

## Foster, Denise

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**From:** Peter Nicolas [pnicolas@uw.edu]  
**Sent:** Wednesday, April 24, 2013 3:57 PM  
**To:** Foster, Denise  
**Subject:** Comment on Proposed Changes to Evidence Rule 804

I write in enthusiastic support of the decision to amend Washington Evidence Rule 804 by adding an exception to the hearsay rule for forfeiture by wrongdoing. The April 21, 2013 murders at Pinewood Village Apartments in Federal Way, Washington-in which the killer chose to kill individuals who witnessed him murder his girlfriend-are a reminder that Washington's hearsay rule, as it currently exists, gives the criminally accused an evidentiary benefit when he or she silence witnesses. Had the witnesses in that case made statements about what they observed before being killed, and had the killer survived, he might have succeeded in having their statements excluded on hearsay grounds.

I might suggest that the rule be explicit on two points that have created some confusion in lower federal and state courts. First, is the forfeiture limited to a prosecution for the very crime witnessed by the witness (and that the defendant expected her to testify as a witness at), or does it also extend to the subsequent prosecution for the murder of the witness? Compare U.S. v. Dhinsa, 243 F.3d 635, 652-53 (2d Cir. 2001) (applies in the subsequent prosecution for murder of the witness), with U.S. v. Lentz, 58 Fed. Appx. 961 (4th Cir. 2003) (Traxler, J., concurring) (only applies to the case in which the defendant expected the witness to testify). Second, what is the appropriate burden of proof on the party seeking to invoke the exception? The predominant approach is the preponderance-of-the-evidence standard, see, e.g., Advisory Committee Note to Federal Rule 804(b)(6), which matches the burden federal courts require for forfeiture of the Confrontation Clause right, see Davis v. Washington, 547 U.S. 813, 833 (2006), but on occasion a lower court has taken a different approach, see, e.g., 85 N.Y.2d 359 (N.Y. 1995) (requiring clear and convincing evidence).

Respectfully Yours,

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