the probative value of purported evidence and weigh it according to its worth.

Trial judges routinely hear the content of proffered information to determine whether it is admissible.<sup>114</sup> Hearsay is not automatically accepted as true simply because it is considered by a judge when considering a preliminary question of admissibility. A party opposing admission of evidence has an opportunity to point out its shortcomings before the judge finds the preliminary facts regarding its admissibility.<sup>115</sup> In addition, judges possess legal training and experience to guide them regarding its usefulness.<sup>116</sup> “[A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.”<sup>117</sup> Even if a judge admits an out-of-court statement, its mere admission is not outcome determinative, because the party aggrieved by its submission to a jury still has the opportunity to attack its probative value as it relates to the substantive issue in the case.<sup>118</sup>

It has long been recognized that justice is best promoted by allowing judges the flexibility to consider and weigh all relevant information with other circumstances in a case when making an admissibility determination.<sup>119</sup> Thus, there are good reasons to allow a judge to consider hearsay when making an admissibility determination under the forfeiture-by-wrongdoing doctrine and “no principled reason to forbid it *per se*.”<sup>120</sup>

#### IV. RESISTANCE TO PURE BOOTSTRAPPING

The Supreme Court in *Bourjaily* held that Rule 104(a) superseded *Glasser* to the extent that *Glasser* prevented courts from considering hearsay statements “for any purpose” when determining their admissibility.<sup>121</sup> However, the *Bourjaily* Court also expressly stated that “[w]e need not decide in this case whether the courts below could have relied solely upon . . . hearsay statements . . .”<sup>122</sup> It further cautioned, as it had “held in other cases concerning admissibility

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114. *See* *Jenkins v. United States*, 80 A.3d 978, 996 n.45 (D.C. 2013) (listing situations where judges consider the content of a statement to determine whether it is admissible under a hearsay exception).

115. *Bourjaily v. United States*, 483 U.S. 171, 180 (1987).

116. *See id.* (commenting that there is no reason to believe that judges are unable to properly recognize the probative value of evidence); *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997) (recognizing that a judge “can bring considerable experience and knowledge to bear on the issue of how much weight” to give evidence).

117. *Bourjaily*, 483 U.S. at 180.

118. *Id.*

119. *Tayloe v. Riggs*, 26 U.S. 591, 598 (1828).

120. *Jenkins v. United States*, 80 A.3d 978, 996 (D.C. 2013); *see also Bourjaily*, 483 U.S. at 179-81; *White*, 116 F.3d at 914.

121. *Bourjaily*, 483 U.S. at 181.

122. *Id.*

determinations, ‘the judge should receive the evidence and give it such weight as his judgment and experience counsel.’”<sup>123</sup>

The Circuit Court of Appeals for the District of Columbia in *United States v. White* held, in part based on *Bourjaily* and Rule 104(a), that a trial court may at least partially rely on hearsay when making a forfeiture-by-wrongdoing determination.<sup>124</sup> Like the *Bourjaily* Court, it left “for another day the issue of whether a forfeiture finding could rest *solely* on hearsay.”<sup>125</sup>

All of the early United States Circuit Courts of Appeal that considered the issue reserved in *Bourjaily* decided that a statement cannot be admitted under the co-conspirator exception to the hearsay rule based solely upon its own content.<sup>126</sup> The Seventh Circuit Court of Appeals in *United States v. Zambrana* found it significant that *Bourjaily* acknowledged the presumptive unreliability of hearsay.<sup>127</sup> It wrote that this presumption may dissipate only when the hearsay is “corroborated by *other evidence* . . . .”<sup>128</sup> The Ninth Circuit Court of Appeals similarly recognized in *United States v. Silverman* that, when making admissibility determinations, trial courts “must bear in mind that out-of-court statements are presumptively unreliable.”<sup>129</sup> The court additionally cautioned that “Rule 104(a) does not diminish the inherent unreliability of such a statement. Because of this presumptive unreliability, a co-conspirator’s statement implicating the defendant in the alleged conspiracy must be corroborated by fairly incriminating evidence.”<sup>130</sup> It therefore concluded that “[t]he admissibility of the contested statements, therefore, hinges on whether the additional evidence . . . sufficiently corroborates the statements to overcome their presumed unreliability.”<sup>131</sup> This universal reaction to

123. *Id.* (quoting *United States v. Matlock*, 415 U.S. 164, 175 (1974)).

124. *White*, 116 F.3d at 914.

125. *White*, 116 F.3d at 914; *cf. Bourjaily*, 483 U.S. at 181 (finding it unnecessary to decide whether hearsay alone could be used to determine the admissibility of a co-conspirator statement)

126. *United States v. Asibor*, 109 F.3d 1023, 1032-33 (5th Cir. 1997); *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996); *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir. 1994); *United States v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir. 1993); *United States v. Beckham*, 968 F.2d 47, 50-51 (D.C. Cir. 1992); *United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988); *United States v. Zambrana*, 841 F.2d 1320, 1343-45 (7th Cir. 1988); *United States v. Martinez*, 825 F.2d 1451, 1452-53 (10th Cir. 1987); *see United States v. Byrom*, 910 F.2d 725, 736 (11th Cir. 1990) (finding sufficient independent evidence to establish involvement in a conspiracy).

127. *Zambrana*, 841 F.2d at 1344-45.

128. *Id.* at 1345; *see also United States v. Gambino*, 926 F.2d 1355, 1361 n.5 (3d Cir. 1991) (“In the absence of any evidence to the contrary, however, the presumption of unreliability controls; and the hearsay statement cannot serve as the basis for establishing the declarant’s connection to the conspiracy.”).

129. *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988).

130. *Id.*

131. *Id.* at 579.

*Bourjaily* was codified in 1997 by an amendment to Federal Rule of Evidence 801(d)(2) (“Rule 801(d)(2”).<sup>132</sup>

The corroboration requirement codified by Rule 801(d)(2) does not directly apply to forfeiture determinations. The 1997 amendments to the Federal Rules of Evidence codified the forfeiture-by-wrongdoing doctrine in Rule 804(b)(6).<sup>133</sup> The 1997 amendments also answered the question left open by *Bourjaily* by amending Rule 801(d)(2) to read:

(d) Statements which are not hearsay.

.....

(2) Admission by party-opponent.—The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. **The contents of the statement shall be considered but are not alone sufficient to establish the declarant’s authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).**<sup>134</sup>

The 1997 amendments therefore limit Rule 104(a) by expressly requiring corroborative evidence as a prerequisite for admission of co-conspirator statements and extend that requirement to statements made by authorized representatives and agents. However, no mention is made of the simultaneously adopted forfeiture-by-wrongdoing exception.<sup>135</sup> In addition, Advisory Committee comments regarding Rule 804(b)(6) cite *Mastrangelo*,<sup>136</sup> which held that hearsay may be used when

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132. Order Amending the FED. R. EVID., 520 U.S. 1323, 1327-28 (1997); see H.R. DOC. NO. 105-69, *supra* note 21, at 18 (Committee Note). The circuits that did not expressly rule on the issue before amendment of Rule 801(d)(2) have subsequently confirmed the need for corroborative evidence when determining admissibility under the co-conspirator exception to the hearsay rule. *FTC v. Ross*, 743 F.3d 886, 894 (4th Cir. 2014); *United States v. Turner*, 718 F.3d 226, 231 (3d Cir. 2013).

133. Order Amending the FED. R. EVID., 520 U.S. at 1328; see *Davis v. Washington*, 547 U.S. 813, 833 (2006) (commenting that the rule codifies the doctrine).

134. Order Amending the FED. R. EVID., 520 U.S. at 1327-28 (emphasis added).

135. *Id.*

136. H.R. DOC. NO. 105-69, *supra* note 21, at 22.

making forfeiture determinations,<sup>137</sup> but Rule 804(b)(6) did not adopt a limitation similar to the one added to Rule 801(d)(2).<sup>138</sup>

The Court of Appeals for the District of Columbia decided, in *Jenkins v. United States*, that restrictions placed upon reception of co-conspirator hearsay need not be applied when considering forfeiture-by-wrongdoing.<sup>139</sup> Both hearsay exceptions were at issue in that case. The court adhered to the restrictive *Glasser* independent evidence requirement for the co-conspirator statement rule.<sup>140</sup> It found no justification for extending that limitation to the forfeiture exception.<sup>141</sup> The *Jenkins* court wrote that “[a]s a general proposition, a trial court is permitted to rely on hearsay (whether or not it falls within a recognized exception) in ruling on the admissibility of evidence, ‘even where (as in this case) the question concerns the defendant’s constitutional rights.’”<sup>142</sup> It was not persuaded that bootstrapping concerns mandated extension of the logic of case law regarding the co-conspirator statement rule to the forfeiture-by-wrongdoing doctrine.<sup>143</sup> The court explained:

Generally speaking, it is appropriate and common for judges to consider the substance of proffered hearsay together with independent evidence in determining whether a hearsay exception is available; and this court has implicitly approved such consideration in its forfeiture-by-wrongdoing cases. Courts in other jurisdictions have done likewise. There are good reasons to allow it, as discussed in *Bourjaily*, and we perceive no principled reason to forbid it *per se*.<sup>144</sup>

The exceptions therefore do not necessarily need to be given identical treatment. The court in *Jenkins* expressly noted, however, that “we are not presented with an instance of ‘pure’ bootstrapping in which the testimony of the missing witness is the *only* evidence supporting forfeiture, and we do not hold that such ‘pure’ bootstrapping would be appropriate.”<sup>145</sup>

Reliability is an admissibility concern under both the co-conspirator statement rule and the forfeiture-by-wrongdoing doctrine. The Second Circuit Court of Appeals in *United States v. Tellier* directed trial courts with respect to the co-conspirator statement rule that when making “preliminary factual determinations under Rule 104(a), the court may consider the hearsay statements themselves. However, these hearsay statements are presumptively unreliable, and, for such statements to be admissible, there must be some independent

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137. *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

138. *See Order Amending the FED. R. EVID.*, 520 U.S. at 1328.

139. *Jenkins v. United States*, 80 A.3d 978, 995-96 (D.C. 2013).

140. *Id.* at 990-92.

141. *Id.* at 995-96.

142. *Id.* at 995 (quoting *Roberson v. United States*, 961 A.2d 1092, 1096 (D.C. 2008)).

143. *Id.* at 996.

144. *Id.* (footnotes omitted).

145. *Id.* at 997 n.49.

corroborating evidence of the defendant's participation in the conspiracy."<sup>146</sup> Although *Tellier* dealt with bootstrapping under the co-conspirator statement rule, there is no reason to believe that hearsay is any more or less reliable when used in other contexts to determine evidence admissibility. Concerns about bootstrapping in the Second Circuit may be logically extended to the forfeiture-by-wrongdoing doctrine, because that circuit has additionally expressed interest in ensuring some measure of reliability when confrontation forfeiture is at issue. It wrote in *United States v. Thai* that trial courts should balance probative value against prejudicial effect when admitting evidence under the forfeiture-by-wrongdoing rule "in order to avoid the admission of 'facially unreliable hearsay.'"<sup>147</sup>

The Colorado Supreme Court allows hearsay to be used when making forfeiture determinations.<sup>148</sup> It has, however, expressed grave concerns about pure bootstrapping in criminal cases. The court ruled in *People v. Montoya* that hearsay may be used in determining whether the prerequisites for admission of co-conspirator statements have been met, but it immediately thereafter added:

We hasten to add, however, that while the alleged co-conspirator's statement may properly be considered in resolving the issue of admissibility, there must also be some evidence, independent of the alleged co-conspirator's statement, establishing that the defendant and the declarant were members of the conspiracy. Although the issue of corroborative evidence was not answered in *Bourjaily*, we believe this requirement is necessary to reduce the risk of "bootstrapping" the evidentiary antecedents for admissibility to the level of competent evidence. This additional requirement, in our view, will contribute some measure of reliability both to the statement itself and to the process by which its admissibility is determined. Without this added safeguard, the out-of-court statement could be put to the double service of establishing its own foundation for admissibility and thereby conceivably providing the sole evidentiary basis for a criminal conviction.<sup>149</sup>

The Colorado Supreme Court later explained in *People v. Bowers* that the holding in *Montoya* was not dictated by rule.<sup>150</sup> *Montoya* therefore expresses a general concern and arguably establishes a common law rule in Colorado that should have application beyond the co-conspirator statement exception.

The Second Circuit and State of Colorado are not alone. The Circuit Court of Appeals for the District of Columbia has ruled that trial courts can rely at least

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146. 83 F.3d 578, 580 (2nd Cir. 1996) (citations omitted).

147. 29 F.3d 785, 814 (2nd Cir. 1994) (quoting *United States v. Aguiar*, 975 F.2d 45, 47 (2nd Cir. 1992) (holding that trial courts should perform balancing in accordance with FED. R. EVID. 403).

148. *Vasquez v. People*, 173 P.3d 1099, 1105 (Colo. 2007).

149. *People v. Montoya*, 753 P.2d 729, 736 (Colo. 1988) (citations omitted).

150. 801 P.2d 511, 526 n.9 (Colo. 1990).

in part on hearsay when making forfeiture determinations.<sup>151</sup> The Sixth, Eighth, and Tenth Circuits also appear to allow its use.<sup>152</sup> However, all have additionally expressed post-*Bourjaily* concerns about pure bootstrapping when making admissibility decisions under the co-conspirator statement rule.<sup>153</sup> Illinois, New Jersey, New York, and Ohio cases display a similar dichotomy.<sup>154</sup> The question remains in those jurisdictions whether, and to what extent, they will extend the reasoning from their cases regarding admissibility under the co-conspirator statement rule to preliminary determinations under the forfeiture-by-wrongdoing doctrine.

Concerns about pure bootstrapping have added significance when forfeiture-by-wrongdoing is at issue; the Confrontation Clause “reflects a judgment, not only about the desirability of reliable evidence. . . , but about how reliability can best be determined[,]” namely cross-examination.<sup>155</sup> Cross-examination at trial is lost when forfeiture-by-wrongdoing is applied and out-of-court statements are admitted into evidence.<sup>156</sup> This has potential implications upon a defendant’s right to due process. The Fifth Circuit Court of Appeals has therefore held that trial courts “should scrutinize the proffered statements to ensure that the evidence is not unreliable.”<sup>157</sup> The New Jersey Supreme Court similarly ruled in

151. *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997).

152. *See Steele v. Taylor*, 684 F.2d 1193, 1202-03 (6th Cir. 1982); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *abrogated on other grounds by Richardson v. United States*, 468 U.S. 317, 325-26 (1984), *as recognized in United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000); *United States v. Carlson*, 547 F.2d 1346, 1353 (8th Cir. 1976).

153. *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir. 1994); *United States v. Beckham*, 968 F.2d 47, 50-51 (D.C. Cir. 1992); *United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989); *United States v. Martinez*, 825 F.2d 1451, 1452-53 (10th Cir. 1987).

154. Illinois allows consideration of hearsay to resolve forfeiture-by-wrongdoing questions. *People v. Stechly*, 870 N.E.2d 333, 353 (Ill. 2007). There must however be sufficient, substantial, and non-hearsay evidence showing the existence of a conspiracy before a co-conspirator statement is admissible in that state. *People v. Melgoza*, 595 N.E.2d 1261, 1272 (Ill. App. 1992). Lower courts in New Jersey and New York have ruled that hearsay may be used when making forfeiture determinations. *State v. Sheppard*, 484 A.2d 1330, 1346-47 (N.J. Super. Ct. Law Div. 1984); *People v. Perkins*, 691 N.Y.S.2d 273, 274-75 (N.Y. Sup. Ct. 1999); *People v. Banks*, 551 N.Y.S.2d 1011, 1012 n.\* (N.Y. Sup. Ct. 1989); *People v. Sweeper*, 471 N.Y.S.2d 486, 487-88 (N.Y. Sup. Ct. 1984). The highest courts in those states have held that alleged co-conspirator statements cannot prove their own admissibility. *State v. Clausell*, 580 A.2d 221, 241 (N.J. 1990); *People v. Bac Tran*, 603 N.E.2d 950, 955-56 (N.Y. 1992). Ohio allows consideration of hearsay to resolve forfeiture-by-wrongdoing questions. *State v. Pickens*, 25 N.E.3d 1023, 1058 ¶ 171 (Ohio 2014). It however requires the existence of a conspiracy to be proven by independent evidence. *State v. Carter*, 651 N.E.2d 965, 971-72 (Ohio 1995).

155. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

156. *Davis v. Washington*, 547 U.S. 813, 833 (2006) (“[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”)

157. *United States v. Thevis*, 665 F.2d 616, 633 n.17 (5th Cir. 1982), *superseded by rule*, FED. R. EVID. 804(b)(6), *as recognized in United States v. Nelson*, 242 Fed. Appx. 164, 171 (5th Cir. 2007). Due process principles may “constitute a further bar to admission of . . . unreliable evidence.” *Michigan v. Bryant*, 562 U.S. 344, 370 n.13 (2011) (citing *Dutton v. Evans*, 400 U.S. 74, 96-97 (1970) (Harlan, J., concurring)). Justice Harlan wrote in *California v. Green* that due process does not permit a conviction

*State v. Byrd* that “[b]efore admitting an out-of-court statement of a witness under the forfeiture-by-wrongdoing rule, the court must determine that the statement bears some indicia of reliability.”<sup>158</sup> It is unclear how this could be done without some sort of corroborative evidence. The forfeiture-by-wrongdoing doctrine does not establish the reliability of an out-of-court statement that it admits.<sup>159</sup> In addition, while Rule 104(a) authorizes use of hearsay when making admissibility determinations, it provides no assurance that the information is trustworthy.<sup>160</sup> Without the added safeguard of corroborative evidence, there would be increased risk that both the admissibility determination and ultimate verdict regarding guilt were based on inherently unreliable evidence.<sup>161</sup> This seems to be at odds with the U.S. Supreme Court’s general approach to the rights of a criminal defendant. Even when defendant misconduct is at issue, the Supreme Court cautions that “courts must indulge every reasonable presumption against the loss of constitutional rights . . . .”<sup>162</sup>

Due process concerns persist despite provisions that relieve judges from strict application of evidentiary rules when making preliminary admissibility determinations. The Kentucky Supreme Court recognized in *Hammond v. Commonwealth* that its version of Rule 104(a) applied to such determinations. However, it also expressed concern that due process requires the proponent of the hearsay to “*first present evidence*” to establish a factual basis for application of the forfeiture-by-wrongdoing doctrine.<sup>163</sup> It therefore held, “while we recognize that the evidentiary hearing to determine the question of forfeiture by wrongdoing is not governed by the Kentucky Rules of Evidence, it should go without saying that the party with the burden of proof must present some *evidence* to prove the material facts at issue.”<sup>164</sup>

The California Supreme Court recognized in *California v. Giles* that federal cases allow hearsay to be considered when making forfeiture determinations, but indicated only qualified concurrence.<sup>165</sup> The *Giles* court,

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based “on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court.” 399 U.S. 149, 186 n.20 (1970) (Harlan, J., concurring).

158. 967 A.2d 285, 304 (N.J. 2009).

159. *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (stating that the forfeiture-by-wrongdoing doctrine “does not purport to be an alternative means of determining reliability.”).

160. *See United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988) (writing that Rule 104(a) does not diminish the inherent unreliability of a hearsay statement).

161. *See People v. Montoya*, 753 P.2d 729, 736 (Colo. 1988) (dealing with admissibility under the co-conspirator statement exception to the hearsay rule).

162. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (courtroom disruption case); *see also Davis v. Washington*, 547 U.S. 813, 833 (2006) (recognizing the risk of witness intimidation in domestic violence cases, but writing that “[w]e may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”).

163. *Hammond v. Commonwealth*, 366 S.W.3d 425, 432 (Ky. 2012) (quoting *Parker v. Commonwealth*, 291 S.W.3d 647, 670 (Ky. 2009)).

164. *Id.* at 432-33.

165. 152 P.3d 433, 446 (Cal. 2007), *vacated on other grounds by Giles v. California*, 554 U.S. 353 (2008).

without a full explanation of its rationale, held that “a trial court cannot make a forfeiture finding based solely on the unavailable witness’s unopposed testimony; there must be independent corroborative evidence that supports the forfeiture finding.”<sup>166</sup> *Giles* was overruled on other grounds by the U.S. Supreme Court,<sup>167</sup> but its holding regarding the usability of hearsay was subsequently reaffirmed by the California Court of Appeals.<sup>168</sup>

The Tenth Circuit Court of Appeals commented in *United States v. Balano* “that often the only evidence of coercion will be the statement of the coerced person, as repeated by government agents.”<sup>169</sup> A corroboration requirement nonetheless would not be fatal to an effective application of the forfeiture-by-wrongdoing doctrine because the need for some additional evidence beyond the content of a hearsay statement does not pose an insurmountable burden. The Tenth Circuit has stated with respect to the corroboration requirement applicable to the co-conspirator statement rule that “such independent evidence may be sufficient even though it is not ‘substantial.’”<sup>170</sup>

Authorities involving the co-conspirator statement rule provide guidance regarding the quantum and type of corroborative evidence required to avoid pure bootstrapping. The Sixth Circuit Court of Appeals succinctly explained in *United States v. Clark* that “ ‘[s]ome’ independent evidence is not merely a scintilla, but rather enough to rebut the presumed unreliability of hearsay.”<sup>171</sup> The Ninth Circuit Court of Appeals in *United States v. Silverman* noted that the proof may consist of “evidence short of proof of the commission of a substantive offense . . .”<sup>172</sup> It nonetheless must be “fairly incriminating,” and “[e]vidence of wholly innocuous conduct or statements by the defendant will rarely be sufficiently corroborative . . .”<sup>173</sup> “It is permissible, however, for a court to consider the corroborating evidence ‘in light of the co-conspirator’s statement itself.’”<sup>174</sup> Therefore, a court is not required to wear blinders when assessing whether sufficient corroborating evidence exists. The hearsay itself may be considered when determining if other evidence is incriminating or innocuous. “[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation

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166. *Id.*

167. See *Giles*, 554 U.S. at 355-73, 376-77.

168. *People v. Osorio*, 81 Cal. Rptr. 3d 167, 173 (Cal. App. 2008).

169. 618 F.2d 624, 629 (10th Cir. 1979), *abrogated on other grounds by* *Richardson v. United States*, 468 U.S. 317, 325-26 (1984), *as recognized in* *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000)

170. *United States v. Owens*, 70 F.3d 1118, 1125 (10th Cir. 1995) (quoting *United States v. Rascon*, 8 F.3d 1537, 1541 (10th Cir.1993)).

171. 18 F.3d 1337, 1342 (6th Cir. 1994).

172. 861 F.2d 571, 579 (9th Cir. 1988).

173. *Id.* at 578.

174. *United States v. Miller*, 981 F.2d 439, 442 (9th Cir. 1992) (quoting *Silverman*, 861 F.2d at 578).



prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.”<sup>175</sup>

*Clark, Silverman*, and other circuit court cases decided in the wake of *Bourjaily* were considered by the Advisory Committee when it recommended addition of a corroboration requirement to Rule 801(d)(2).<sup>176</sup> Committee commentary is instructive regarding the types of proof that may satisfactorily corroborate a hearsay statement:

The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question.<sup>177</sup>

The circumstances surrounding the utterance of the hearsay may therefore be sufficient.<sup>178</sup> This type of proof may actually be more probative than confirmatory evidence to rebut a hearsay statement’s presumed unreliability.<sup>179</sup>

Circumstantial evidence may be sufficient to satisfy the corroborative evidence requirement under the co-conspirator statement rule.<sup>180</sup> This is consistent with cases involving the forfeiture-by-wrongdoing doctrine which have held that witness tampering may be proven entirely by circumstantial evidence.<sup>181</sup> The Seventh Circuit Court of Appeals explained in *United States v. Scott*:

It seems almost certain that, in a case involving coercion or threats, a witness who refuses to testify at trial will not testify to the actions

175. *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987); see *Geraci v. Senkowski*, 23 F.Supp.2d 246, 258 (E.D.N.Y. 1998) (“Standing alone, such conduct may be innocuous, but a factfinder is not required to view it in isolation.”), *aff’d*, 211 F.3d 6 (2d Cir. 2000).

176. H.R. DOC. NO. 105-69, *supra* note 21, at 18.

177. *Id.*

178. *Cf. State v. Byrd*, 967 A.2d 285, 304 (N.J. 2009) (holding that a statement is admissible under the forfeiture-by-wrongdoing rule if “its reliability has been established by a preponderance of the evidence in light of all surrounding relevant circumstances.”) (quoting *State v. Gross*, 577 A.2d 814, 820 (N.J. 1990)).

179. *Cf. Lilly v. Virginia*, 527 U.S. 116, 137-38 (1999) (stating that the Supreme Court had “squarely rejected the notion that ‘evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears “particular guarantees of trustworthiness.” ’ ”); *Idaho v. Wright*, 497 U.S. 805, 819-23 (1990) (explaining that the exceptions to the hearsay rule rely on context and the circumstances in which certain types of statements are made to assure truthfulness and later doubting whether the confirmatory type of corroborating evidence provides any basis to presume that a hearsay statement is trustworthy).

180. *United States v. Warman*, 578 F.3d 320, 337 (6th Cir. 2009); see also *United States v. Zambrana*, 841 F.2d 1320, 1346-47 (7th Cir. 1988).

181. *United States v. Stewart*, 485 F.3d 666, 671 (2nd Cir. 2007); see generally Tim Donaldson & Karen Olson, *Classic Abusive Relationships and the Inference of Witness Tampering in Family Violence Cases after Giles v. California*, 36 LINCOLN L. REV. 45, 75-79 (2008-09) (reviewing cases approving reliance upon circumstantial evidence to prove forfeiture).

procuring his or her unavailability. It would not serve the goal of Rule 804(b)(6) to hold that circumstantial evidence cannot support a finding of coercion. Were we to hold otherwise, defendants would have a perverse incentive to cover up wrongdoing with still more wrongdoing, to the loss of probative evidence at trial.<sup>182</sup>

In those instances, “[c]ircumstantial evidence is not a disfavored form of proof and, in fact, may be stronger than direct evidence when it depends upon ‘undisputed evidentiary facts about which human observers are less likely to err . . . or to distort.’”<sup>183</sup> Circumstantial evidence should therefore also be adequate to satisfy any corroborative proof requirement that might be engrafted to Rule 104(a) with respect to admissibility determinations under the forfeiture-by-wrongdoing doctrine.

## V. CONCLUSION

The forfeiture-by-wrongdoing doctrine is a “prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself.’”<sup>184</sup> Forfeiture is a preliminary question involving the admissibility of evidence, and it would therefore normally be governed by Rule 104(a), and similar state evidentiary rules, which provide that the exclusionary rules, other than privileges, do not apply to such determinations.<sup>185</sup> A majority of lower courts have therefore held that hearsay may be used to prove forfeiture-by-wrongdoing.<sup>186</sup>

The Utah Supreme Court has acknowledged that its version of Rule 104(a) gives trial courts the ability to disregard evidentiary rules when making admissibility determinations, but it has explained that the real question is whether that power should be exercised.<sup>187</sup> The Utah Supreme Court has determined that the right of confrontation is too important to let questions regarding its forfeiture to be based on inadmissible evidence, and state courts in Utah therefore can rest forfeiture decisions only upon proof admissible under evidentiary rules.<sup>188</sup> The Utah rule aligns that state with authority originating from *Glasser v. United States* where the U.S. Supreme Court expressed concern before Rule 104(a) was adopted about hearsay lifting “itself by its own bootstraps to the level of competent evidence.”<sup>189</sup>

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182. *United States v. Scott*, 284 F.3d 758, 764 (7th Cir. 2002); *see also United States v. Jonassen*, 759 F.3d 653, 662 (7th Cir. 2014).

183. *People v. Geraci*, 649 N.E.2d 817, 823 (N.Y. 1995).

184. H.R. DOC. NO. 105-69, *supra* note 21, at 22 (Committee Note) (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2nd Cir. 1982)).

185. *See Mastrangelo*, 693 F.2d at 273; *State v. Pickens*, 25 N.E.3d 1023, 1058 ¶ 171 (Ohio 2014).

186. *See United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997).

187. *State v. Poole*, 232 P.3d 519, 527 (Utah 2010).

188. *Id.*

189. *Glasser v. United States*, 315 U.S. 60, 75 (1941).

The Court of Appeals for the District of Columbia wrote in *Jenkins v. United States* that it is not persuaded that bootstrapping concerns mandate extension of the logic adopted by *Glasser* and like cases to the forfeiture-by-wrongdoing doctrine.<sup>190</sup> Courts elsewhere have correctly observed that successful witness tampering would often not be provable if hearsay could not be used.<sup>191</sup> The court in *Jenkins* reasoned that there is “no principled reason to forbid it *per se*.”<sup>192</sup> That court nonetheless noted that it was not holding that “‘pure’ bootstrapping would be appropriate.”<sup>193</sup>

A judge can bring considerable experience and knowledge to bear on the issue of how much weight to give hearsay, and the practicalities of criminal trials demand that the judge have discretion to consider its content when making a preliminary determination regarding its admissibility.<sup>194</sup> Hearsay is “only presumed unreliable.”<sup>195</sup> It has probative value, and the presumption “may be rebutted by appropriate proof.”<sup>196</sup>

Witness tampering is difficult to prove. Witnesses too scared to testify are unlikely to testify as to why they are scared.<sup>197</sup> Despite this difficulty, trial courts should scrutinize hearsay statements when applying the forfeiture-by-wrongdoing doctrine to make sure that they are reliable.<sup>198</sup> Rule 104(a) does not by itself guarantee the reliability of a hearsay statement when used to help establish its own admissibility.<sup>199</sup> The forfeiture-by-wrongdoing doctrine also does not itself determine reliability.<sup>200</sup> Without the added safeguard of corroborative evidence, there is a risk in instances of pure bootstrapping that an “out-of-court statement could be put to the double service of establishing its own foundation for admissibility and thereby conceivably providing the sole evidentiary basis for a criminal conviction.”<sup>201</sup> Trial courts should therefore be allowed to consider hearsay when making admissibility determinations under the forfeiture-by-wrongdoing doctrine, but at least some corroborative evidence should also be required.

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190. See *Jenkins*, 80 A.3d at 996 (citing *Butler v. United States*, 481 A.2d 431 (D.C. 1984)). *Butler* adhered to *Glasser*. *Butler v. United States*, 481 A.2d 431, 439-40 (D.C. 1984).

191. *Geraci v. Senkowski*, 23 F.Supp.2d 246, 258 (E.D.N.Y. 1998), *aff'd* 211 F.3d 6 (2d Cir. 2000); see also *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *abrogated on other grounds by Richardson v. United States*, 468 U.S. 317, 325-26 (1984), *as recognized in United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000).

192. 80 A.3d 978, 996 (D.C. 2013).

193. *Id.* at 997 n.49.

194. *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997).

195. *Bourjaily v. United States*, 483 U.S. 171, 179 (1987).

196. *Id.*

197. *United States v. Scott*, 284 F.3d 758, 764 (7th Cir. 2002).

198. *United States v. Thevis*, 665 F.2d 616, 633 n.17 (5th Cir. 1982), *superseded by rule*, FED. R. EVID. 804(b)(6), *as recognized in United States v. Nelson*, 242 Fed. Appx. 164, 171 (5th Cir. 2007).

199. *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988).

200. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

201. *People v. Montoya*, 753 P.2d 729, 736 (Colo. 1988).

