

SAMPLE MOTION

FORFEITURE BY WRONDGOING

CURRENT AS OF SEPTEMBER 2012

COMPILED BY



AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

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The following is a **sample motion** to admit evidence under the doctrine of forfeiture by wrongdoing. It is based upon a fictional crime, and the names of the parties, attorneys, and judges, are similarly fictional. This first sample motion involves victims who are unavailable because they were killed by the defendant; a second sample involving a victim who refuses to testify is forthcoming, and will be added shortly. The jurisdiction is the State of New Jersey, which recently codified the doctrine of forfeiture by wrongdoing in its evidence rules, under N.J. R. Evid. 804(b)(9), following a recommendation and proposal by the New Jersey Supreme Court in **State v. Byrd**, 967 A.2d 287 (N.J. 2009). Because the evidence rule is relatively new in the State, there are very few New Jersey cases involving its application. Thus, to the extent that any issues were not addressed in **Byrd** or in the language of the Rule itself, the motion would have to rest upon the case law of other jurisdictions with an analogous rule of evidence and, where helpful and appropriate, equitable forfeiture jurisdictions.

In **Byrd**, the same case in which the Court announced the proposal of the new rule on forfeiture by wrongdoing, the Court explicitly set forth the procedure that would be followed in any preliminary hearing. Although the Evidence Rule does not, by its own terms, specify the standard of proof, the **Byrd** Court declared that the standard will be a preponderance of the evidence. *Id.* at 303-04.

Byrd requires that intent to present evidence under the rule be made in writing and as soon as practicable once the prosecutor is aware that the witness will be unavailable. The notice must identify the witness and set forth the statement or statements the State seeks to admit under the forfeiture rule. *Id.* at 302-03.

Byrd further prescribes certain procedural requirements for the preliminary hearing to be held before admitting hearsay under the new rule. The trial court must order a recalcitrant witness to testify, under threat of contempt, before ruling that the witness is “unavailable,” although whether to actually cite the witness for contempt is left to the trial court’s discretion. *Id.* at 303. Before a statement can be admitted under the forfeiture rule, the trial court must find that the statement “bears some indicia of reliability.” *Id.* at 304. If the statement “(A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition,” then the statement is deemed to be sufficiently reliable. *Id.* at 305. Where there is no writing, recording, or statement under oath, the statement will be admissible only where “the State demonstrates that the statement has *compelling* indicia of trustworthiness.” *Id.* (emphasis in original).

**** Practice Note ****

In preparing your own motion and supporting brief or memorandum, it is **critical** to state, and to be prepared to argue, your own jurisdiction's law:

- Whether forfeiture is by evidence rule or by common law equitable principles (if the latter, discuss the seminal case(s))
- What procedural requirements exist regarding notice, timing, and content of a preliminary hearing
- What standard of proof applies (preponderance of the evidence or clear and convincing evidence)
- Any State-specific law concerning what kinds of acts will result in forfeiture (*e.g.*, non-criminal acts designed to intimidate or to induce the witness not to testify)
- Any additional requirements (such as satisfying a residual hearsay exception or any specific reliability standards)

Remember, too, that if the statements in question are *clearly* “nontestimonial” under **Crawford** and its progeny, you *may* not need to concern yourself with forfeiture, since there is no confrontation issue. On the other hand, if it is not absolutely clear that the statement will be considered nontestimonial, it is best to seek a ruling on forfeiture grounds, in the alternative. In this way, even if an appellate court later rules that the statement was testimonial, and therefore subject to the defendant's right of confrontation, a conviction can still be upheld on the basis of a finding of forfeiture. This might eliminate a remand for a forfeiture hearing or, worse yet, a new trial. By fully developing the facts relevant to forfeiture, you will be providing the appellate court with the necessary record to uphold the conviction on the grounds that defendant forfeited his confrontation rights, even if the court should find the statement in question was testimonial.

Another advantage to obtaining a ruling on forfeiture even for nontestimonial statements, in states that have adopted a version of Fed. R. Evid. 804(b)(6), is that the Rule explicitly makes such statements admissible as exceptions to the rule against hearsay. In contrast, a hearsay statement that is merely nontestimonial might still have to come within some other exception to the hearsay rule—an additional hurdle that might be avoided if the statement is admissible under the forfeiture Rule.

In the sample motion that follows, the State argues that certain statements should be considered nontestimonial statements and, in the alternative, that the statements should be admitted under the forfeiture doctrine. By having the court make rulings on both points, the record will be clear for any appellate review.

County
Office of the Prosecutor
[PROSECUTOR] County Prosecutor

Hon. [JUDGE]
County Hall of Justice
101 Maine Street
Town, State 08101

Re: State v. Darryl Davis
Ind. No. 11-11-4821

Dear [JUDGE]:

Please accept this letter brief in lieu of a more formal brief in support of the State's motion to admit evidence pursuant to N.J.R.E. 804(b)(9), which codifies the doctrine of forfeiture by wrongdoing. Defendant is charged with the murders of Veronica Vance and Brian Boyce in two separate incidents, as well as several related crimes. The State maintains that both murders were committed for the purpose of making the victims unavailable as witnesses, and that the prior statements of these witnesses are therefore admissible under N.J.R.E. 804(b)(9). In addition, the State seeks a ruling that certain statements, namely the statements of Veronica Vance made during a 911 call and, later, to victim advocate Anna Alvarez, are nontestimonial and, therefore, not subject to the Sixth Amendment right of confrontation pursuant to Davis v. Washington, 547 U.S. 813 (2006) and State v. Buda, 195 N.J. 278 (2008).

STATEMENT OF FACTS

***** [Practice note: In your Statement of Facts, set forth in as much detail as possible of the facts that tend to prove not only the predicates for admission of particular statements under the forfeiture by wrongdoing doctrine, but also the crime itself. The facts proving forfeiture conduct must be presented in the context of the crimes alleged. The court should have a clear picture of the defendant's actions and the basis for your argument the defendant acted with the intent to deprive the court of the witnesses' testimony. The facts will normally be drawn from police reports, witness statements, and other evidence such as 911 recordings, medical records, and phone records.] *****

In the fall of 2010, defendant Darryl Davis and victim Veronica Vance were in a relationship that had been characterized by a pattern of domestic abuse over its five-year duration. Vance's friends often saw her with bruises, which Vance tried to cover with makeup and dark glasses. One of Vance's close friends, Francine Fulton, suspected that defendant was responsible for the bruises, and had repeatedly urged Vance to end the relationship. Vance was dismissive about her concerns, however, and insisted that she loved defendant. She told Fulton that defendant just had a lot of problems and was doing his best to straighten out his life. Fulton noticed that Vance would get nervous about the time if she was visiting at Fulton's house, and that sometimes Vance would get dozens of text messages from defendant demanding to know where she was and when she would be home. Vance would apologize to Fulton, telling her she had to go. Although Fulton did not know defendant well, she disapproved of the way he seemed to control everything Vance did. She once saw defendant order Vance to change clothes because he thought the top she was wearing was too revealing. Defendant screamed at Vance that she "look[ed] like a some kind of a 'ho'." When Fulton spoke up, saying that she thought Vance looked nice, defendant yelled that he wasn't surprised at how Vance dressed,

considering “the trash she hangs out with.” Another time Fulton saw him yell at Vance and refuse to let her go to a friend’s baby shower because he was angry that she had not consulted him first.

***** [Practice note: In this sample brief, we have not included the worst of the abusive profanity the defendant used toward, and about, this victim. If you have direct quotes using such language, it is best to include those direct quotes, perhaps with a footnote (if your judge is easily offended) explaining to the court why the quotes are relevant (e.g., to show the probable effect on the victim or to show the defendant’s attitude toward her).] *****

Vance had a job at Department Store, working as a cashier. In May of 2010 Vance showed up at work on crutches with a cast on her lower leg. She told her supervisor, Susan Sales, that she had broken her ankle while tripping up the stairs in her house. Vance explained this same injury to her friend Fulton by telling her she had been “play fighting with Darryl” in the garage when she fell over some boxes.

Defendant, who was twice convicted for distribution of cocaine, enjoyed a modest amount of financial success. ***** [Practice note: a Rule 404(b) motion will be required for admission at trial of any evidence concerning defendant’s involvement with drugs. Because the facts, as detailed below, include an incident in which defendant blamed the victim for his inability to find his stash of drugs, as well as defendant’s bribery of the second victim with a large quantity of cocaine, evidence of those incidents should be admissible as evidence of defendant’s motive and intent under Rule 404(b).] ***** He often drove a BMW that he had registered in Vance’s name. Defendant had a friend, Brian Boyce, who spent a lot of time at Vance’s house when defendant was staying there, as he often did.

On September 7, 2010, at around 10:30 p.m., Police were dispatched to Vance's home in response to a 911 call. Vance called 911 to report that her boyfriend, Darryl Davis, had assaulted her and threatened to kill her. Vance was tearful and breathing hard on the phone, as she told the 911 operator, in a raspy voice, what had happened. She told the operator that her boyfriend had just "tried to choke me to death." In response to the operator's questions, Vance said she and defendant had argued on the phone, and he had threatened to come over and kill her. A short time later, he showed up at her house, pounding on the door and threatening to kill her. She had opened the door a crack, hoping to reason with him, but he forced the door open, grabbed her, threw her against the wall, and strangled her with his hands, causing her to gasp for breath. Vance urged the operator to "[p]lease, please hurry, he's coming back, I know he is!"

When the police arrived, Vance yanked open the door and said, "Thank God you're here—he's gonna kill me!" The responding officer, Officer Hector Martinez of the Police Department, noted in his report that Vance was crying and shaking, and further noted his observations of a broken chain on the front door and red marks on Vance's throat. The officer took a sworn, taped statement from Vance at the house. When the officer asked her about any history of domestic violence, Vance said that defendant had been "smacking" and threatening her for a long time, but that things had been getting worse, and it seemed like he was angry all the time and she could not seem to do anything to please him. She said that in May, he had thrown her down the steps in the garage, causing her to fall and break her ankle. That fight was about defendant's inability to find his stash of cocaine after she had straightened up

the garage. Vance said that defendant's friend, Brian Boyce, had witnessed that incident, and that Boyce was the one who had driven her to the hospital for an x-ray. Vance told the officer that tonight's incident started because defendant found out she was pregnant and thinking about an abortion. He had screamed obscenities at her and accused her of being pregnant by someone else, since she was thinking about an abortion. Officer Martinez advised Vance of her domestic violence rights, including the right to a temporary restraining order (TRO). Vance obtained a TRO that night, though she declined any medical treatment.

Defendant was arrested the next day and was charged with terroristic threats under N.J.S.A. 2C:12-3a/b, third-degree aggravated assault under N.J.S.A. 2C:12-1b(3), and second-degree burglary under N.J.S.A. 2C:18-2. On September 13, 2010, the date of case screening, Vance met with Anna Alvarez, a victim advocate with the County Prosecutor's Office. A victim advocate's job is to provide emotional support to victims during the legal proceedings and to refer victims to appropriate resources that can provide any assistance the victim may need. As they spoke privately in a conference room at the courthouse, Vance told Alvarez about the history of abuse, telling her that she felt like her life was not her own because defendant controlled everything she did. She said she had been thinking about leaving defendant, but was afraid to try to do so. She said she felt "trapped" when she learned she was pregnant. She told Alvarez she had confided in a couple of friends about the pregnancy, and her thoughts about an abortion, but somehow word had leaked back to defendant, who promptly called her, threatened her, and then came over to the house and assaulted her. Vance said she still cared about

defendant, but his violence was scaring her and she thought she might have to leave him. She said she was afraid that if she had his child she would be tied to him forever. She said that she was equally scared at this point to have an abortion, since he had threatened to kill her if she did, and she was becoming convinced he was capable of doing so. Alvarez provided Vance with contact information for several counseling services that assist victims of domestic violence, as well as a women's health center that provided both abortion services and prenatal care.

Approximately a week later, Vance bailed defendant out of jail, and they resumed their relationship. The restraining order was dismissed at her request. Vance also attempted to have the criminal charges dismissed, telling the Prosecutor's Office investigator that defendant was "just upset, understandably" because he had heard she was considering having an abortion, but that "everything is OK between us now—we're planning to get married." Despite her request, the Prosecutor's Office declined to dismiss the charges, which were still pending in October of that year.

On Sunday, October 10, 2010, around 11 p.m., the Fire Department responded to a fire at Vance's house. Based upon the presence of accelerants at the scene, the Fire Marshall determined that the fire was an arson. No one was in the house at the time of the blaze, which did considerable damage to the interior of the house. The front door lock was broken, and several cabinet drawers had been pulled out. Investigators attempted to locate Vance, but were unsuccessful.

When Vance did not show up at work the next morning, several of her friends and her supervisor contacted the police. Police contacted defendant, who claimed

not to know where Vance was. A couple of days later, on October 12, 2011, a citizen contacted the police to report that he had found a body in a wooded area approximately two miles from Vance's home. Police and crime scene investigators were dispatched to the scene, where they found the body of an adult black female lying face down on the ground. A small baggie of cocaine was found approximately twelve inches from the body. Based upon the pattern of footprints and the absence of other marks in the dirt, it appeared that the body had been carried into the area and placed there by one or more unknown actors. The body, later identified as Veronica Vance, was examined by the County Medical Examiner. The autopsy report noted that the victim's neck was severely bruised, and her hyoid bone fractured. The Medical Examiner concluded that the cause of death was asphyxiation due to manual strangulation (based upon the fractured hyoid bone and absence of ligature marks), and that the manner of death was homicide. The Medical Examiner estimated that the victim had been killed two to three days before the body was discovered. The toxicology screen was negative for any illegal drugs, including cocaine. The victim's pregnancy was confirmed.

Darryl Davis was an immediate suspect in the murder, but his friend Brian Boyce provided an alibi for the day of the fire (which was presumed to be the date of the murder), stating that defendant had gone with him to hang out that evening at the home of Boyce's sister, Brenda Boyce. Brenda confirmed to police that her brother and defendant had been over at her house that evening between 8 p.m. and 2 a.m., "just hanging out, talking, listening to music."

Defendant provided a taped statement to the police, in which he said he was “devastated” by Vance’s death. He admitted that their relationship had been somewhat rocky, but he claimed that the problem was Vance’s drug use. He said he had been very worried about her, and that she had “all kinds of low-lives—you know, dealers and junkies and crack-heads” over at the house at all hours. He admitted he had argued with Vance about her pregnancy, but claimed he was simply concerned about the health of the unborn child due to Vance’s continued drug use. He adamantly denied threatening her, forcing his way into the house, or assaulting her on September 7, 2010. According to defendant, Vance had admitted to him she was beaten up that night by a drug dealer to whom she owed money. She told defendant that she had accused him only because the drug dealer had threatened to kill her and she was too scared to identify the real perpetrator. Defendant said he had been “a little bit” angry about being falsely accused, but he had forgiven Vance because she had promised to get help for her drug problem. He said they planned to get married before the baby was born. He said that he was firmly convinced Vance had been murdered by the drug dealer to whom she owed money, but that he did not know this person’s identity. Defendant said, “She don’t tell me about that aspect of her life because, you know, she know I don’t approve. I straightened my own life out. I don’t want to be hearin’ about it, you know?” Defendant stated that at the time the fire was reported he was at the home of Brenda Boyce, the sister of his friend Brian Boyce, where he had been hanging out since early that evening. He said the victim had been “fine” when he saw her earlier in the day. The murder

investigation remained open, with defendant as the primary suspect but police lacking sufficient evidence to charge him with Vance's murder.

On March 30, 2011, Brian Boyce came into the Prosecutor's Office, requesting to speak with Investigator William Badger, the lead investigator in the Veronica Vance homicide case. Boyce told Inv. Badger that he wanted to provide information about the murder. Inv. Badger took Boyce back into an interview room, where he took a sworn taped statement from Boyce. In the statement, Boyce explained that he was defendant's best friend from childhood. He said he had remained close to defendant throughout that time, and that they were basically "inseparable, joined at the hip, you might say." He knew Veronica Vance very well, from the time she and defendant first began their relationship. Although defendant had never "officially" moved into Vance's house, he was over there constantly, and Boyce and defendant often hung out there. Boyce had seen defendant get angry with Vance, often ordering her around, yelling at her, "smacking" her, and "basically disrespecting her." He had also seen defendant act lovingly toward Vance, especially when he wanted her to do something, or after a particularly bad argument. Back in the spring of 2010, Boyce was over at the house when defendant started looking for some cocaine he wanted to give Boyce to sell for him. Defendant got more and more angry when he could not find the cocaine where he believed he had hidden it in the garage, and defendant started cursing "that stupid bitch, she cleaned up in here and now nothin's where it's supposed to be." He was screaming and hollering so much that Vance came out to the garage to see what was wrong. Defendant "got right up in her face, called her a 'useless bitch,' and threw her down the steps of the garage."

Vance fell to the ground and screamed in pain. Defendant walked into the house and slammed the door, then left in the BMW. Boyce went over to help Vance, who found that she could not stand on her right foot. Boyce helped her into his own car and drove her to the emergency room, where Vance was treated for a broken ankle.

Boyce was asked about Vance's drug use, and his response was, "Nope, no way. She absolutely did not approve of drugs. She used to tell me and Darryl all the time to keep it out of her house."

Boyce stated that on October 10, 2010, he was over at Vance's house "just hangin' out, as usual" with defendant. Boyce was in the garage alone, smoking a "blunt" (cigar filled with marijuana), when he heard loud voices from inside the house. He could hear defendant and Vance arguing about her having an abortion. Boyce said defendant had told him Vance was pregnant, and that it had led to a "big fight" (as defendant told Boyce) that resulted in defendant's being locked up for a few days the previous month. Defendant had told Boyce he was confident Vance would drop the charges "because he told me, like, she knows what's good for her." Boyce heard the argument get louder, and he heard Vance scream, "like a really scared scream." Suddenly, the screaming stopped, and it got quiet. Boyce said he had a feeling something was "really wrong." When he went into the living room, defendant was on top of Vance, strangling her as he straddled her on the ground. Vance appeared to be unconscious. Boyce said he "just froze" because defendant was completely enraged. Defendant finally gave one last push into Vance's neck, then stood up and kicked her in the side. He said defendant suddenly noticed him standing there, and defendant had yelled at him, "What're YOU lookin' at?"

Boyce stated he asked defendant, "Man, what did you do? What did you do that for?" Defendant responded, "Bitch don't get it. Done screwed up my life every which way." Boyce asked what he was going to do now—"how he plan to deal with the situation." Defendant assured him he would "deal with it," and informed him that he expected Boyce to help. Boyce explained to the investigator that he thought what defendant had done was "nasty—no woman should die that way," but that "Darryl is the kind of guy you just don't say no to," so he felt he had no choice but to comply. Boyce said defendant assured him that they would "deal with it in a way that won't get you in the middle of nothin'." Defendant said they would wait until it got dark and put the Vance's body in the BMW so they could dump it later. On defendant's instructions, Boyce broke the front door lock so it would appear someone had broken into the house. They pulled some drawers out of the cabinets to make it look like the place had been ransacked. After it got dark, Boyce went out to make sure the neighborhood was quiet before they carried Vance's body out to the car, placing her body on the floor of the back seat and throwing a blanket over it. Defendant went into the garage and got a can of gasoline, which he poured around the living room where he had strangled Vance. They went out to the car and drove to a secluded, wooded area, parking the car off the road where it would not be readily visible. They took the body out of the back seat and carried it a short distance into the woods, putting the body face down on the ground. Boyce stated that defendant reached into his pocket and tossed a bag of cocaine next to the body, telling Boyce he had gotten the idea from a rap song, and that it would "make it look like a drug deal gone bad." They then went back to the house. Defendant went into

the house to set the fire, and the two men drove back to the home of Boyce's sister, Brenda, who lived a few blocks away. Boyce said he had later burned the clothes he was wearing that night "because I watch TV, and I know y'all can sometimes get evidence off clothes and all that."

Boyce said defendant had assured him he would have nothing to worry about in terms of his involvement in Vance's murder. Because Vance was already dead by the time Boyce came on the scene, defendant told him, Boyce could never be charged with anything more serious than "abuse of a corpse, which don't carry more than 18 months or a year or something." Defendant also told Boyce he would reward him for the risk he did take, promising him "the whole package" of a delivery of cocaine he expected to receive the following week. True to his word, the following week defendant gave Boyce 20 ounces of cocaine. Boyce said he had sold the cocaine through "a few associates, each getting a piece" of the profit, and ultimately had made about \$25,000 from selling the cocaine, some of which he had spent on a used Lexus.

In his statement, Boyce told Inv. Badger that in spite of the payment and assurances he had received from defendant, he had never felt comfortable about what had happened, and he was starting to worry about his own well-being, and that of his sister, Brenda, who was now in a relationship with defendant. Defendant had made several comments to Boyce, "in a jokey kind of way, but you could tell he was trying to tell me something," to the effect that it was a good thing defendant had been so generous to Boyce because it was so much easier than having to dump another body. Defendant constantly talked to Boyce about the homicide

investigation, repeatedly expressing concern that Brenda Boyce would stick with the alibi. Boyce said defendant could not understand why the Prosecutor's Office had not yet dismissed the domestic violence charges from September "cause, like, he say, 'It ain't like they got any witnesses now.'" Defendant complained to Boyce about still having to go to court over "that old bullshit."

Boyce had also noticed that defendant was starting to treat Boyce's sister, Brenda, the same way he had treated Vance, controlling where she went and what she did, and "blowing up on her" when she did something he did not like. Boyce said he felt responsible for allowing Brenda to get involved with defendant, and he feared for her safety "after seeing what he did to Ronnie." Boyce said he also feared for his own life, since he was apparently the only witness who could definitely tie defendant to the murder, and defendant seemed "obsessed" with what various witnesses could say about him. Boyce begged Inv. Badger to keep his statement confidential "at least until he [defendant] gets locked up. Because once he hear about this, he be comin' after me."

Following the statement, Inv. Badger obtained a warrant for defendant's arrest, charging him with the murder of Veronica Vance. The Statement of Probable Cause included details from Boyce's statement. Defendant was arrested on April 2, 2011, and held on \$750,000 full cash bail.

On April 8, 2011, at around 10 p.m., police were dispatched to the residence of Brian Boyce for a report of a shooting. Police found the body of Brian Boyce lying on the ground next to his Lexus, which was parked on the street in front of his house. He had been shot in the back of the head, at close range. A neighbor heard a

gunshot, looked outside, and saw a person he recognized as Ronald Rogue running from the area. Rogue was, according to several witnesses, a close friend of defendant's. Jail visitor logs confirmed that Rogue had visited defendant in the jail twice between the date of defendant's arrest and the murder of Brian Boyce.

Brenda Boyce was re-interviewed by police, and she admitted she had lied about the alibi she had provided for her brother and defendant, stating that they had actually showed up at her house a little after 11 p.m. on the night of October 10. She said her brother had told her that if anyone asked, she should say they had been at the house since 8 p.m. When Brenda heard about the fire, and, later, about the death of Vance (whom she did not know well, personally, but had met on a couple of occasions), she had become suspicious that Brian and defendant had something to do with it. She never confronted them with her suspicions, however, and she had become romantically involved with defendant shortly thereafter. She told police she "should have known better" because defendant immediately became possessive and controlling, and she was becoming afraid he would be physically violent to her.

Investigators obtained Vance's cell phone records for the time defendant was in jail following the September 7, 2010, assault. Those records showed that during that time she received twenty-three telephone calls originating from the County jail. The first ten calls were "missed calls" that went unanswered; the subsequent calls lasted from one to twenty minutes in duration. Medical records from Hospital indicate that the Veronica Vance was treated on May 9, 2010, for a broken ankle, which she reportedly sustained when she "fell down steps in garage."

In November of 2011, a County grand jury indicted defendant under the above-captioned indictment, charging him with second-degree aggravated assault arising from the May 9, 2010, incident when he broke the victim's ankle, as well as the following charges arising from the September 7, 2010 domestic violence incident: terroristic threats in violation of N.J.S.A. 2C:12-3a/b, third-degree aggravated assault in violation of N.J.S.A. 2C:12-1b(3), and second-degree burglary in violation of N.J.S.A. 2C:18-2. In connection with the October 10, 2010, homicide of Veronica Vance, he was charged with first-degree murder in violation of N.J.S.A. 2C:11-3, second-degree arson in violation of N.J.S.A. 2C:17-1a(2), evidence tampering in violation of N.J.S.A. 2C:28-6, second-degree witness retaliation in violation of N.J.S.A. 2C:28-5b (retaliation against Veronica Vance), second-degree witness tampering in violation of N.J.S.A. 2C:28-5a (tampering with Veronica Vance) and third-degree witness tampering in violation of N.J.S.A. 2C:28-5a (tampering with Brian Boyce). In connection with the April 8, 2011, homicide of Brian Boyce, defendant, along with co-defendant Ronald Rogue, was charged with first-degree murder in violation of N.J.S.A. 2C:11-3, second-degree witness retaliation in violation of N.J.S.A. 2C:28-5b, and second-degree witness tampering in violation of N.J.S.A. 2C:28-5a. Finally, defendant was also charged with stalking Veronica Vance in violation of N.J.S.A. 2C:12-10 during the period between May 9, 2010, and October 10, 2010.

In the present motion, the State seeks to have statements of Veronica Vance and Brian Boyce admitted as evidence pursuant to N.J.R.E. 804(b)(9) (forfeiture by wrongdoing). Specifically, the State seeks to admit the following statements of these

witnesses: Vance's recorded telephone call to the 911 operator on September 7, 2010 (Exhibit A); Vance's taped statement to the responding officer on September 7, 2010 (Exhibit B); Vance's unrecorded statements to Anna Alvarez on September 13, 2010 (Exhibit C); and Brian Boyce's statement to Inv. Badger on March 30, 2010 (Exhibit D). Complete transcripts of the recorded statements, and the affidavit of Anna Alvarez containing a summary of the unrecorded statements, are attached hereto as Exhibits. ***** [Practice note: Attach to the moving papers transcripts of any recorded statements, copies of any written statements, and affidavit summaries of any unrecorded statements you wish to have admitted.] *****

LEGAL ARGUMENT

POINT I: TESTIMONIAL HEARSAY STATEMENTS OF AN UNAVAILABLE WITNESS ARE ADMISSIBLE WHERE THE DEFENDANT'S WRONGFUL CONDUCT HAS PROCURED THE UNAVAILABILITY OF THE WITNESS.

The doctrine of forfeiture by wrongdoing has a long history in the common law. If a defendant causes a witness to be unavailable for trial through his wrongful acts, with the intention of preventing that witness from testifying, then the introduction of the witness's prior testimonial statements is not barred by the Confrontation Clause of the Sixth Amendment of the United States Constitution. The principle was recognized by the United States Supreme Court in Reynolds v. United States, 98 U.S. 145 (1878): "[I]f a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that against the legitimate consequences of his own wrongful acts. ... [I]f he voluntarily keeps the witnesses away, he cannot insist on his privilege [to confront

the witnesses]. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.” Id. at 158. When that Court decided the landmark case of Crawford v. Washington, 541 U.S. 36 (2004), which dramatically altered the conceptual basis for a defendant’s Sixth Amendment right of confrontation, it recognized the continuing validity of this long-standing exception to that right. Contrasting the old standard under Ohio v. Roberts, 448 U.S. 56 (1980) (which had permitted the introduction of hearsay where the evidence was deemed sufficiently reliable) with the newly-announced test (which is based upon whether or not the statement is “testimonial” in nature), the Court emphasized that “[t]he Roberts test ... is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.” Id. at 62 (emphasis added).

The continued viability of the doctrine was recognized in Giles v. California, 54 U.S. 353 (2008), where the Court held that the admission of evidence under the forfeiture by wrongdoing evidence rule constitutionally required the State to show, by a preponderance of the evidence, that the defendant acted with the purpose of preventing the witness from testifying. Nothing in Giles suggests that the State must show defendant’s sole purpose was to prevent the witness from testifying. In Giles, the defendant was charged with the murder of his ex-girlfriend. Three weeks before the killing (for which the defendant claimed self-defense), the victim had reported to

the police that the defendant had beaten, strangled, and threatened to kill her during an argument. The trial court admitted the victim's statements to the police under California's evidentiary rule that permits admission of certain statements describing prior injury or threat to injure the unavailable declarant. The Supreme Court held that, in order to satisfy the requirements of the Confrontation Clause, such statements would be admissible only where the defendant acted with the purpose to silence the victim. The Court noted, however, that

[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. [*Giles, supra*, 128 U.S. at 377.]

In his concurring opinion, Justice Souter added that

the element of intention [to silence the witness] would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger. [*Giles, supra*, 128 U.S. at 380 (Souter, J., concurring).]

In 2011, New Jersey joined the federal government and the numerous States that have codified the forfeiture doctrine in their evidence rules. In *State v. Byrd*, 198 N.J. 319 (2009), the New Jersey Supreme Court proposed a new rule of evidence

codifying forfeiture by wrongdoing in this State. Adopted in 2010, with an effective date of July 1, 2011, N.J.R.E. 804(b)(9) provides that “[a] statement offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness” is not excluded by the rule against hearsay. In State v. Rose, 425 N.J.Super. 463 (App. Div. 2012), the Appellate Division held that the new Evidence Rule would be applicable even where the wrongful conduct that prevented the witness from testifying occurred before the effective date of the Rule.

In Byrd, the Supreme Court set forth the procedural requirements for admission of evidence under the new forfeiture Rule. First, the State must provide written notice of intent to offer evidence under the Rule as soon as practicable, specifying the names of the witnesses and the content of the statements it seeks to admit. 198 N.J. at 302-03. Next, the court must hold a hearing at which the burden is on the State to show, by a preponderance of the evidence, that the “engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the witness's unavailability.” Id. at 303-04. The hearing is to be governed by N.J.R.E. 104(a). Id. at 303. In such a hearing, the court does not apply the rules of evidence, except for valid claims of privilege or N.J.R.E. 403 (which permits the court to bar evidence “if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence”). Thus, hearsay, including the statements that the State is seeking to admit at trial will be admissible at this preliminary hearing.

Finally, statements will be admissible under N.J.R.E. 804(b)(9) only when the court finds, after the Rule 104(a) hearing, that the statements are sufficiently reliable. Byrd, supra, 198 N.J. at 304. The Court held that the standard for determining reliability of a prior statement under N.J.R.E. 804(b)(9) should be the same as that applied in determining the reliability of a witness's prior inconsistent statement offered by the party calling the witness, as set forth in State v. Gross, 121 N.J. 18 (1990). Id. Under that standard, a statement that "(A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition" will be admissible provided that, in light of all of the surrounding relevant circumstances, the statement is reliable. Id. Among the relevant circumstances to be considered under Gross are:

(1) the declarant's connection to and interest in the matter reported in the out-of-court statement, (2) the person or persons to whom the statement was given, (3) the place and occasion for giving the statement, (4) whether the declarant was then in custody or otherwise the target of investigation, (5) the physical and mental condition of the declarant at the time, (6) the presence or absence of other persons, (7) whether the declarant incriminated himself or sought to exculpate himself by his statement, (8) the extent to which the writing is in the declarant's hand, (9) the presence or absence, and the nature of, any interrogation, (10) whether the offered sound recording or writing contains the entirety, or only a portion of the summary, of the communication, (11) the presence or absence of any motive to fabricate, (12) the presence or absence of any express or implicit pressures inducement or coercion for making the statement, (13) whether the anticipated use of the statement was apparent or made known to the declarant, (14) the inherent believability or lack of believability of the statement, and (15) the presence or absence of corroborating evidence. [Gross, supra, 121 N.J. at 29.]

Where the statement at issue was neither written nor recorded, nor made under oath, the statement will still be admissible where the State can show that the statement bears “compelling indicia of trustworthiness.” Byrd, supra, 198 N.J. at 304 (emphasis in original). The State submits that the statements made by Veronica Vance in the 911 call, in the taped statement to Officer Martinez, and in her unrecorded conversation with victim advocate Anna Alvarez, and the statements made by Brian Boyce in his statement to Inv. Badger satisfy all of the criteria of N.J.R.E. 804(b)(9) and Byrd and, therefore, should be ruled admissible at trial.

POINT II: DEFENDANT’S WRONGFUL CONDUCT WAS INTENDED TO,
AND DID, PROCURE THE UNAVAILABILITY OF THE WITNESSES.

The evidence overwhelmingly shows that defendant is responsible for the unavailability of Vance and Boyce. Because this court is not bound by the rules of evidence at the present hearing, N.J.R.E. 104(a), it may properly consider Boyce’s statement in which he describes witnessing the murder of Vance at defendant’s hands. That description is corroborated by other evidence in the case. Boyce described how defendant strangled Vance with his hands. This is corroborated by the autopsy report concluding that Vance died as a result of manual strangulation. Boyce’s description of defendant’s disposal of the Vance’s body, the location, and the planting of the baggie of cocaine to make it look like “a drug deal gone bad” is corroborated by the cocaine that was found at the location near the body, the description of how the body was found (which was consistent with the body being carried into the wooded area), and the absence of any drugs in Vance’s blood system. His description of their efforts to tamper with the crime scene is

corroborated by the crime scene investigation that showed a broken front door lock, cabinet drawers that were pulled out, and the presence of accelerants. Defendant's responsibility for Vance's death is also supported by his demonstrably false alibi and his demonstrably false claims that Vance was a regular drug user in an effort to support his suggestion that she was killed by a drug dealer to whom she owed money.

The evidence that defendant was responsible for Boyce's death is similarly strong, albeit circumstantial. Boyce was murdered only days after defendant's arrest on the strength of information provided by Boyce. That information was conveyed to defendant at the time of his arrest because it was included in the Statement of Probable Cause accompanying the arrest warrant. A witness who is personally familiar with Ronald Rogue identified him as the person fleeing the scene immediately after Boyce was shot. Rogue, a close friend of defendant's, had visited defendant in jail twice between the time of defendant's arrest and the murder of Boyce. There was no evidence of robbery or any other motive for Rogue to shoot Boyce. The shooting can only be characterized as an execution: Boyce was shot at close range in the back of the head as he was getting into his car. Defendant had paid off Boyce for his assistance in concealing Vance's murder, and had referred to the payment as being "easier than dumping another body," a scarcely veiled threat that a witness against him would be disposed of. The evidence all points to defendant's solicitation of Boyce's murder to prevent him from testifying against him.

It is also clear that in killing Vance, defendant was motivated, at least in part, to make her unavailable as a witness. Vance and defendant were in the kind of “classic abusive relationship” in which defendant sought to isolate Vance to dissuade her from seeking outside help. See Giles, *supra*, 128 U.S. at 377, 380. Both Vance, in her statements to Officer Martinez and in her statements to advocate Alvarez, and Boyce, in his taped statement, described a history of physical abuse in the form of hitting, shoving, and on the night of September 7, 2010, strangulation. Vance and Boyce independently described the event that caused her ankle to be broken as one in which defendant had angrily shoved her down the steps in the garage, which resulted in Boyce’s taking her to the emergency room for treatment. Vance confided in no one the truth about that incident until she spoke with Officer Martinez and with Alvarez after defendant had strangled her and she was desperate to get away: she told hospital personnel only that she had fallen down some steps, but she told her supervisor that she had accidentally fallen up some steps, and she had told her friend Francine Fulton that she had accidentally fallen while she was “play fighting” with defendant in the garage. Defendant exercised obsessive control over Vance, verbally or physically abusing her when she displeased him or did not consult with him about her plans. He interfered with her outside friendships by insisting she come home if she was with her friend Fulton, by insulting Fulton when she tried to discourage defendant’s verbal abuse of Vance, and by forbidding her to socialize without his prior approval. His efforts to isolate and control Vance were echoed in his treatment of Brenda Boyce once they became involved in a relationship.

Following defendant's incarceration for the September 7 incident in which he threatened Vance, broke into her house, and strangled her, defendant called Vance repeatedly from the jail. Vance's initial cooperation with law enforcement, in which she sought help and described her desperation to extricate herself from her abusive relationship, evaporated after these phone calls. First Vance bailed defendant out of jail. Then the restraining order was dismissed at Vance's request. Finally, Vance actively sought dismissal of the criminal charges, explaining that everything now was "okay" and that they were going to be married. Given the history of the relationship, characterized by control and abuse that was followed by loving behavior when defendant wanted something (as described by Boyce in his statement to Inv. Badger), it is clear that defendant was responsible for the change in Vance's willingness to cooperate with the Prosecutor's Office.

Although Boyce stated that he heard defendant and Vance arguing over the abortion issue immediately before defendant killed her, defendant's remark to Boyce that Vance had "screwed up my life every which way" clearly suggests that his motive for killing her went far beyond their dispute about Vance's pregnancy. Defendant had told Boyce that he was sure Vance would drop the charges because "she knows what's good for her." Defendant's continuing irritation at having to go to court for the original assault charge after Vance's death and his remark that the State had no longer had any witnesses to the case clearly show that defendant's murder of Vance was motivated at least in part by his desire to prevent her from testifying. Defendant's willingness to manipulate the criminal justice system is further demonstrated by his payment to Boyce for his role in concealing the crime

and supporting his alibi, his seemingly joking remark that it was easier to pay Boyce than to “dump another body,” and his ready elimination of Boyce as a witness to Vance’s murder once it became clear Boyce was cooperating with the police. It is plain to see that defendant had no intention of permitting either Boyce or Vance to testify against him in court. As threats to his freedom, they had to be eliminated. When his usual tactics to control Vance did not result in dismissal of the criminal charges, defendant took lethal action to ensure her silence. When his efforts to pay off Boyce failed to ensure his silence, Boyce suffered the same fate. The State submits it can carry its burden to show, by a preponderance of the evidence, that defendant intentionally procured the unavailability of Vance and Boyce as witnesses.

POINT III: THE STATEMENTS THE STATE SEEKS TO ADMIT ARE
SUFFICIENTLY RELIABLE TO JUSTIFY THEIR ADMISSION.

***** [Practice note: Even if your jurisdiction does not explicitly require a finding of reliability as a condition to admission of statements admitted under the forfeiture of wrongdoing doctrine, it is good practice to establish their reliability. Where reliability is not a condition, do not argue that the statements are “sufficiently reliable to justify their admission,” but rather, simply note that they are reliable and explain why] *****

Vance’s statements to the 911 operator

Vance’s statements to the 911 operator are contained in a sound recording, under circumstances demonstrating their reliability under the Gross standard. At the time Vance made her call to 911, she was seeking the help of the police. She made the call freely, with no apparent motive to fabricate. Her demeanor during the call shows that she was fearful, and her raspy voice is consistent with her report

that she was strangled. Her statements to the 911 operator are consistent with the observations of the responding officer. Her explanation of the events that immediately preceded the threats and assault she was reporting placed the emergency in which she found herself in context; they were not made for the purpose of recounting past events with an eye toward future prosecution. While the State submits that all of Vance's statements to the 911 operator are nontestimonial under Davis v. Washington, 547 U.S. 813 (2006), because they were made in the context of an ongoing emergency situation in which the victim clearly feared defendant's return at any moment, the State submits that even if some portion of the statements are deemed to be testimonial, they are nevertheless admissible under N.J.R.E. 804(b)(9).

Vance's recorded statement to Officer Martinez

Vance's recorded statement to Officer Martinez immediately after the September 7 assault, although testimonial, is sufficiently under reliable, under the Gross standard, to justify its admission pursuant to N.J.R.E. 804(b)(9). The statement was made to a police officer, whom she had summoned for assistance, immediately after a crime that had caused her to be injured and emotionally distraught. She was in her own home, not in police custody. She had no motive to exculpate herself at defendant's expense. The statement evidences no coercion or pressure on the part of the officer asking the questions. The questioning was straightforward, eliciting only the facts of the offense that had just occurred and the history of the relationship between the parties. Vance was no doubt aware that her

answers would be used in the course of investigation and eventual court proceedings, and she took an oath to tell the truth. The statement is inherently believable, and is corroborated by the 911 call and the officer's observations of injury to Vance's neck and the broken chain on the front door, as well as Vance's demeanor during the statement.

Vance's unrecorded statements to Anna Alvarez

***** [Practice note: Many jurisdictions have a privilege that attaches to a victim's statements to a victim advocate (e.g., N.J.R.E. 517). Here, since the victim advocate is employed by the Prosecutor's Office, the privilege under that Evidence Rule probably does not apply. In some jurisdictions, the privilege may not survive the victim's death. Be sure to consult with the advocate, and check the law of your own jurisdiction, before seeking to admit statements made by the victim to an advocate.] *****

The State submits that Vance's unrecorded statements to victim advocate Anna Alvarez are nontestimonial. According to the Affidavit of Anna Alvarez (see Exhibit B, attached), although Alvarez is employed by the Prosecutor's Office, her role is not that of a law enforcement representative. Her job is to assist victims through the process of criminal proceedings and to refer them for services that may help them recover from the crimes. She does not routinely share information with investigators and prosecutors for the purpose of documenting evidence. Alvarez primarily assists victims of domestic violence for the purpose of increasing their safety and directing them to services that will help them to recover from or to leave an abusive relationship. It was only when Vance was killed that Inv. Badger approached Alvarez and asked if she had any information that might help with the

investigation, at which point she disclosed the content of their conversation on the date of the case screening.

In State v. Buda, 195 N.J. 278 (2008), the New Jersey Supreme Court held that the statement of a three-year-old child abuse victim to a Division of Youth and Family Services (DYFS) worker about the source of his injuries was not testimonial. The interview in that case was at the hospital where the child victim was being examined and treated for the injuries he had received as a result of beatings inflicted by his mother's boyfriend. Acknowledging that, at times, DYFS workers may act in a law enforcement capacity, the Court found that in this case, the worker's primary role was to act to protect the victim from his assailant with whom he had been living. "Here the DYFS worker was doing precisely her job: she was not collecting information about past events for prosecutorial purposes, but gathering data in order to assure a child's future well-being." Id. at 307. Observing that an investigator from the Prosecutor's Office was already on the scene and handling evidentiary matters, the Court found the "division of duties" to be "clear," with responsibility for evidence collection resting with the investigator, while the DYFS worker "was responsible for ensuring [the victim's] continued safety and well-being." Id. "Viewed in its proper context, [the victim's] statement to the DYFS worker was a statement seeking to end defendant's then-present reign of terror over [him], a statement no different than the domestic abuse victim's 911 call Davis instructs is nontestimonial." Id. Likewise, the victim's statements to Alvarez were, viewed in their proper context, statements seeking to end this defendant's "then-present reign of terror," by obtaining referrals for counseling and other assistance.

Vance had already provided her evidentiary statement to the responding police officer; the victim advocate's role was to assure Vance's continued well-being. The State submits that the statements to Alvarez were nontestimonial and admissible under N.J.R.E. 803(c)(3) as a statement of then existing mental, emotional, or physical condition.

However, even if Vance's unrecorded statements to Alvarez are deemed to be testimonial or otherwise barred by the hearsay rule, the State submits that the reliability of the statements is sufficiently compelling to justify their admission pursuant to N.J.R.E. 804(b)(9). The statements were made informally to a victim advocate whose job was to provide assistance to Vance in protecting herself from her abusive relationship with defendant. Vance had nothing to gain by being less than truthful with Alvarez. Indeed, the statements can be likened to statements made for the purpose of receiving medical treatment—statements that have long been recognized as admissible exceptions to the hearsay rule because of their high degree of reliability. See In Re C.A., 146 N.J. 71, 98-99 (1996) (citing Biunno, Current N.J. Rules of Evidence, Comment on N.J.R.E. 803(c)(4) (1994-95)). The assistance Vance could receive from Alvarez was only as good as the truthfulness of her statements about the relationship. Their conversation was in a private, safe environment. Vance was free to speak or to leave if she did not wish to discuss the matter. The conversation was not focused upon the criminal charges or prosecution, but rather upon Vance's need for practical assistance in view of the situation in which she found herself. Moreover, the statements are corroborated by other evidence in the case, including the observations of Vance's friends, the

statement of Brian Boyce, and the 911 call. The State submits that under all of the circumstances, the unrecorded statements to Alvarez are sufficiently compelling in their reliability to justify their admission under N.J.R.E. 804(b)(9).

Boyce's recorded statement to Inv. Badger

Boyce's recorded statement to Inv. Badger is unquestionably testimonial. The State submits that the reliability of that statement, however, is sufficient to justify its admission under N.J.R.E. 804(b)(9). Although the statement was given in an interview room at the Prosecutor's Office, Boyce showed up there unbidden in order to provide relevant information. While defendant had been questioned as a possible suspect in Vance's murder, up until that point Boyce had been questioned only in connection with defendant's alibi, not as a person possibly involved in the crime. Boyce was not under suspicion and had no reason to come forward to exculpate himself at defendant's expense. There is no indication Boyce had any ulterior motive to inculcate defendant in the crime. His sole motivation in providing the statement appears to be his stated concern for his own physical well-being and that of his sister, Brenda Boyce, who was involved in a relationship with defendant characterized by abusive conduct similar to that inflicted on Vance.

Although Boyce no doubt hoped for lenient treatment with respect to his involvement with the concealment of Vance's murder and his involvement in selling the cocaine given to him by defendant as a payoff for his role in covering up for defendant, it must be remembered that it was only after he provided his statement that there was any evidence of his guilt of those crimes. His voice and demeanor, as recorded on tape and as observed by Inv. Badger, were consistent with that of a

truthful statement. Boyce gave the statement under oath. The interrogation was minimal; the statement proceeded in a chronological narrative, with questions only being asked to elicit additional detail. The statement is inherently believable; much of it is corroborated by other evidence in the case, and details of the statement fill in gaps that were previously unknown to investigators, but fit with the evidence collected during the course of the investigation. Under all of the circumstances, the State submits that the statement is sufficiently reliable under the Gross standard to justify its admission pursuant to N.J.R.E. 804(b)(9).

CONCLUSION

The New Jersey Supreme Court proposed the new evidence rule codifying the doctrine of forfeiture by wrongdoing to serve three important public policy rationales: “to remove any profit that a defendant might receive from his own wrongdoing[,] . . . to provide a strong deterrent against intimidation and violence directed at witnesses by defendants attempting to game the judicial system[, and to further] . . . the truth-seeking function of the adversary process, allowing fact finders access to valuable evidence no longer available through live testimony.” Byrd, supra, 198 N.J. at 337-38. Admission of the highly reliable statements proffered by the State in the present case will serve all three of those important interests. This defendant must not be permitted to silence the witnesses against him by the expedient of murdering them. The jury should hear the evidence that would have been available to them were it not for defendant’s wrongful conduct. Admission of the evidence will deter others who would seek to silence the witnesses against them

by killing them or otherwise making them unavailable to testify. For all of the foregoing reasons, the State submits that its motion to admit the statements of Veronica Vance and Brian Boyce under N.J.R.E. 804(b)(9) should be granted. The State further respectfully submits that the statements of Vance in the 911 call and to Anna Alvarez should be ruled to be nontestimonial statements not subject to the Sixth Amendment right of confrontation pursuant to Davis v. Washington, supra.

Respectfully submitted,

[PROSECUTOR]
Assistant Prosecutor

Cc: [DEFENSE ATTORNEY], Esq.

The names and incidents contained in this sample motion are fictitious.

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