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Procuring the Right to an Unfair Trial: Federal Rule of Evidence 804(B)(6) and the Due Process Implications of the Rule's Failure to Require Standards of Reliability for Admissible Evidence

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Abstract
This Comment argues that though the doctrine of forfeiture by wrongdoing allows a court to forfeit both a defendant's right to object to the admission of hearsay statements and the right of confrontation, the current state of the law requires all out-of-court statements admitted under Rule 804(b)(6) to possess some level of reliability in order to satisfy due process. Part I of this Comment discusses the doctrine of forfeiture by wrongdoing, the courts' treatment of this principle prior to 1997, and its codification into the Federal Rules of Evidence. Part II looks at Confrontation Clause issues unique to hearsay exceptions and examines Ohio v. Roberts19 and Crawford v. Washington, the Supreme Court's two most important cases dealing with this issue. In discussing the guarantees of due process, Part III explains that any fair criminal trial requires convictions to be based on reliable evidence and maintains that Rule 804(b)(6), when given its plain language interpretation, violates the Due Process Clause by allowing admission of untrustworthy and unreliable evidence. Part IV of this Comment argues that the Crawford Court's rejection of the Roberts "indicia of reliability" standard separated due process from Confrontation Clause analysis, thereby giving the accused a strengthened argument that all statements admitted under Rule 804(b)(6) must bear sufficient indicia of reliability.

Keywords
Federal Rules of Evidence, Rule 804(b)(6), Out-of court statements, Confrontation Clause, Sixth Amendment, Due Process, Rights of criminal defendant

PROCURING THE RIGHT TO AN UNFAIR TRIAL: FEDERAL RULE OF EVIDENCE 804(B)(6) AND THE DUE PROCESS IMPLICATIONS OF THE RULE'S FAILURE TO REQUIRE STANDARDS OF RELIABILITY FOR ADMISSIBLE EVIDENCE

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* Articles Editor, *American University Law Review*, Volume 56; J.D. Candidate, May 2007, *American University Washington College of Law*; B.A., International Studies, with highest honors, 2002, *University of North Carolina at Chapel Hill*. Many thanks to my editor, Ryan Wolf, for all of his help and hard work. I would also like to thank my advisor and evidence guru, Professor Paul R. Rice, for all of his advice and guidance. Finally, I especially would like to thank my husband, Jason Barnett, and my family for their unconditional love and support.

INTRODUCTION

In a hypothetical case,[1] a gang member awaits trial on murder charges, accused of killing a rival gang member.[2] There is only one eyewitness to the shooting and she has implicated the defendant. The eyewitness is the girlfriend of a rival gang member. While awaiting trial, other members of the defendant's gang, through threats of violence, intimidate the witness into not testifying and she flees the jurisdiction. There is evidence the defendant knew his fellow gang members were going to engage in witness tampering. This witness' statements are the strongest evidence the prosecution has to link the defendant to the crime. The prosecution's other evidence, that the accused attended the party where the shooting occurred and that the accused and the deceased had a prior feud, is merely circumstantial. Therefore, the prosecution seeks to introduce the witness' out-of-court statements made to police some time after the shooting. If the defendant is innocent, what protections, if any, does he have against the admission of the declarant's possibly fabricated out-of-court statements? As this Comment will discuss, the

1. The inspiration for this hypothetical came from a discussion with Professor Paul Rice as well as actual events described by Professor Stanley A. Goldman. Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. REV. 1, 1-2 (1986).

2. Although an accused gang member is not the most sympathetic of figures, Federal Rule of Evidence 804(b)(6) was codified in part as a result of increased drug and gang activity. Therefore, a hypothetical scenario involving one of these players is most useful to this discussion. *See* Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of Codification of the Concept into Federal Rule 804(b)(6)*, 80 NEB. L. REV. 891, 904-05 (2001) (noting a rise in witness intimidation due in part to an explosion in gang-related drug activity beginning in the 1980s).

accused's only hope may lie in how the court interprets Federal Rule of Evidence 804(b)(6).[3]

In 1997, the Advisory Committee adopted Federal Rule of Evidence 804(b)(6) as an exception to the hearsay rule when the declarant is unavailable.[4] Rule 804(b)(6) 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."[5] However, unlike other exceptions to the hearsay rule, the Committee adopted the forfeiture by wrongdoing rule without any standards of reliability or particular guarantees of trustworthiness to guide judges in determining the admissibility of such out-of-court statements.[6]

The use of hearsay statements against an accused implicates the Sixth Amendment's Confrontation Clause because the defendant arguably is robbed of the right to confront adverse witnesses when the declarant is unavailable.[7] However, a criminal defendant who is

3. Rule 804(b)(6) codifies the forfeiture by wrongdoing doctrine as one of the hearsay exceptions in the Federal Rules of Evidence. Although Rule 804(b)(6) potentially applies in the civil context, this Comment will focus on its use in criminal cases because of the rule's limited relevance in civil trials. *See* James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 542-43 (2003) (minimizing the need for Rule 804(b)(6) in civil trials because liberal discovery rules and lengthy pretrial procedures allow litigants to find and depose witnesses easily and their statements are readily admissible because of the Confrontation Clause's inapplicability to civil cases). Furthermore, the codification of Rule 804(b)(6) was largely intended for use in criminal cases. *See* Flanagan, *supra*, at 462 (characterizing Rule 804(b)(6) as an exception geared toward criminal defendants, not civil litigants); Birdsong, *supra* note 2, at 893, 903 (directing his commentary specifically toward prosecutors and defense attorneys, and noting that the rule was considered and approved for adoption by members of the Criminal Rules Committee of the Advisory Committee on Rules of Evidence). At the time of publication, no civil cases invoked Rule 804(b)(6).

4. Federal Rule of Evidence 804(b)(6) was a codification of the common law doctrine of forfeiture by wrongdoing, a principle courts had recognized for over a century. *See* Reynolds v. United States, 98 U.S. 145 (1878) (adopting for the first time the forfeiture by wrongdoing doctrine in order to admit an unavailable declarant's out-of-court statements).

5. FED. R. EVID. 804(b)(6). As the language of the rule indicates, it applies equally to defendants who directly procure the unavailability of a witness and to those who merely acquiesce in the wrongdoing, such as failing to notify the proper authorities if they have reason to believe that another person plans to prevent a witness from testifying. *See* United States v. Thompson, 286 F.3d 950, 965 (7th Cir. 2002) (approving the view that testimony of an unavailable declarant can be admitted against all co-conspirators when the wrongdoing was reasonably foreseeable to other conspirators).

6. *See* PAUL R. RICE & ROY A. KATRIEL, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE, § 5.01, 381 (5th ed. 2005) (explaining that some hearsay exceptions, such as declarations against interest, are by their very nature trustworthy, while others, such as the business records exception, are reliable because of the situation under which they were made).

7. *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO.

directly or indirectly responsible for the unavailability of an adverse witness cannot challenge the admission of such statements under the Confrontation Clause because his or her misconduct waives that right.[8] Nevertheless, the accused still retains due process rights,[9] and the assertion of those rights collides with the lack of reliable evidentiary standards in Rule 804(b)(6).[10]

Prior to codification of Rule 804(b)(6), many courts used Federal Rule of Evidence 807,[11] the residual exception, to admit an unavailable declarant's out-of-court statements when the defendant had wrongfully procured the witness' unavailability.[12] Compared to the use of Rule 804(b)(6) to admit such statements, the courts' use of Rule 807 better preserved the defendant's due process rights.[13] Conversely, after codification, there has been no agreement on whether hearsay statements must still pass an independent test for

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L.J. 1011, 1012 (1998) [hereinafter Friedman, *Basic Principles*] (noting that when the prosecution offers a hearsay statement at trial, the actual declarant is not present and therefore, the defendant could argue that he had no opportunity to confront that witness); *cf.* Crawford v. Washington, 541 U.S. 36, 61 (2004) (formulating a new test for analyzing Confrontation Clause rights by requiring all "testimonial" hearsay to be previously tested by cross-examination before its admission at trial).

8. *See* United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982) (holding that a criminal defendant who procures the unavailability of an adverse witness forfeits any Confrontation Clause objections to the admission of that witness' out-of-court statements); *see also* Paul T. Markland, Comment, *The Admission of Hearsay Evidence Where Defendant Misconduct Causes the Unavailability of a Prosecution Witness*, 43 AM. U. L. REV. 995, 1003-05 (1994) (surveying various court decisions that recognize the doctrine of forfeiture by wrongdoing).

9. *See* Alycia Sykora, Comment, *Forfeiture by Misconduct: Proposed Federal Rule of Evidence 804(b)(6)*, 75 OR. L. REV. 855, 869 (1996) (recognizing that misconduct does not waive a criminal defendant's due process rights); *see also* United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (assuming that admission of unreliable hearsay statements may violate a defendant's due process rights even where the defendant's wrongdoing caused the need to use hearsay evidence rather than live testimony).

10. *See* FED. R. EVID. 804(b)(6) (indicating no standards of reliability by its language alone); *Aguiar*, 975 F.2d at 47 (noting that the admission of "facially unreliable hearsay" implicates the Due Process Clause); *see also infra* Part III.B (commenting that Rule 804(b)(6) sets forth no conditions or standards to guarantee the reliability of out-of-court hearsay statements).

11. Prior to 1997, Rule 807 existed as two rules: Rule 804(b)(5) and Rule 803(24). For purposes of clarity, this Comment will refer to the residual exception as Rule 807. *See infra* note 39 (discussing the overwhelming similarity between the pre-1997 and post-1997 residual hearsay exceptions).

12. *See, e.g.*, *Mastrangelo*, 693 F.2d at 272 (finding "particularized guarantees of trustworthiness" made the witness' out-of-court statements admissible where the defendant's wrongdoing had helped procure the witness' unavailability); *see also* Flanagan, *supra* note 3, at 468 (describing pre-1997 forfeiture by wrongdoing cases and their reliance on the residual exception to admit the unavailable declarant's statements).

13. The residual exception requires that hearsay statements contain "particularized guarantees of trustworthiness" in order to be admissible, thus preserving a defendant's due process rights by ensuring the reliability of admissible evidence. FED. R. EVID. 807.

reliability when the declarant's unavailability is due to the defendant's wrongdoing.[14] Prior to 2004, case law suggested that "indicia of reliability" was an element of confrontation analysis.[15] Since a defendant's misconduct in procuring the unavailability of a witness waived confrontation rights, courts were not obligated to analyze such statements for trustworthiness and reliability.[16] The Supreme Court's recent decision in *Crawford v. Washington*,[17] however, reinvigorates the argument that an "indicia of reliability" test is better suited to a due process analysis.[18] Therefore, a criminal defendant can now argue that failure to require guarantees of trustworthiness in all admitted out-of-court statements violates the Due Process Clause, regardless of the plain language of Rule 804(b)(6).

This Comment argues that though the doctrine of forfeiture by wrongdoing allows a court to forfeit both a defendant's right to object to the admission of hearsay statements and the right of confrontation, the current state of the law requires all out-of-court statements admitted under Rule 804(b)(6) to possess some level of reliability in order to satisfy due process. Part I of this Comment discusses the doctrine of forfeiture by wrongdoing, the courts' treatment of this principle prior to 1997, and its codification into the Federal Rules of Evidence. Part II looks at Confrontation Clause issues unique to hearsay exceptions and examines *Ohio v. Roberts*[19] and *Crawford v. Washington*, the Supreme Court's two most important cases dealing with this issue. In discussing the guarantees of due process, Part III explains that any fair criminal trial requires convictions to be based on reliable evidence and maintains that Rule 804(b)(6), when given its plain language interpretation, violates the Due Process Clause by allowing admission of untrustworthy and unreliable evidence. Part IV of this Comment argues that the *Crawford* Court's rejection of the *Roberts* "indicia of reliability"

14. *Compare* Cotto v. Herbert, 331 F.3d 217, 235 (2d Cir. 2003) (holding that hearsay statements still had to pass reliability standards despite forfeiture), *with* United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997) (finding that statements did not have to pass a separate reliability test for admission).

15. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding that hearsay statements must bear sufficient "indicia of reliability" to pass confrontation scrutiny); United States v. Oates, 560 F.2d 45, 82 n.38 (2d Cir. 1977) (indicating that in order to pass confrontation analysis, an extra-judicial statement must possess adequate "indicia of reliability").

16. *See* United States v. Houlihan, 92 F.3d 1271, 1281 (1st Cir. 1996) (finding that forfeiture by wrongdoing makes a special examination of reliability unnecessary since that finding is linked to confrontation).

17. 541 U.S. 36 (2004).

18. *See id.* at 61 (overruling the *Roberts* "indicia of reliability" test for Confrontation Clause analysis).

19. 448 U.S. 56 (1980).

standard separated due process from Confrontation Clause analysis, thereby giving the accused a strengthened argument that all statements admitted under Rule 804(b)(6) must bear sufficient indicia of reliability.

I. BACKGROUND TO FEDERAL RULE OF EVIDENCE 804(B)(6) AND THE COMMON LAW DOCTRINE OF FORFEITURE BY WRONGDOING

Although not officially codified into the Federal Rules of Evidence until 1997, courts have recognized the doctrine of forfeiture by wrongdoing for over a century.[20] The doctrine enjoyed special use in the federal courts as a means to deter witness tampering.[21] Its codification as Federal Rule 804(b)(6) sought to remedy inconsistent applications and provide a standard for courts to use in admitting a witness' out-of-court statements when the defendant procured that witness' unavailability.[22]

A. Doctrine of Forfeiture by Wrongdoing Prior to 1997

The doctrine of forfeiture by wrongdoing is premised on the rationale that people should not benefit from their misconduct.[23] All courts agree that the waiver of confrontation rights, either through witness tampering or by some other means, is constitutional.[24]

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20. *See* Illinois v. Allen, 397 U.S. 337, 343 (1970) (recognizing the loss of a criminal defendant's confrontation rights due to his own disruptive behavior at trial); Reynolds v. United States, 98 U.S. 145, 158 (1878) (holding that a defendant waives his confrontation rights when he has deliberately made the witness unavailable).

21. *See* United States v. Johnson, 219 F.3d 349, 355 (4th Cir. 2000) (finding that the defendant was directly involved in the witness' unavailability and invoking the forfeiture by wrongdoing doctrine to admit the witness' testimony); United States v. Mastrangelo, 693 F.2d 269, 271 (2d Cir. 1982) (invoking the forfeiture by wrongdoing doctrine when the defendant ordered the prosecution's key witness to be killed).

22. *See* FED. R. EVID. 804(b)(6) advisory committee's notes ("Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied.").

23. *See* Birdsong, *supra* note 2, at 898 (discussing how early courts, including the Supreme Court, believed this doctrine arose from the principles of common honesty and that its application would not be harmful if used correctly); *see also* Joan Comparet-Cassani, Crawford *and the Forfeiture by Wrongdoing Exception*, 42 SAN DIEGO L. REV. 1185, 1193-94 (2005) (arguing that forfeiture operates in an equitable fashion and is supported by notions of what is "ethically and morally correct").

24. *See* Sykora, *supra* note 9, at 859 (recognizing that although confrontation rights are fundamental, they are not absolute); *cf.* United States v. Thevis, 665 F.2d 616, 630-31 (5th Cir. 1982) (waiving defendant's right to confront testimony admitted against him); *Mastrangelo*, 693 F.2d at 272-73 (asserting that a defendant who procures the unavailability of a witness loses the right to object to the admission of that witness' testimony on Confrontation Clause grounds); United States v. Balano, 618 F.2d 624, 628 (10th Cir. 1979) (finding waiver of confrontation rights when the defendant threatened the witness' life).

Although early cases defined the loss of rights as a waiver,[25] today the principle is best viewed as a forfeiture of rights. The term "waiver" implies that the accused knowingly and intentionally relinquished a right.[26] The waiver test, however, becomes problematic where, for example, a criminal defendant murders a witness but is unfamiliar with the doctrine of forfeiture by wrongdoing and therefore could argue that he did not knowingly or intentionally waive his confrontation rights.[27] Forfeiture is a more appropriate term to define the loss of rights due to defendant misconduct because it operates as a penalty.[28] Under forfeiture, the court does not have to find the defendant intentionally waived confrontation rights; rather, the loss of rights flows from the misconduct.[29] It is harder for criminal defendants to argue they should escape penalty for their misconduct because they were unaware courts frowned upon witness tampering.

Prior to codification, the forfeiture by wrongdoing doctrine was recognized at common law and traces its roots back to the 1878 case of *Reynolds v. United States*.[30] In *Reynolds*, the Supreme Court concluded that an unavailable declarant's testimony from a prior trial was admissible at Reynolds' later trial because it was Reynolds himself who had kept the witness away.[31] The Court held that if the accused is

25. *See* Flanagan, *supra* note 3, at 473.

26. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (defining a valid waiver as an "intentional relinquishment or abandonment of a known right or privilege"). An example of a valid waiver would be pleading guilty and thereby intentionally waiving one's right to a jury trial.

27. *See* Sykora, *supra* note 9, at 860 (arguing that the doctrine would only meet the *Zerbst* test where judges inform defendants prior to trial that any involvement in witness tampering will waive their confrontation rights; otherwise, defendants could argue that they would not have engaged in misconduct if they had known it would result in a loss of Sixth Amendment rights); *see also* Comparet-Cassani, *supra* note 23, at 1192 (calling it a "legal fiction" to believe that a defendant who procures a witness' unavailability "knowingly, intelligently, and deliberately forfeits his right to exclude hearsay evidence").

28. *See* Sykora, *supra* note 9, at 861 (characterizing forfeiture as the consequence of engaging in conduct of which the court disapproves).

29. *See* Reynolds v. United States, 98 U.S. 145, 158 (1878) (finding that the Constitution does not "guarantee an accused person against the legitimate consequences of his own wrongful acts"). However, the Court went on to soften this pronouncement by recognizing that competent evidence must be supplied in "some lawful way" to be admissible. *Id.*

30. *Id.* The *Reynolds* Court traced the history of the doctrine of forfeiture by wrongdoing back to the English case of Lord Morley in 1666. *Id.* at 158-59. There, the House of Lords found that if a prisoner had detained the witness, the witness' prior examination made under oath to the coroner could be read at trial. *Id.* at 158. This doctrine was again recognized in the English cases of *Harrison's Case* and *Regina v. Scaife*. *Id.* at 158-59.

31. *Id.* at 158. In reviewing Reynolds' conviction on bigamy charges, the Court discovered that the witness who testified at the first trial, a woman named Schofield, was Reynolds' second wife. *Id.* at 159. On the first attempt to subpoena her,

responsible for a witness' unavailability, then he cannot claim error in being denied the right to confront that witness.[32] After *Reynolds*, the forfeiture by wrongdoing doctrine grew in other areas beyond witness unavailability.[33] It was given further legitimacy as a means to curb witness tampering in *United States v. Mastrangelo*, a case that involved the murder of the prosecution's key witness.[34]

Although the doctrine originally applied only to statements contained in a prior deposition or from prior trial testimony,[35] as it progressed, many courts came to view forfeiture by wrongdoing as a more general exception to the hearsay rule, applying it to admit a variety of statements.[36] In response to this evolution, courts also had to develop standards by which to judge the reliability of such statements.[37] Even from its earliest use, courts recognized that such

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Reynolds informed the officer that she was not home and would not testify without properly being served. *Id.* at 159-60. On the second attempt to subpoena the witness, Reynolds' first wife told the officer that Schofield had not been home for weeks and that her whereabouts were unknown. *Id.* at 160.

32. *Id.* at 158.

33. *See, e.g.*, Illinois v. Allen, 397 U.S. 337, 343 (1970) (finding that defendants can lose the right to be present at trial through their own disruptive behavior); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (recognizing that the right of confrontation can be lost through both consent and misconduct); Diaz v. United States, 223 U.S. 442, 452-53 (1912) (holding that Diaz voluntarily chose not to attend his trial and that he decided to admit testimony from an earlier, related misdemeanor trial, thereby waiving his right to confront that testimony).

34. 693 F.2d 269 (2d Cir. 1982). At Mastrangelo's trial for drug conspiracy, the prosecution only had one eyewitness, James Bennet, actually linking Mastrangelo to the crime. *Id.* Bennet was shot and killed while on his way to the courthouse to testify. *Id.* at 271. During Mastrangelo's retrial, the trial court allowed the government to introduce the witness' prior testimony under the forfeiture by misconduct doctrine. *Id.* The Second Circuit affirmed, holding that the defendant's involvement in the killing resulted in a waiver of all Confrontation Clause objections. *Id.*; *see* Birdsong, *supra* note 2, at 902 (recognizing *Mastrangelo* as the "first of the major forfeiture" cases decided since the adoption of the Federal Rules of Evidence and highlighting the witness killing in this case as the beginning of an era in which defendants were more likely to resort to violence to prevent witnesses from testifying).

35. *See* Flanagan, *supra* note 3, at 464 (characterizing the early common law doctrine as admitting only prior recorded testimony of an unavailable witness and noting that it was not originally intended to be a broad exception to the hearsay rule that would allow for admission of all out-of-court statements).

36. *See* United States v. Dhinsa, 243 F.3d 635, 653 (2d Cir. 2001) (placing no subject matter limitation on the admissibility of a declarant's statements when the defendant procured the witness' unavailability); *cf.* United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (admitting the unsworn statement of an accomplice made immediately following his arrest on drug charges); Steele v. Taylor, 684 F.2d 1193, 1204 (6th Cir. 1982) (allowing a witness' unsworn statements into evidence); United States v. Rivera, 292 F. Supp. 2d 827, 829 (E.D. Va. 2003) (admitting the declarant's statements to her guardian *ad litem* concerning the defendant's role in the charged offense).

37. *See* Flanagan, *supra* note 3, at 468 (analyzing forfeiture by misconduct cases prior to the codification of Rule 804(b)(6) and explaining that courts looked for "particularized guarantees of trustworthiness" to admit these hearsay statements).

statements needed some level of trustworthiness for admission.[38] Following enactment of the Federal Rules of Evidence, courts turned to Rule 807[39] to admit out-of-court statements when the defendant caused the declarant's unavailability.[40] Using the residual exception to admit an unavailable declarant's out-of-court statements required the court to find that the statements possessed "particularized guarantees of trustworthiness," a requirement that is notably lacking for statements admitted under Rule 804(b)(6).[41]

By 1997, the use of forfeiture by wrongdoing to admit the testimony of witnesses that defendants had intimidated or killed was in wide practice, although its use was far from consistent across courts.[42] Most courts required a showing by a preponderance of the

38. *Cf.* Reynolds v. United States, 98 U.S. 145, 158 (1878) (acknowledging that a defendant's wrongdoing waives the right to object to the admission of "competent" hearsay evidence in place of the unavailable witness' testimony, and basing this decision on early English cases that required sworn, written testimony before allowing the evidence to be admitted).

39. Prior to 1997, the residual exception to the hearsay rule was codified in two separate rules: Rule 804(b)(5) and Rule 803(24). Rule 804(b)(5), used when the declarant was unavailable, admitted

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Today, the residual exception is one rule: Rule 807. The language of Rule 807 is virtually identical to Rule 804(b)(5) and yields the same results. *See* FED. R. EVID. 807 advisory committee's note ("The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.").

40. *See* Flanagan, *supra* note 3, at 467-68 (asserting that federal courts used the residual exception more extensively than other hearsay exceptions to admit the out-of-court statements of a witness made unavailable through defendant misconduct); *see also* United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976) (finding that the elements of the residual exception had been met, including the requirement of particularized guarantees of trustworthiness, since the witness testified before the grand jury about a matter involving him). *But see* Sykora, *supra* note 9, at 120 (arguing that it is potentially easier to admit an unavailable witness' statements by applying the principle of waiver than to meet all of the elements of the residual exception).

41. *See* United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982) (admitting the murdered witness' prior testimony after finding that it was "surrounded with sufficient particularized guarantees of trustworthiness" to overcome any objections to its admission).

42. *See* Enrico B. Valdez & Shelley A. Nieto Dahlberg, *Tales From the Crypt: An Examination of Forfeiture by Misconduct and its Applicability to the Texas Legal System*, 31 ST. MARY'S L.J. 99, 124 (1999) (noting that although both the waiver doctrine and the residual exception have their benefits, neither system provides a completely adequate approach for deterring witness tampering and admitting the statements of a witness who the defendant made unavailable). The lack of a uniform method among the federal courts to admit a witness' out-of-court statements in such a situation was a hindrance to effective deterrence of witness tampering. *Id.* at 127.

evidence that the defendant had caused the unavailability of a witness;[43] however, the Fifth Circuit adopted a clear and convincing standard.[44] Moreover, the recognition of both the common law forfeiture by wrongdoing doctrine and Federal Rule 807 gave courts two different ways to admit an unavailable declarant's out-of-court statements, leading to further inconsistencies.[45]

An increase in witness tampering and intimidation, coupled with this lack of uniformity among the federal courts, led the Advisory Committee to codify the doctrine in the Federal Rules of Evidence in 1997.[46] There are several factors that explain the Committee's perceived need for codification. First, a 1995 Department of Justice study revealed an increasing trend in witness intimidation beginning in the 1980s and continuing into the 1990s.[47] Second, Judge Ralph K. Winter, the author of the *Mastrangelo* opinion, became the Chairman of the Advisory Committee on Evidence Rules in 1994—three years prior to the codification of Rule 804(b)(6).[48] Judge Winter admitted to the Advisory Committee members that the witness killing in *Mastrangelo* influenced his desire to see the doctrine of forfeiture codified.[49] Finally, disagreement among courts about the best procedure for admitting an unavailable witness' out-of-court

43. *E.g.*, *Mastrangelo*, 693 F.2d at 273; United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979).

44. *See* United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982).

45. *Compare* United States v. Houlihan, 92 F.3d 1271, 1281-82 (1st Cir. 1996) (using the forfeiture doctrine to waive the defendant's confrontation rights and hearsay objections), *and* United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (admitting the hearsay statements using the forfeiture by wrongdoing doctrine), *with* United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976) (using the residual exception to admit the unavailable declarant's out-of-court statements).

46. *See* Valdez & Nieto Dahlberg, *supra* note 42, at 127 (asserting that the doctrine of forfeiture by wrongdoing was codified in response to inconsistencies at the federal level); *see also* Birdsong, *supra* note 2, at 904-05 (discussing the rise in witness intimidation that had begun in the late 1980s). *But see* Flanagan, *supra* note 3, at 475 (questioning the need for codification since there was broad agreement among the federal courts as to the application of the misconduct doctrine).

47. *See* Birdsong, *supra* note 2, at 904-05 (citing Kerry Murphy Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses*, National Institute of Justice, Research in Action 2 (Justice Dep't Oct. 1995)) (explaining that the increase in violence was related to gang-controlled drug activity and that witness intimidation was suspected in seventy-five to one hundred percent of crimes committed in some gang-ridden neighborhoods). This trend toward witness intimidation and tampering was most shockingly seen in the *Mastrangelo* case, where the prosecution's key witness was gunned down on his way to trial. 693 F.2d at 271; *see also* John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 835-36 (1996) (describing a rash of murders in a Boston neighborhood in the late 1970s and early 1980s that largely went unsolved because witnesses were intimidated into a "code of silence" that would result in death if broken).

48. *See* Birdsong, *supra* note 2, at 905. Some commentators view the *Mastrangelo* case as the starting point towards the push for codification. *Id.* at 902.

49. *Id.* at 906.

statements also fueled the need for codification.[50] Through personal desires, responsiveness to increases in violence, and the need for uniformity among the federal courts, by the end of 1997, the doctrine of forfeiture by wrongdoing was officially codified as Federal Rule of Evidence 804(b)(6).[51]

B. Federal Rule of Evidence 804(b)(6)—an Exception to the Hearsay Rule

The Advisory Committee officially enacted Rule 804(b)(6) in 1997, which provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (6) Forfeiture by Wrongdoing. 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.[52]

While it solved some of the problems courts had faced in admitting the out-of-court statements of a declarant made unavailable by the defendant's wrongdoing,[53] the new rule left several questions unanswered. For example, although the Advisory Committee Notes indicate that a preponderance of the evidence standard applies to factual determinations concerning the defendant's role in the witness' unavailability,[54] clear adoption of this standard does not appear in the language of the rule itself.[55] Also missing from the rule

50. *See* Valdez & Nieto Dahlberg, *supra* note 42, at 124, 127 (recognizing that the lack of standards for proof and reliability within the waiver doctrine and the unpredictable outcomes reached under Rule 807 contributed to inconsistent applications of the principle within the federal courts).

51. *See* FED. R. EVID. 804(b)(6) advisory committee's note ("Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness.").

52. FED. R. EVID. 804(b)(6).

53. *See* Valdez & Nieto Dahlberg, *supra* note 42, at 120, 127 (discussing the problems with both approaches: the waiver doctrine waived objections to hearsay rather than creating an exception for admission, and Rule 807 encompassed rigid requirements and yielded disparate results).

54. FED. R. EVID. 804(b)(6) advisory committee's note. This lack of a clear evidentiary standard was one inconsistency seen in the federal courts prior to codification. *Compare* United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982) (requiring a clear and convincing evidentiary standard), *with* United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996) (finding preponderance of the evidence to be the proper standard), *and* United States v. Aguiar, 975 F.2d 45, 48 (2d Cir. 1992) (using the preponderance of the evidence standard).

55. Language appearing in the notes, but absent from the rule, can be problematic. *See, e.g.*, Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring) (reminding the majority that although persuasive, it is the rules themselves, and not the Advisory Committee Notes, that are controlling); Horenkamp v. Van Winkle & Co., Inc., 402 F.3d 1129, 1132 (11th Cir. 2005)

are any standards a trial court could use to assess the reliability of the unavailable declarant's statements.[56] The failure to include standards for judging reliability in Rule 804(b)(6) is somewhat unusual because, unlike other Rule 804 hearsay exceptions, no underlying rationale suggests that these statements are made under circumstances which render them inherently trustworthy.[57]

Even though Rule 804(b)(6) contains neither explicit nor implicit reliability standards, the Advisory Committee chose to include this rule within the 804 hearsay exceptions.[58] Under the Federal Rules of Evidence, hearsay exceptions are codified into two categories: (1) where declarant unavailability is immaterial[59] and (2) where declarant unavailability is a requirement.[60] Where the declarant is unavailable, the statements are regarded as less reliable and courts are typically stricter in applying exceptions, requiring all delineated elements to be met prior to admission.[61] Noting that 804(b)(6) is not premised on any underlying concept of reliability, some critics have questioned why the Advisory Committee codified it within the 804 hearsay exceptions in the first place.[62] For example, admissions, which are not inherently reliable,[63] were completely reclassified as

(acknowledging that the Advisory Committee Notes for federal rules are not binding).

56. Prior to codification, many courts assessed the reliability of hearsay statements of declarants made unavailable by defendants' wrongdoing before admitting them at trial. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982) (finding particularized guarantees of trustworthiness supported admission of the witness' out-of-court statement); United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976) (same).

57. *See* Flanagan, *supra* note 3, at 461 (noting that Rule 804(b)(6) is different from other hearsay exceptions because it lacks inherent reliability standards and expressing concern as to how this will impact the "truth-finding" goals of evidence).

58. Other Rule 804 exceptions include former testimony (Rule 804(b)(1)), dying declarations (Rule 804(b)(2)), statements against interest (Rule 804(b)(3)), and statements of personal or family history (Rule 804(b)(4)). FED. R. EVID. 804.

59. *See* FED. R. EVID. 803 (listing hearsay exceptions that apply regardless of declarant availability).

60. *See* FED. R. EVID. 804(b) (listing hearsay exceptions that are admissible only when the declarant is unavailable).

61. *See* Valdez & Nieto Dahlberg, *supra* note 42, at 113-14 (recognizing that courts' distrust of these statements stems from their preference for live testimony and noting that such exceptions arose out of necessity). The four other hearsay exceptions in Rule 804 have rigid and carefully delineated requirements to overcome suspicions as to their reliability. For example, Rule 804(b)(2), the dying declaration exception, requires that the declarant make the statement under the belief that death is imminent and that the statement concern the cause or circumstances of the impending death. Furthermore, the Rule restricts the use of dying declarations to civil actions and homicide cases only. FED. R. EVID. 804(b)(2).

62. *See* Paul R. Rice & Neals-Erik William Delker, *A Short History of Too Little Consequence*, 191 FED. RULES DECISIONS 678, 690 (2000) (criticizing the Evidence Code for encouraging disparate treatment of rules intended to address similar problems).

63. *See id.* (asserting that the trustworthiness of admissions is based on the adversarial nature of the judicial process, rather than on any underlying reliability

nonhearsay under the Federal Rules of Evidence rather than codified within one of the hearsay exceptions.[64] There is no explanation as to why 804(b)(6) was not given similar treatment. Regardless of the Advisory Committee's reasoning, the question as to whether Rule 804(b)(6) requires out-of-court statements to meet any standard of reliability remains unanswered.[65]

II. HEARSAY EXCEPTIONS AND THE CONFRONTATION CLAUSE

Although the Confrontation Clause guarantees all criminal defendants the right to confront adverse witnesses,[66] evidentiary hearsay exceptions allow courts to admit a declarant's testimony for truth without requiring the witness to be available for cross-examination.[67] This poses a unique issue for confrontation analysis. The doctrine of forfeiture by wrongdoing permits courts to bypass this problem because the defendant's misconduct forfeits both his confrontation rights and his right to object on hearsay grounds.[68]

A. The Right to Confront Adverse Witnesses Under Roberts *and* Crawford

Under the Federal Rules of Evidence, hearsay is a statement, "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[69] Yet the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him."[70] Therefore, the admission of an unavailable declarant's statements in a criminal trial implicates the Confrontation Clause

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and explaining why the Advisory Committee chose to create a new category of exclusions from the definition of hearsay instead of codify admissions as hearsay exceptions).

64. *See* FED. R. EVID. 801(d)(2) (listing certain statements that the Federal Rules do not consider to be hearsay).

65. *See supra* notes 56-58 and accompanying text (discussing the lack of language in Rule 804(b)(6) requiring certain reliability standards for admissibility).

66. U.S. CONST. amend. VI.

67. *See* FED. R. EVID. 802, 803 & 804 (codifying the common law hearsay rule, which generally excludes from evidence any out-of-court statement that is offered for the truth of the matter asserted therein, and listing exceptions to that rule that admit evidence without allowing for cross examination); *see also* Brumley v. Wingard, 269 F.3d 629, 664 (6th Cir. 2001) (outlining the types of extra-judicial statements that courts tend to admit despite the defendant's inability to conduct cross-examination).

68. *See* Sykora, *supra* note 9, at 859 (noting that confrontation rights can be lost through consent or misconduct); *see also* United States v. Balano, 618 F.2d 624, 628 (10th Cir. 1979) (holding that the defendant lost his confrontation rights when he threatened the witness' life and caused his unavailability).

69. FED. R. EVID. 801(c). The Federal Rules define a statement as an "oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion." FED. R. EVID. 801(a).

70. U.S. CONST. amend. VI.

because the defendant is arguably robbed of his right to confront adverse witnesses.[71] Over the past twenty years, the Supreme Court has addressed this issue several times[72] and has formulated two different tests intended to protect a criminal defendant's confrontation rights when the prosecution seeks to introduce hearsay evidence. The Court developed the first test in the 1980 case of *Ohio v. Roberts*, which remained in place until 2004, when *Roberts* was overruled and a new test was formulated in *Crawford v. Washington*.[73]

Until 1965, the Confrontation Clause applied only in federal courts, but following the Supreme Court's decision in *Pointer v. Texas*,[74] which extended the right of confrontation to the states, it became more pressing for the Court to formulate a standard by which to judge the admissibility of hearsay evidence. That opportunity came when the Supreme Court decided *Ohio v. Roberts*.[75] For hearsay statements to be admissible under the *Roberts* test, the proponent of hearsay statements had to prove that the declarant was unavailable and that the statement possessed "indicia of reliability."[76] Reliability was automatically inferred if the hearsay statement fell within a "firmly rooted" hearsay exception.[77] Otherwise, the statement had to possess "particularized guarantees of trustworthiness" to be admissible.[78]

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71. *See* Birdsong, *supra* note 2, at 896 (recognizing that the Confrontation Clause is not an automatic bar against the admission of hearsay, but noting that the use of hearsay evidence against criminal defendants does pose a unique situation regarding the accused's confrontation rights); *see also* Friedman, *Basic Principles*, *supra* note 7, at 1011 (stating that the Confrontation Clause is applicable in situations where witnesses testify against a criminal defendant at trial and characterizing this right as one that normally involves "face-to-face" confrontation).

72. *See, e.g.*, White v. Illinois, 502 U.S. 346, 357 (1992) (finding excited utterances did not violate the Confrontation Clause when admitted as an exception to the hearsay rule); Lee v. Illinois, 476 U.S. 530, 546 (1986) (recognizing that admission of an untrustworthy codefendant's confession was a violation of the accused's confrontation rights); *see also* Mattox v. United States, 156 U.S. 237, 240 (1895) (holding that the admission of previous trial testimony when the declarant is unavailable for the present trial does not violate the Confrontation Clause).

73. 541 U.S. 36 (2004).

74. 380 U.S. 400, 407-08 (1965) (stating that the introduction of evidence from a preliminary hearing violated the Confrontation Clause because the defendant was not represented by counsel at that hearing).

75. 448 U.S. 56 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004); *see* Friedman, *Basic Principles*, *supra* note 7, at 1014-15 (arguing that *Roberts* gave the Supreme Court the opportunity to formulate a "general approach" to confrontation doctrine in relation to the admission of hearsay evidence); *see also* Ruth L. Friedman, Comment, *The Confrontation Clause in Search of a Paradigm: Has Public Policy Trumped the Constitution?*, 22 PACE L. REV. 455, 457 (2002) [hereinafter Friedman, *Paradigm*] (calling the Supreme Court's confrontation jurisprudence incoherent, fractured, and unpredictable).

76. 448 U.S. at 66.

77. *Id.*

78. *Id.*

The first requirement of the *Roberts* test, unavailability, assumed that if the declarant was available, the proponent should produce his or her live testimony, rather than introduce the out-of-court statement.[79] The unavailability requirement, however, proved to be unworkable in many situations, and the Supreme Court loosened this requirement over time.[80] The second element of the *Roberts* test, the reliability requirement, had two parts: (1) a *per se* admissibility prong for hearsay statements that fell within a firmly rooted exception; and (2) a more flexible prong for statements warranting admission so long as they bore particularized guarantees of trustworthiness.[81] This second element required a reliability determination for all hearsay statements that the proponent sought to admit, a concept that some commentators criticized as unrelated to confrontation analysis.[82] Like the unavailability requirement, the reliability requirement was inconsistent in its application.[83] The disparate conclusions emanating from *Roberts* analyses produced much criticism of the *Roberts* test.[84] This perceived deficiency in the *Roberts* standard led to its overruling in 2004.[85]

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79. *Id.* at 65-66.

80. *See* RICE & KATRIEL, *supra* note 6, § 5.03, at 453 (discussing the *Roberts* test's failure to specifically distinguish between Rule 803 exceptions, where declarant availability is immaterial, and Rule 804 exceptions, where declarant availability is material, and noting that admissibility under the standard was often granted to 803 exceptions without production of the declarant at trial); *see also* Friedman, *Basic Principles*, *supra* note 7, at 1016 (recognizing that the *Roberts* unavailability requirement was too strict and noting that the Supreme Court greatly relaxed this element).

81. *Roberts*, 448 U.S. at 66.

82. *See* RICE & KATRIEL, *supra* note 6, § 5.03, at 453 (arguing that the "indicia of reliability" test is better suited to a due process, not Confrontation Clause, analysis); *see also* Friedman, *Basic Principles*, *supra* note 7, at 1028 (characterizing the truth-seeking mission of reliability determinations as an ill-suited measure for whether or not the admission of hearsay statements violates the right of confrontation).

83. *See, e.g.*, Lee v. Illinois, 476 U.S. 530, 543-44 (1986) (refusing to characterize the hearsay statement at issue as a declaration against penal interest, which would have made the statement automatically admissible as a firmly rooted exception, and instead focusing on the specific facts of the statement as it pertained to the particular case).

84. *See* Laird Kirkpatrick, Crawford*: A Look Backward, A Look Forward*, CRIM. JUST., Summer 2005, at 6, 8 (criticizing *Roberts* for its subjective reliability standard and arguing that it leads to inconsistent case law and is an ineffective standard for excluding statements that violate the Confrontation Clause); Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 202 (2004) (noting that the Court faced problems implementing the *Roberts* test almost immediately); *see also* Friedman, *Basic Principles*, *supra* note 7, at 1022 (arguing that *Roberts* fails to appreciate the true value of the Confrontation Clause by forcing the Clause to conform to the Federal Rules on hearsay rather than the other way around).

85. *See* Kirkpatrick, *supra* note 84, at 9 (explaining that the Supreme Court finally heeded the call for new confrontation jurisprudence and seized the opportunity to develop it in *Crawford*).

The Supreme Court abandoned the *Roberts* test when it decided *Crawford v. Washington*.[86] *Crawford* implicated the Confrontation Clause when the defendant objected to the admission of his wife's tape-recorded statements against him, which were admitted in her absence because she invoked her marital privilege not to testify.[87] In formulating a new test, the Court divided hearsay into "testimonial" and "nontestimonial" statements[88] and held that the "testimonial" hearsay of an unavailable declarant was admissible only if the criminal defendant had a prior opportunity to cross-examine the declarant.[89]

Writing for the court, Justice Scalia's opinion derived its focus on "testimonial" versus "nontestimonial" statements from a historic analysis of confrontation rights and the Framers' intent behind the Sixth Amendment.[90] *Crawford* explained that not all declarants could be considered "witnesses" under the true meaning of the Confrontation Clause,[91] a determination that had been largely overlooked under *Roberts*.[92] Under this new formulation, a "witness"

86. *See* 541 U.S. 36, 61-62 (2004) (holding that testimonial statements would no longer be analyzed under the *Roberts* "indicia of reliability" standard); *see also* Paul W. Grimm & Jerome E. Deise, Jr., *Hearsay, Confrontation, and Forfeiture by Wrongdoing:* Crawford v. Washington*, a Reassessment of the Confrontation Clause*, 35 U. BALT. L. FORUM 6, 14 (2004) (viewing the *Crawford* decision as abandoning the reliability analysis prevalent in *Roberts* and its progeny and focusing instead on a new "testimonial" standard for confrontation analysis in relation to hearsay evidence (citing GEORGE FISHER, EVIDENCE, SUPPLEMENT, at p.1, Foundation Press (2004))).

87. 541 U.S. at 40.

88. *See id.* at 51-52 (explaining that the focus of the Confrontation Clause was on witnesses who "bear testimony" and to provide cross-examination of "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial").

89. *Id.* at 59.

90. *See id.* at 50, 53-54 (drawing from its historical analysis two main points: (1) the Confrontation Clause's particular concern was to prohibit the use of *ex parte* examinations against the accused, a practice that was widely criticized following the trial of Sir Walter Raleigh; and (2) according to the Framers' notion of Sixth Amendment protections, an unavailable declarant's statements could not be admitted at trial unless the criminal defendant had a prior opportunity for cross-examination). Raleigh's trial was adjudicated under the Star Chamber, one of the most heavily criticized eras in English judicial history because it allowed evidence to be presented only through hearsay affidavits. Friedman, *Paradigm*, *supra* note 75, at 467. The Framers of the U.S. Constitution included the Sixth Amendment to ensure that unchecked governmental power, reminiscent of the Star Chamber, could never take root in the United States. *Id.* at 469. Prior to *Crawford*, critics advocated for such a "testimonial/nontestimonial" classification because it was free from burdensome reliability determinations. *See* Friedman, *Basic Principles*, *supra* note 7, at 1013 (criticizing the prevailing doctrine and arguing that the Confrontation Clause gives the defendant the right to confront adverse witnesses who make testimonial statements).

91. 541 U.S. at 42-43.

92. *See* Friedman, *Basic Principles*, *supra* note 7, at 1015 (criticizing the *Roberts* decision for automatically assuming that hearsay declarants always qualify as

for purposes of the Confrontation Clause is a person who bears testimony against the accused.[93] Within this framework, hearsay statements implicate the Confrontation Clause only when they are "testimonial" in nature.[94] "Testimonial" statements, in their broadest sense, are those statements "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[95] In order to be admitted and withstand Confrontation Clause scrutiny, the new standard requires all "testimonial" statements to have been previously cross-examined by the defendant; the court pays no regard to the statement's reliability or trustworthiness.[96] Although the *Crawford* opinion has not been without its share of critics,[97] as Confrontation Clause analysis stands today, the "indicia of reliability" standard no longer plays a role under the Sixth Amendment framework.

B. Defendant Misconduct Forfeits the Right of Confrontation and All Hearsay Objections

In dictum, the *Crawford* Court acknowledged that a criminal defendant who procures the unavailability of a witness through misconduct forfeits his or her confrontation rights on "equitable grounds."[98] Although this principle had been recognized long before

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"witnesses" under the Confrontation Clause definition); Kirkpatrick, *supra* note 84, at 10 (noting that case law before *Crawford* always characterized the hearsay declarant as a "witness against" in terms of Confrontation Clause analysis).

93. *Crawford*, 541 U.S. at 51.

94. *See id.* at 68 (holding that nontestimonial hearsay statements are excepted from Confrontation Clause analysis).

95. *Id.* at 52. Justice Scalia supplemented this concept of "testimonial" statements with several examples including "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements . . . ." *Id.* at 51.

96. *Id.* at 61. *Crawford* ultimately viewed the Confrontation Clause not as a guarantee that the evidence be reliable, but as an ultimate guarantee that cross examination would test the reliability of the statement. *See id.* (asserting that the constitutionality of statements under the Confrontation Clause should not turn on "amorphous notions of reliability").

97. *See id.* at 71-72 (Rehnquist, C.J., dissenting in part and concurring in judgment) (condemning the majority opinion for failing to provide a clear and concise definition of "testimonial"); *see also* Kirkpatrick, *supra* note 84, at 10 (noting that the Court's definition of "testimonial" will not always yield uniform results because a "testimonial statement" will not always be "accusatorial" within the meaning of the Confrontation Clause); Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After* Crawford, CRIM. JUST., Summer 2005, at 24, 25 (lambasting *Crawford* for overturning *Roberts* without clearly delineating its replacement).

98. 541 U.S. at 62. *See* Joshua Deahl, Note, *Expanding Forfeiture Without Sacrificing Confrontation After* Crawford, 104 MICH. L. REV. 599, 600 (2005) (noting that though *Crawford* rejected a series of confrontation exceptions, it left "equitable exceptions"

the decision,[99] *Crawford* was the first Supreme Court decision to explicitly recognize the legitimacy of Federal Rule of Evidence 804(b)(6). It is important to examine how recognition of this principle bears on confrontation analysis.

Sixth Amendment rights are not absolute; a party can waive them either expressly or impliedly.[100] This recognition of forfeiture through misconduct makes statements admitted pursuant to Rule 804(b)(6) constitutional under confrontation analysis.[101] The admission of an unavailable declarant's out-of-court statements when that declarant's absence is due to the defendant's misconduct has never been premised on the inherent reliability of the statements.[102] Prior to *Crawford*, a court would likely rebuff a defendant's argument that the unavailable declarant's hearsay statements lacked reliability; this finding was explicitly linked to a defendant's Sixth Amendment right to confrontation—a right forfeited by any defendant who intentionally procures a witness' unavailability.[103] Today, however, the reliability of the statements admitted under Rule 804(b)(6) does not factor into Confrontation Clause analysis.[104] Nevertheless, reliability becomes extremely important when examining the due process implications of Rule 804(b)(6) because due process guarantees are not rights that a defendant can forfeit.

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undisturbed).

99. *See supra* notes 30-36 and accompanying text (discussing the common law doctrine of forfeiture by wrongdoing and courts' universal recognition that a criminal defendant can forfeit his confrontation rights through his own misconduct).

100. *See* United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996) (recognizing confrontation rights as central to our judicial system but noting that they are not absolute); *see also* Grimm & Deise, *supra* note 86, at 27 (calling Rule 804(b)(6) an "unapologetic rule of necessity" in order to justify the loss of confrontation rights); Sykora, *supra* note 9, at 859 (acknowledging confrontation rights as fundamental but not absolute).

101. *See* Grimm & Deise, *supra* note 86, at 30 (characterizing forfeiture as an "equitable" principle that mandates a loss of confrontation rights because an accused who procures the unavailability of a witness against him should not be allowed to profit from his wrongdoing).

102. *See id.* (arguing that the touchstone of Rule 804(b)(6)'s constitutionality lies in forfeiture, not in any finding of indicia of reliability in the proffered hearsay statements); *see also* Flanagan, *supra* note 3, at 461 (accepting that the rule may be problematic in its application because the exception does not address the circumstances in which the statements were made, thus creating reliability issues).

103. *See* Flanagan, *supra* note 3, at 468-69 (discussing how the defendant's misconduct waived his confrontation rights, and therefore, instead of making determinations as to the reliability of evidence, courts focused only on whether the defendant was responsible for the witness' unavailability).

104. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) (overruling the *Roberts* test and rejecting "amorphous notions of reliability" as a touchstone for confrontation analysis).

III. THE DUE PROCESS CLAUSE'S GUARANTEE OF FUNDAMENTAL FAIRNESS AND RULE 804(B)(6)'S LACK OF RELIABILITY STANDARDS

Despite a loss of confrontation rights, a defendant's misconduct does not waive or forfeit his right to a conviction based on reliable evidence.[105] The Due Process Clause guarantees this right in all criminal trials.[106] When a defendant procures a witness' unavailability, and a court automatically admits that witness' out-of-court statements without performing an independent reliability determination, Rule 804(b)(6) runs afoul of due process.

A. A Defendant May Not Forfeit the Right to a Conviction Based on Reliable Evidence

Because of the inalienability of due process rights,[107] a criminal defendant's right to reliable evidence does not stop at a finding of forfeiture by wrongdoing. The Fifth and Fourteenth Amendments guarantee a criminal defendant certain fundamental rights,[108] including the right to criminal convictions based on evidence sufficient to establish guilt beyond a reasonable doubt.[109] Related to this issue is the admission of, and possible conviction based on, unreliable evidence.[110] If a criminal conviction were to result from

105. *See* Sykora, *supra* note 9, at 862 (stating that a criminal defendant cannot forfeit his right to due process no matter how abhorrent the misconduct).

106. *See* Andrew C. Foltz, Note, *Oregon's New Character Evidence Rule*, 78 OR. L. REV. 315, 333 (1999) (asserting that a due process violation results when courts admit unreliable evidence and juries use that evidence to convict).

107. *See* Sykora, *supra* note 9, at 862.

108. U.S. CONST. amend. V, XIV; *see, e.g.*, Rock v. Arkansas, 483 U.S. 44, 49 (1987) (recognizing that the Due Process Clause guarantees a criminal defendant the right to present a defense); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (holding that due process requires a chance to be heard "at a meaningful time and in a meaningful manner"). Furthermore, the Due Process Clause has never been interpreted to be rigid in its application. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

109. *See In re* Winship, 397 U.S. 358, 364 (1970) (establishing the proof beyond a reasonable doubt standard as a constitutional mandate in criminal cases); Brinegar v. United States, 338 U.S. 160, 174 (1949) (noting that guilty verdicts in criminal cases must comport with the rules of evidence as well as be proven beyond a reasonable doubt); *see also* Foltz, *supra* note 106, at 318 (recognizing that fundamental fairness compels guilty findings to be based on sound, reliable evidence); Goldman, *supra* note 1, at 3 (stating that the Supreme Court's application of due process has long asserted that criminal convictions must only result from proof beyond a reasonable doubt).

110. *See* Flanagan, *supra* note 3, at 491 (citing United States v. Thevis, 665 F.2d 616, 633 (5th Cir. 1982)) (conceding that the due process clause forbids the admission of evidence "totally lacking in reliability"); Foltz, *supra* note 106, at 333 (arguing that the admission of evidence that leads to a deprivation of fundamental fairness at a criminal trial results in a due process violation); *see also* United States v. Carlson, 547 F.2d 1346, 1360 n.14 (8th Cir. 1976) (holding that due process analysis

such evidence, a constitutional violation would occur.[111] The courts have agreed.[112]

When the admission of hearsay statements could violate due process, Supreme Court precedent appears to forbid courts from circumventing a reliability determination merely because Rule 804(b)(6) does not provide for mandatory reliability standards.[113] It is especially important to consider these guarantees of due process where the majority of the prosecution's evidence consists of an unavailable declarant's out-of-court statements.[114] Revisiting the introductory hypothetical is helpful here.[115] Circumstantial evidence places the accused in the vicinity of the shooting, but the only direct evidence of his guilt is the statement from the girlfriend of a rival gang member. If her statements are fabricated and a jury convicts the defendant in large part because of such statements, then a due process violation would result.

Once a court determines that the accused has procured the unavailability of an adverse witness through wrongdoing, all hearsay objections and confrontation rights are waived.[116] However, due process protections remain in effect even under forfeiture by wrongdoing analysis.[117] The right to due process is a fundamental

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is appropriate when admission of unreliable statements could result in an unfair trial).

111. *See* Goldman, *supra* note 1, at 2-3 (analyzing the unreliability of prior inconsistent statements and arguing that conviction based solely on such a statement is insufficient to meet the requirements of due process).

112. *See* Jackson v. Virginia, 443 U.S. 307, 317-18 (1979) (requiring reversal of any conviction based on evidence that does not amount to proof beyond a reasonable doubt); California v. Green, 399 U.S. 149, 163-64 n.15 (1970) (agreeing that due process rights, "wholly apart from the Confrontation Clause," prohibit convictions where a "reliable evidentiary basis is totally lacking").

113. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that the rules of evidence "may not be applied mechanistically to defeat the ends of justice"); *see also* Grimm & Deise, *supra* note 86, at 7-8 (recognizing the judicial system's legitimate interest in punishing criminal activity but conceding that admissible evidence must sometimes yield to overarching constitutional rights).

114. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 271 (2d Cir. 1982) (revealing that the only substantial link between the defendant and the drug conspiracy charge was a witness' statement that he saw the defendant purchase trucks used in the crime).

115. *See supra* notes 1-3 and accompanying text (giving hypothetical details and background).

116. *See* United States v. Reynolds, 98 U.S. 145, 158 (1878) (holding that if the accused is responsible for the unavailability of a witness, he cannot claim error in being denied the right to confront such witness); *Mastrangelo*, 693 F.2d at 271 (finding that the defendant's involvement in the murder of the prosecution's witness resulted in a waiver of all Confrontation Clause objections to the admission of the murdered witness' prior testimony).

117. *See* Sykora, *supra* note 9, at 862 (noting that regardless of a defendant's criminal misconduct in procuring a witness' unavailability, he cannot forfeit his fundamental due process guarantees).

right—a right courts vigorously safeguard and the Constitution explicitly protects.[118] In other contexts, courts and commentators have noted that a defendant, no matter the conduct, does not forfeit the right to a fair trial.[119] If courts interpret Rule 804(b)(6) to include a blanket forfeiture of all due process rights, it would certainly collide with the Constitution.

The cases specifically concerning forfeiture by wrongdoing have never explicitly stated that an accused retains the fundamental right to a fair trial; however, they have at least implicitly accepted this notion.[120] Moreover, the legal system as a whole has an important interest in guaranteeing due process rights to all criminal defendants, regardless of their conduct or the nature of their crimes.[121] No amount of bad behavior will forfeit a defendant's due process rights, and the courts must take account of this when considering the admission of hearsay statements under Rule 804(b)(6).

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118. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991) (noting that few interests are more important than the right to a fair trial); *see also* Harris v. McRae, 448 U.S. 297, 312 (1980) (holding that a law that infringes upon a fundamental right protected by the Constitution is unconstitutional).

119. *See* Lowery v. Cardwell, 575 F.2d 727, 730 (9th Cir. 1978) (holding that even if the accused perjured herself, she did not forfeit her right to a fair trial); *cf.* Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 116 (1959) (arguing that a prisoner should not forfeit all rights to a fair trial as punishment for a prison escape).

120. The Fifth Circuit, while holding that the defendant's misconduct waived his confrontation rights, acknowledged that certain protections were still available through the Due Process Clause. *See* United States v. Thevis, 665 F.2d 616, 632-33 (5th Cir. 1982) (noting that constitutional concerns over the reliability of the evidence should fall under other constitutional provisions, like the Due Process Clause, rather than the Confrontation Clause), *superseded on other grounds by* FED. R. EVID. 804(b)(6), *as stated in* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001).

121. In order to ensure confidence in judgments, the courts must safeguard due process and make sure convictions are based on reliable evidence to protect the larger public interest. *See* Nichols v. Collins, 802 F. Supp. 66, 74 (S.D. Tex. 1992), *rev'd sub nom.* Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995) (noting that in order to maintain the public's faith in the courts' ability to guarantee a fair trial, the state owes a duty to its citizens to promote the goals of truth and justice); *see also* Stafford Henderson Byers, *Delivering Indigents' Rights to Counsel While Respecting Lawyers' Right to Their Profession: A System "Between a Rock and a Hard Place*," 13 ST. JOHN'S J. LEGAL COMMENT. 491, 519 (1999) (arguing that if a defendant does not receive a fair trial, the system loses legitimacy because an innocent person is convicted and a guilty person goes free); Flanagan, *supra* note 3, at 522 (regarding the requirement that verdicts be based on reliable evidence as a central institutional value that is important no matter what conduct the defendant displays); Reed, *supra* note 84, at 223-24 (recognizing that public policy reasons, such as ensuring the credibility of criminal trials, sometimes mandate restrictions on evidence).

B. The Lack of Reliability Standards in Federal Rule of Evidence 804(b)(6) Runs Afoul of Due Process

Admitting any out-of-court statement as substantive evidence when the declarant is unavailable involves some risk of unreliability.[122] For this reason, the hearsay exceptions under the Federal Rules of Evidence generally require statements to contain some guarantee of trustworthiness or inherent reliability.[123] For example, Rule 804(b)(1), the hearsay exception for former testimony, allows former testimony of an unavailable declarant to be admitted only when a criminal defendant (or a predecessor in interest in a civil action) had an opportunity and similar motive to develop the declarant's testimony through direct or cross examination.[124] These strict requirements are meant to guarantee the statements' reliability.[125] The declarations against interest exception is an example of a hearsay exception thought to be inherently reliable because such statements are assumed to be trustworthy when made.[126] If a declarant utters a statement that is harmful to his own self-interest, courts assume that the declarant thought carefully about the accuracy and reliability of the statement before making it.[127]

Rule 804(b)(6), however, contains neither an assumption of inherent reliability nor any requirements to assure trustworthiness.[128] Presumably, once the court has found a waiver by wrongdoing, all hearsay statements of the unavailable declarant become automatically

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122. *See* Goldman, *supra* note 1, at 2 (warning that the admission of untrustworthy evidence poses a serious risk when that evidence takes the form of an out-of-court statement); *see also* Markland, *supra* note 8, at 1013 (recognizing that the judicial system is compromised when "totally uncorroborated and unreliable" evidence is allowed to go before the jury); Sykora, *supra* note 9, at 862 (asserting that a due process violation occurs when completely untrustworthy evidence goes to the jury).

123. *See* RICE & KATRIEL, *supra* note 6, § 5.01, at 381 (explaining that some hearsay exceptions, such as declarations against interest, are implicitly trustworthy because of their very nature, and others, such as the business records exception, are reliable because of the situation under which they were made).

124. FED. R. EVID. 804(b)(1).

125. *See* RICE & KATRIEL, *supra* note 6, § 5.03, at 391 (noting that the requirements for former testimony eliminate concerns about sincerity since the testimony was originally given under oath and assures accuracy and reliability because it was subject to cross examination).

126. FED. R. EVID. 804(b)(3); *see* RICE & KATRIEL, *supra* note 6, § 5.03, at 424 (stating that courts assume the accuracy of statements against interest because the declarant speaks at his own risk, and thus should ensure the truthfulness of his statements before uttering them).

127. RICE & KATRIEL, *supra* note 6, § 5.03, at 424.

128. FED. R. EVID. 804(b)(6) (providing a hearsay exception for "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 witness"); *see infra* notes 129-131 and accompanying text (demonstrating the low hurdle for admitting evidence if the defendant has procured the witness' unavailability).

admissible.[129] The fact that Rule 804(b)(6) contains no reliability standards raises the question of how, or even whether, courts measure the admissibility of the unavailable declarant's out-of-court statements.[130] Even critics who strongly support the forfeiture by misconduct rule acknowledge that the Rule's failure to include such standards leads to concerns that courts will admit inherently unreliable statements in criminal trials.[131]

In forfeiture cases, the circumstances surrounding the making of out-of-court statements often raise reliability concerns. Although witness tampering and intimidation are highly abhorrent, not all witnesses involved in such cases are free of improper motive.[132]

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129. Of course, the court must first find that the defendant has procured the witness' unavailability, but this is a low hurdle for the prosecution to overcome. Besides the Fifth Circuit, all federal circuits, along with the Advisory Committee's Notes on Rule 804(b)(6), require only a preponderance of the evidence to prove that the accused procured the unavailability of the witness through wrongdoing. *See* FED. R. EVID. 804(b)(6) advisory committee's notes (recommending a preponderance of the evidence standard for a determination of whether the defendant procured the unavailability of the witness); United States v. Aguiar, 975 F.2d 45, 48 (2d Cir. 1992) (using a preponderance of the evidence standard). *But see* United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982) (requiring a clear and convincing evidentiary standard to ensure the admission of reliable evidence). Regarding the amount of evidence that this preponderance standard requires, one commentator noted that if "a witness was at one point willing to testify against a defendant, but suddenly became unavailable" this would be "strong evidence" that the defendant was responsible for the witness' unavailability. Deahl, *supra* note 98, at 614.

130. *See* David J. Tess, *Losing the Right to Confront: Defining Waiver to Better Address a Defendant's Actions and Their Effects on a Witness*, 27 U. MICH. J.L. REFORM 877, 895-96 (1994) (questioning whether courts give much weight to the reliability of evidence once the court has found a forfeiture of confrontation rights). Certainly criminal defendants should not profit from their own misconduct, but they still must be afforded the basic tenets of fairness. *See* Glen Weissenberger, *The Admissibility of Grand Jury Transcripts: Avoiding the Constitutional Issue*, 59 TUL. L. REV. 335, 352 n.52 (1984) ("It is unimaginable that by committing an extrinsic antisocial act which renders the declarant unavailable, the accused waives every incident of a fair trial.").

131. *See* Grimm & Deise, *supra* note 86, at 41 (noting that the federal rule does "pose some risk of admitting unreliable testimony"); *see also* Valdez & Nieto Dahlberg, *supra* note 42, at 131 (recognizing the common criticism that Rule 804(b)(6)'s failure to include standards of reliability could lead to the admission of dubious evidence).

132. *See* Flanagan, *supra* note 3, at 471-72 (characterizing witnesses involved in forfeiture by wrongdoing cases as "often highly impeachable" and noting that many were accomplices or were testifying in exchange for immunity from prosecution; very few cases centered on totally innocent bystanders). Furthermore, since many federal cases involving the forfeiture by misconduct doctrine concern witnesses who were centrally involved in the alleged crime, *see, e.g.*, United States v. Scott, 284 F.3d 758, 760 (7th Cir. 2002) (unavailable declarant was also a coconspirator in the drug conspiracy); United States v. Houlihan, 92 F.3d 1271, 1278 (1st Cir. 1996) (witness was arrested with the defendant for the crime charged but cooperated after his arrest), the witnesses' statements are particularly suspicious or unreliable. *See* Lilly v. Virginia, 527 U.S. 116, 137 (1999) (finding that codefendant confessions are often highly unreliable); Williamson v. United States, 512 U.S. 594, 603-04 (1994) (holding that codefendant confessions which point the finger at others are inadmissible).

Especially when the declarant is actually a coconspirator, the sincerity of such statements is questionable.[133] In this Comment's hypothetical, the declarant is the girlfriend of a rival gang member, which gives her a reason to fabricate her story and directly calls into question her sincerity. Moreover, questions as to accuracy arise over the method by which the declarant's out-of-court statements are admitted at trial.[134] The forfeiture by wrongdoing doctrine, as applied today, allows for the admission of any hearsay statement, including unsworn remarks or unrecorded statements.[135] These situations give rise to questions concerning sincerity, accuracy, and reliability—issues that the hearsay exceptions are meant to cure.

However, commentators urge that despite Rule 804(b)(6)'s failure to include standards of reliability, it remains highly unlikely that courts will admit completely untrustworthy evidence.[136] First, some critics argue that the mere fact that the defendant procured the unavailability of the witness is a testament to the truthfulness of the statements.[137] However, such a presumption in a criminal case would not supply proof of guilt beyond a reasonable doubt because there may be other plausible explanations for the defendant's conduct, such as fear of conviction based on fabricated statements.[138] This

133. *See* Flanagan, *supra* note 3, at 521 (arguing that in such situations coconspirators will realize that it is in their interest to minimize their own participation in the crime, while exaggerating the responsibility of others); *see also* Lee v. Illinois, 476 U.S. 530, 542 (1986) (criticizing accomplice confessions which implicate the defendant as "inevitably suspect").

134. *See* Flanagan, *supra* note 3, at 524 (noting that as time went by, courts facing forfeiture by wrongdoing admitted less reliable forms of hearsay, as compared to the early cases that primarily involved prior testimony or prior sworn statements).

135. *See* United States v. Dhinsa, 243 F.3d 635, 653 (2d Cir. 2001) (placing no limitation on the subject matter of a declarant's statements that can be offered against the defendant when the defendant has procured the witness' unavailability); *see also* Flanagan, *supra* note 3, at 524-25 (asserting that hearsay that must be reconstructed through an officer's notes or testimony gives rise to memory problems and could lead to the admission of unreliable evidence).

136. *See* Grimm & Deise, *supra* note 69, at 42-43 (asserting that the Federal Rules of Evidence are designed to minimize the admission of unreliable evidence, even where evidence is admitted under Rule 804(b)(6)); *see also* Valdez & Nieto Dahlberg, *supra* note 42, at 135 (arguing that a Rule 403 balancing test would screen unreliable evidence). *But see* D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 294 (1989) (noting that Rule 403 was approved during the incipiency of the *Winship* proof beyond-a-reasonable-doubt standard, so the rule remained fixed while the *Winship* standard continued to develop).

137. *See* Valdez & Nieto Dahlberg, *supra* note 42, at 123-24 (furthering the assumption that if the witness' statements were untrustworthy, the defendant would not have procured that witness' unavailability); Markland, *supra* note 8, at 1014 (offering the argument that the defendant's act of procurement implicitly asserts that the witness' statements are true and reliable).

138. *See* Flanagan, *supra* note 3, at 521 (arguing that a defendant's reasons for procuring the unavailability of a witness are strong even when the witness is lying,

argument becomes even more tenuous if the defendant is found to have "acquiesced" in the unavailability of the witness. To demonstrate acquiescence, only a minimal amount of fact is necessary to link the defendant to the murder,[139] and those facts need only be proved by a preponderance of the evidence.[140] This slight connection does not in any way establish that the defendant knew the witness' statements to be true, wished the witness to be unavailable, or even had control over the situation to stop the misconduct.[141] In terms of the hypothetical presented earlier,[142] there is no evidence that the accused ordered the disappearance of the witness, or furthermore, that his fellow gang members knew he might be innocent and the statements perhaps fabricated. Acquiescence, therefore, magnifies the possibility that a defendant might lose his constitutional rights to due process.

The other main argument supporting the proposition that Rule 804(b)(6) does not admit unreliable evidence is that the balancing test in Federal Rule of Evidence 403 generally excludes unreliable and prejudicial evidence and preserves a criminal defendant's due process rights.[143] Rule 403 states that "evidence may be excluded if its

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such as the consequences of pre-trial detention and the damage to one's standing in the community that can flow from false accusations, or even worse, the possibility of conviction based on untrue statements). Also, the accused may have a motive to prevent any testimony which may be damning to his case, regardless of whether such testimony is true or false. *Id.* at 521 (citing MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 177 (Quorum Books 1985)).

139. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 271 (2d Cir. 1982) (acknowledging that the only evidence linking the defendant to the crime was the purchase of four trucks).

140. *See id.* at 273-74 (finding that the necessary level of proof for demonstrating the defendant's acquiescence was his prior knowledge of the impending wrongdoing concerning the witness and a failure to warn). The acquiescence element can be even more problematic in conspiracy cases, where the actions of one co-conspirator can be imputed to the others. *See* United States v. Cherry, 217 F.3d 811, 813 (10th Cir. 2000) (imputing waiver of confrontation rights to co-conspirators as a result of their actions in furtherance of the conspiracy and because the witness' murder was a foreseeable consequence of the conspiracy).

141. *See* Flanagan, *supra* note 3, at 503 (arguing that knowledge of impending events cannot be equated with agreement, consent, responsibility, or control).

142. *See supra* notes 1-3 and accompanying text (describing the hypothetical, where the strongest evidence implicating the defendant is the out-of-court testimony of a rival gang member's girlfriend).

143. *See* Valdez & Nieto Dahlberg, *supra* note 42, at 135 (discussing constitutional protections afforded by Rule 403 and noting that a court would perform a balancing test with the aim of excluding completely unreliable evidence); Markland, *supra* note 8, at 1020 (assuming that all evidence offered for admission would pass the Rule 403 balancing test between probative value and prejudicial effect). *But see* Friedman, *Basic Principles*, *supra* note 7, at 1031 (proffering the view that balancing tests do little to secure fundamental rights because "a judge disposed to rule against the right will generally have an easy enough time finding ample weight on the other side of the balance").

probative value is substantially outweighed by the danger of unfair prejudice."[144] Supporters of Rule 804(b)(6) argue that once a court finds forfeiture of hearsay objections and confrontation rights by wrongdoing, "presumably the hearsay statements must still be sufficiently reliable and their probative value must outweigh their prejudicial impact" to meet due process standards.[145] But this is merely a presumption.[146] This presumption is made more problematic by the fact that Rule 403 is a permissive, not a mandatory, rule of evidence.[147] A further argument against the protection afforded by Rule 403 balancing is that it unconstitutionally shifts the burden of persuasion to a criminal defendant.[148] In other circumstances, the burden is on the prosecution to guarantee the reliability of its evidence.[149] But if a defendant is seeking to exclude evidence under Rule 403, the burden is on the accused to prove that the probative value of the evidence is *substantially* outweighed by its prejudicial effect.[150] There is no universal support for the suggestion that Rule 403 sufficiently screens all unreliable evidence from admission.[151] The protections of Rule 403 in this context are simply

144. FED. R. EVID. 403.

145. Tess, *supra* note 130, at 895.

146. *See id.* at 895-96 (questioning whether courts seriously consider the issue of probative value and prejudicial effect after a determination that the defendant procured the witness' unavailability).

147. *See* FED. R. EVID. 403 ("[E]vidence *may be* excluded if . . . .") (emphasis added); Lewis, *supra* note 136, at 292 (noting that even if a judge determines that admission of the evidence substantially outweighs its probative value, he is not required to exclude the evidence because the rule states only that the evidence "may" be excluded if the defendant meets the burden set out under the rule). Some circuits require that a trial court balance probative value against prejudicial effect before admitting a declarant's out-of-court statements, *see, e.g.*, United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997), while others have found such tests superfluous. *See, e.g.*, United States v. Houlihan, 92 F.3d 1271, 1281 (1st Cir. 1996) (finding that forfeiture by wrongdoing makes a special examination of reliability unnecessary).

148. *See* Lewis, *supra* note 136, at 332, 348-49 (criticizing Rule 403 for placing the relatively high burden on the defendant and suggesting that this favors the admission of probative evidence at the expense of admitting unfairly prejudicial evidence).

149. *See* Lewis, *supra* note 136, at 350-52 (analyzing cases involving admission of hearsay evidence, such as uncross-examined accomplice confessions, and noting that the constitutionally-mandated requirement "that the prosecution . . . rebut[] a 'weighty presumption' against the admission of the evidence" effectively requires the prosecution to prove such evidence possesses "substantial guarantees" of reliability).

150. *See id.* at 331-32 (criticizing the application of this rule because it only allows for exclusion when probative value is *substantially* outweighed by prejudicial effect, meaning that when the probative value is merely outweighed by unfair prejudice, it is admissible despite increased risk of error).

151. *See* Flanagan, *supra* note 3, at 525 (arguing that a Rule 403 balancing test is not sufficient to prevent the admission of all unreliable evidence because the test does not take into account witness credibility; moreover, the prejudicial effect of the evidence must *substantially* outweigh its probative value to be inadmissible); Kroger, *supra* note 47, at 861-62 (calling the protections afforded by a Rule 403 balancing test

not sufficient to guarantee a criminal defendant's due process rights, and therefore, the need for explicit reliability standards in Rule 804(b)(6) is clear.

The disparate judicial treatment of the doctrine of forfeiture by wrongdoing since its codification in Rule 804(b)(6) underscores the need for explicit standards governing the reliability of all admitted evidence.[152] The differing approaches in assessing the need for reliability standards in Rule 804(b)(6) cases was due in part to conflicting interpretations of *Roberts*' "indicia of reliability" test as it pertained to forfeiture of confrontation rights.[153] However, after the Supreme Court's 2004 decision in *Crawford*, this analysis must be revisited.

IV. *CRAWFORD*'S REJECTION OF RELIABILITY PERMITS DEFENDANTS TO INDEPENDENTLY ASSERT DUE PROCESS RIGHTS TO RELIABLE EVIDENCE UNDER RULE 804(B)(6)

Crawford v. Washington ultimately recognized that reliability is better suited to due process determinations than confrontation analysis.[154] A fair understanding of the doctrine of forfeiture by wrongdoing after *Crawford* does not permit grouping notions of reliability with confrontation rights.[155] As the law stands today, courts should be required to perform separate reliability determinations when admitting evidence pursuant to Rule 804(b)(6).[156]

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minimal at best, and noting that "appellate courts review Rule 403 determinations [under the] abuse of discretion [standard,] which precludes any serious appellate review of statement reliability and probity").

152. *Compare* Cotto v. Herbert, 331 F.3d 217, 235 (2d Cir. 2003) (noting that the "indicia of reliability" standard promulgated under *Ohio v. Roberts* applies to confrontation rights, which the defendant forfeited through misconduct, but nevertheless entertaining the defendant's argument that the "admission of facially unreliable hearsay would raise a due process challenge" (quoting United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992))), *with* United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997) (holding that once a court properly determines the defendant has waived his right to confrontation by misconduct, it is not obligated to perform any separate tests for "indicia of reliability" that would normally accompany a confrontation or hearsay issue under *Roberts*).

153. *See* cases cited *supra* note 152.

154. *See* 541 U.S. 36, 61 (2004) (rejecting the use of "amorphous notions of 'reliability'" in confrontation analyses); *see also* Andrew Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After* Crawford v. Washington, 20 CRIM. JUST. 39, 47 (2005) (arguing that reliability should never have been the key focus of confrontation scrutiny and urging that "[r]eliability inquiries belong elsewhere, in the fundamental due process guarantees of a fair trial").

155. *See* United States v. Montague, 421 F.3d 1099, 1102 (10th Cir. 2005) (holding that the Confrontation Clause was not intended as a means for assessing reliability).

156. *See* Taslitz, *supra* note 154, at 47 (suggesting that courts look to the Due Process Clause, not the Confrontation Clause, to ensure reliable evidence sustains convictions).

A. The Roberts *"Indicia of Reliability" Standard is Better Suited as a Form of Due Process*

The reliability requirement for admissible evidence is generally seen as a due process issue.[157] However, in formulating a standard under which hearsay evidence satisfies Confrontation Clause scrutiny, the *Roberts* Court held that admissible evidence must bear sufficient "indicia of reliability," requiring the evidence to either "fall[] within a firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness" for admissibility.[158] Careful analysis of this opinion led to arguments that *Roberts*' Confrontation Clause analysis subsumed due process concerns.[159]

Characterizing confrontation rights as involving reliability standards bears a direct impact on a court's interpretation of Rule 804(b)(6). Under a *Roberts* analysis, a court could easily dismiss a defendant's request for a reliability determination because it was linked to the confrontation rights he had forfeited.[160] Several cases dealing with the application of Rule 804(b)(6) prior to *Crawford* did just that.

In *United States v. Houlihan*,[161] the First Circuit found that forfeiture by wrongdoing waived both the defendant's confrontation rights and his hearsay objections to the admission of the out-of-court statements;

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157. *See supra* notes 105-112 and accompanying text (discussing the admission of reliable evidence and linking it to criminal defendants' due process right to a fair trial).

158. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

159. *See* RICE & KATRIEL, *supra* note 6, § 5.03, at 453 (characterizing the two prong test in *Roberts* as fusing the two separate issues of face-to-face confrontation rights under the Sixth Amendment and due process guarantees of the Fourteenth Amendment into one single standard); White v. Illinois, 502 U.S. 346, 363-64 (1992) (Thomas, J., concurring) (criticizing the implications of the *Roberts* decision by noting: "Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them."); *see also* Hansel M. Harlan, Note, White v. Illinois *and the "Hearsay Clause" of the Sixth Amendment*, 54 LA. L. REV. 177, 184 (1993) (noting that the reliability standard in *Roberts* was ill-suited to confrontation analysis, whose historical focus was on physical confrontation); Taslitz, *supra* note 154, at 39, 47 (arguing that reliability should never have been the key focus of confrontation scrutiny and urging that "[r]eliability inquiries belong elsewhere, in the fundamental due process guarantees of a fair trial"); Reed, *supra* note 84, at 219-20 (regarding the union between Confrontation Clause analysis and hearsay determinations as a mischaracterization of Sixth Amendment protections).

160. *See* United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997) (holding that once a court properly determines the defendant has waived his right to confrontation by misconduct, it is not obligated to perform any separate tests for "indicia of reliability" that would normally accompany a confrontation/hearsay issue under *Roberts*); *see also* Flanagan, *supra* note 3, at 472 (noting that in Rule 804(b)(6) cases, courts would often focus on the defendant's abhorrent deeds and the government's need for evidence, rather than on reliability).

161. 92 F.3d 1271 (1st Cir. 1996).

therefore, any separate determination as to reliability was unnecessary.[162] In *United States v. Dhinsa*,[163] the Second Circuit went into even further detail concerning this issue. The defendant argued that since the district court failed to independently assess the reliability of the out-of-court statements admitted into evidence, the holding violated the Supreme Court's ruling in *Lilly v. Virginia*.[164] The court rejected the defendant's argument, noting that *Lilly* would only apply if the defendant had not waived his confrontation rights through misconduct.[165] The *Dhinsa* court's ruling, which combined reliability standards and a defendant's confrontation rights, assuredly was based on its understanding of confrontation rights according to *Roberts*.[166] But following the Supreme Court's decision in *Crawford*, which overruled the *Roberts* test,[167] this argument must be reexamined.

B. Crawford's *Rejection of Reliability as an Appropriate Test for Confrontation Issues Separated Due Process from Confrontation Clause Analysis*

In 2004, when the Supreme Court decided *Crawford v. Washington*, it shifted its focus concerning confrontation rights and rejected the notion that an "indicia of reliability" standard was part of a Confrontation Clause analysis.[168] With this decision came a severing of traditional due process concerns from the Sixth Amendment right of confrontation.[169] In determining whether confrontation rights are

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162. *Id.* at 1281.

163. 243 F.3d 635 (2d Cir. 2001).

164. *Id.* at 650. Extending the rule from *Roberts*, the Supreme Court held in *Lilly* that the reliability of hearsay statements are sufficiently acceptable to allow uncross-examined hearsay when the "evidence falls within a firmly rooted hearsay exception" or "contains particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statement's reliability." 527 U.S. 116, 124-25 (1999) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

165. *See Dhinsa*, 243 F.3d at 655 (holding that once the defendant waives confrontation rights, "the district court is not required to assess independently the reliability of" statements admitted pursuant to Rule 804(b)(6)).

166. *See id.* at 654-55 (characterizing the primary goal of the Confrontation Clause as "ensur[ing] the reliability of the evidence [admitted] against a criminal defendant by" requiring it to be subjected to cross examination (quoting *Lilly*, 527 U.S. at 123-24)); *cf.* United States v. Bryce, 208 F.3d 346, 351 (2d Cir. 1999) (noting that a determination of whether a hearsay statement violates the Confrontation Clause centers on an examination of its trustworthiness).

167. Crawford v. Washington, 541 U.S. 36, 68 (2004) (scrapping the *Roberts* test in situations involving testimonial evidence).

168. *See id.* at 68-69 (reformulating the test to require that all "testimonial" hearsay of an unavailable declarant be previously subjected to cross-examination in order for it to be admissible at trial and completely striking any reference to reliability standards).

169. *See supra* notes 105-112 and accompanying text (discussing the standards for reliable evidence as part of the due process right to a fair trial).

preserved, the Supreme Court focused on the primary abuses that the Framers' sought to curb with this Amendment, rather than the reliability of the evidence actually admitted.[170]

After *Crawford*, a defendant now has a strengthened argument for a due process analysis independent from any Confrontation Clause concerns.[171] With this understanding, it becomes clear that the admission of unreliable evidence in criminal trials through the introduction of hearsay statements is not a confrontation concern, it is a due process concern.[172] When a criminal defendant wrongfully causes the unavailability of a witness, the proper confrontation analysis under Rule 804(b)(6) is a finding of whether the defendant forfeits the right to have testimonial evidence that has not been previously subject to cross-examination excluded from trial.[173] The right to exclude unreliable evidence from trial is preserved separately and deserves a proper due process determination.[174]

In *United States v. Montague*,[175] the only case decided since *Crawford* to explicitly analyze the applicability of forfeiture by misconduct in relation to reliability, the Tenth Circuit endorsed this view. There, defendant Montague challenged the admission of his wife's grand

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170. *See Crawford*, 541 U.S. at 63 (characterizing reliability as an amorphous concept and noting that *Roberts*' focus on reliability allowed the admission of "core testimonial statements that the Confrontation Clause plainly meant to exclude"); *see also* Taslitz, *supra* note 154, at 42 (regarding reliability as something the Framers would have seen as alien to Sixth Amendment concerns).

171. *See* Taslitz, *supra* note 154, at 40 (asserting that the main goals of confrontation analysis are "preventing governmental abuses in the creation of evidence, promoting the legitimacy of verdicts, and allowing for the catharsis of face-to-face confrontation"); *see also* Friedman, *Basic Principles*, *supra* note 7, at 1028-29 (criticizing the Supreme Court's confrontation analysis prior to *Crawford* because it mistakenly made reliability the central issue for Confrontation Clause applicability); Kirkpatrick, *supra* note 84, at 8 (indicating that the majority of criticism leveled at the *Roberts* opinion was due to its inclusion of reliability in confrontation analysis).

172. *See* Taslitz, *supra* note 154, at 43 (noting that government abuse is the real target of confrontation scrutiny while other causes of unreliable evidence should be dealt with through due process mechanisms); *see also* Friedman, *Basic Principles*, *supra* note 7, at 1022 (arguing that the plain language of the Confrontation Clause cannot be interpreted as a "rule against hearsay or of its exceptions, or of unavailability, reliability, or truth-determination").

173. *See Crawford*, 541 U.S. at 68-69 (setting forth a new test for confrontation analysis that excludes "testimonial evidence" when there has been no prior opportunity for the defendant to cross-examine the statement); *see also supra* notes 168-170 and accompanying text (discussing the *Crawford* decision and its effect on confrontation rights).

174. *See infra* notes 179-190 and accompanying text.

175. 421 F.3d 1099 (10th Cir. 2005). In *Montague*, the defendant, charged with illegal firearm possession, was found to have intimidated his wife into not testifying at trial. *Id.* at 1100-01. Following her husband's arrest, the wife told both defense investigators and her mother-in-law that the guns did not really belong to her husband and that she had planted them in their home to frame him. *Id.* at 1101. However, during her grand jury testimony, she confessed that she did not want to lie for her husband and that the weapons really did belong to him. *Id.*

jury testimony as a violation of the Supreme Court's holding in *Crawford*.[176] The *Montague* court explicitly recognized that *Crawford* acknowledged the viability of the forfeiture by wrongdoing doctrine.[177] The court agreed that the *Roberts* analysis was an inadequate tool for assessing all Confrontation Clause challenges because of its focus on reliability.[178] *Montague* supports the conclusion that reliability is no longer a confrontation concern under *Crawford*.

C. With Reliability Separated from Confrontation Clause Issues, a Defendant Has a Strengthened Due Process Argument that All Statements Must Bear Sufficient Indicia of Reliability

The Supreme Court's affirmation that reliability no longer factors into confrontation analysis[179] places reliability back where it belongs—as a due process tool.[180] A full understanding of *Crawford* strengthens the due process argument available to criminal defendants who challenge the admission of unreliable evidence under Rule 804(b)(6). By excluding reliability and limiting Confrontation Clause analysis to testimonial statements with a prior opportunity for cross-examination, the Supreme Court has widened the field in respect to due process claims.[181] Specific reliability determinations should now be required in all Rule 804(b)(6) cases to ensure defendants' due process rights.[182] The ruling in *Montague* strongly supports this assertion.[183] Despite a witness who made inconsistent statements during the course of the investigation,[184] the court did not

176. *Id.* at 1101-02.

177. *See id.* at 1102 (noting that as established under *Crawford*, the misconduct principle is a separate basis for admissibility of hearsay statements).

178. *See id.* (recognizing that those exceptions to the Confrontation Clause not intended as a "surrogate means of assessing reliability" should not be analyzed under *Roberts*).

179. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) (stating that rather than requiring some "amorphous notion of reliability," the Confrontation Clause only requires the cross-examination of evidence).

180. *See supra* notes 105-112 and accompanying text (discussing the reliability of evidence as part of the due process right to a fair trial).

181. *See* Harlan, *supra* note 159, at 186 (asserting even before the *Crawford* limitation was adopted, that "[i]n light of the narrow applicability of the Confrontation Clause in the hearsay area, the Due Process Clause . . . should be expected to emerge more frequently in defense challenges to such conduct").

182. *See* Lewis, *supra* note 136, at 296 (citing *In re* Winship, 397 U.S. 358, 362-64 (1970)) (characterizing reliability as a central focus of the due process guarantee that criminal convictions be based on proof beyond a reasonable doubt and noting that this standard reduces the possibility of unjust convictions).

183. *See* United States v. Montague, 421 F.3d 1099 (10th Cir. 2005); *see also supra* notes 175-178 and accompanying text (explaining that *Montague*, the only post-*Crawford* decision to address the reliability of statements admitted under Rule 804(b)(6), excluded a reliability determination from its confrontation analysis).

184. *Montague*, 421 F.3d at 1101; *see also supra* note 177 (summarizing the witness'

examine the reliability of these statements because, according to its reasoning, reliability determinations were no longer appropriate under confrontation analysis.[185] So, on one hand, the court characterized reliability as an improper focus in Confrontation Clause challenges,[186] yet on the other hand, it failed to establish exactly where that reliability determination regarding the admissibility of the declarant's statements should fall.[187]

The reliability determination missing from *Montague* should be mandated at the trial level in order to avoid inconsistencies in the federal courts.[188] Because Rule 804(b)(6) does not mention standards of reliability, a plain language interpretation of the rule is unhelpful.[189] Likewise, cases decided since *Crawford* are unhelpful as they have overlooked reliability determinations altogether.[190] In order to preserve a criminal defendant's due process rights, courts should engage in specific findings of reliability concerning the admission of out-of-court statements.

Some commentators, pointing to the doctrine's foundation on equitable principles, argue that reliability determinations allow a criminal defendant to profit from his own wrongdoing.[191] However, despite the level of wrongdoing, both defendants and the public have a compelling need to maintain and ensure due process protections in

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statements to investigators and before the grand jury).

185. *Montague*, 421 F.3d at 1102. The consistency of testimony is one indication of its trustworthiness. *See* United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976) (noting that one factor that tended to make the unavailable declarant's statements reliable was that he never recanted his original testimony). In *Montague*, the wife's prior inconsistent statements should have raised reliability concerns. *See* Goldman, *supra* note 1, at 1 (arguing that prior inconsistent statements are inherently untrustworthy and noting that "[c]onvictions based solely on prior inconsistent statements [would] raise serious due process . . . issues").

186. *Cf. Montague*, 421 F.3d at 1102 ("[T]he 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.").

187. *See id.* (ceasing its discussion of the reliability of the admitted statements altogether).

188. *Compare* Cotto v. Herbert, 331 F.3d 217, 235 (2d Cir. 2003) (finding that despite a waiver of confrontation rights, due process still required the evidence to meet certain standards of reliability), *with* United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997) (holding that "indicia of reliability" belonged under the *Roberts* test, and once a defendant was found to have waived his confrontation rights, no further determinations as to reliability were required).

189. *See* FED. R. EVID. 804(b)(6) ("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."); *see also supra* notes 56-65 and accompanying text (discussing the adoption of Rule 804(b)(6) and its lack of explicit or implicit reliability standards).

190. *See, e.g.*, *Montague*, 421 F.3d at 1101-02.

191. *See* Grimm & Deise, *supra* note 86, at 32-33 (arguing that exclusion of witness' statements on hearsay principles in a forfeiture by wrongdoing scenario would be an inequitable result).

all cases.[192] Convictions based on unreliable evidence would not only disturb the public's faith in the judicial system, but would violate the Constitution.[193] Other critics argue that the Federal Rules of Evidence already contain enough built-in safeguards to prevent unreliable evidence from reaching a jury.[194] However, an examination of the types of witnesses involved in these cases and the various kinds of statements admitted indicates that the possibility of admitting facially unreliable evidence exists.[195] A due process analysis does not subvert the underlying rationale of the rule—that a person should not profit from his or her misconduct; it merely protects the constitutional rights of all defendants, no matter how heinous their actions. To protect these constitutional guarantees, the law should require courts to make particularized findings, on the record, regarding the trustworthiness of evidence admitted under Rule 804(b)(6).[196] Courts should at least assess the witness' credibility, whether the witness had a motive to fabricate the out-of-court statements, and the accuracy and form of such statements. Courts that do engage in such reliability determinations often find that the statements are still trustworthy enough to merit admission.[197] This

192. *See* Byers, *supra* note 121, at 519 (arguing that when a defendant does not receive a fair trial, the criminal justice system loses legitimacy because an innocent person is convicted and a guilty person goes free); *see also* Flanagan, *supra* note 3, at 522 (regarding the requirement that verdicts be based on reliable evidence as a central institutional value that is important irrespective of the defendant's conduct); Birdsong, *supra* note 2, at 894 (characterizing fairness in trials as one of the main goals of the Federal Rules of Evidence).

193. *See* Kroger, *supra* note 47, at 883 (urging that the state has no legitimate interest in convicting citizens on unreliable evidence); *see also supra* notes 105-112 and accompanying text (explaining how both commentators and courts have found that the Due Process Clause guarantees the right to a conviction based on reliable evidence).

194. *See supra* notes 136-151 and accompanying text (disputing arguments that the Rule 403 balancing test and the inference of a statement's truth that arises when a defendant procures the unavailability of a witness are adequate to cure any due process challenges).

195. *See supra* notes 132-133 and accompanying text (discussing the admission of codefendant statements and examining possible impure motives for such testimony); *supra* note 36 (demonstrating that hearsay statements in forfeiture cases can range from prior, sworn testimony to casual statements made among acquaintances).

196. *See, e.g.*, Cotto v. Herbert, 331 F.3d 217, 235-36 (2d Cir. 2003) (finding hearsay evidence reliable after taking into account the proximity in time between the shooting and the witness' statements to police, the detailed description of the event in question, the corroboration of the declarant's statements by other testimony, and the fact that the witness had no motive to fabricate).

197. *See id.* (assessing the reliability of the out-of-court statements and still finding them suitable for admission); United States v. Mastrangelo, 533 F. Supp. 389, 390-91 (E.D.N.Y. 1982) (finding the circumstances surrounding the unavailable declarant's statements provided enough "particularized guarantees of trustworthiness" to warrant its admission), *aff'd,* 693 F.2d 269, 272 (2d Cir. 1982).

trend further deflates critics' argument that reliability determinations would allow defendants to profit from their wrongdoing.

CONCLUSION

Returning to the hypothetical, admission of the declarant's out-of-court statements presents a distinct threat that the jury could hear unreliable evidence. The witness is a rival gang member's girlfriend, and thus she has possible motives to fabricate her statements. She did not give her statements under oath and there is no evidence they were recorded in any format other than in the police officer's notes. The officer who took her statement at the time of the shooting would most likely recount her testimony, if the court found it admissible. These circumstances present problems concerning accuracy, sincerity and memory, which could be overlooked if the judge does not make an independent determination of their reliability. Furthermore, since the prosecution's other evidence is circumstantial, a jury conviction based on this testimony could result in a due process violation if the girlfriend's statements are found to be facially unreliable.

This Comment does not condone witness tampering, nor does it advocate prohibiting prosecutors from using Federal Rule of Evidence 804(b)(6) to admit the statements of an unavailable declarant. Rather, it argues that Rule 804(b)(6), as written, raises serious implications for a criminal defendant's due process right to a fair trial. No matter how heinous the crime, the judicial system must always work to guarantee that convictions are based on reliable evidence. By requiring judges to make separate reliability determinations concerning evidence admitted pursuant to Rule 804(b)(6), courts will not only safeguard criminal defendants' due process rights, but also the public's interest in justice.