

COMMENTS

THE ADMISSION OF HEARSAY EVIDENCE WHERE DEFENDANT MISCONDUCT CAUSES THE UNAVAILABILITY OF A PROSECUTION WITNESS

PAUL T. MARKLAND

INTRODUCTION

Announcing the verdict of a trial concerning the execution-style murder of a California mother of two, the *Sacramento Bee* recently reported that the testimony at the trial indicated "that the woman was killed because she was a witness to another crime."¹ Unfortunately, the woman had seen the defendant murder two other people.² In a similar situation, an eight-year-old witness to a cult slaying in Texas was recently murdered due to her knowledge of the crime.³ Prosecutors in the District of Columbia, already struggling with witness protection problems,⁴ recently lost several witnesses, including a corrections officer who was shot to death just days before his scheduled court appearance, a witness to that officer's murder, and a witness whose murder caused a mistrial in a drug case.⁵ The

1. *Teen Sentenced in Slayings*, SACRAMENTO BEE, Apr. 10, 1993, at B3 (reporting that witness' body was found in hotel room with killer's two victims).

2. *Id.* (noting that defendant claimed to have killed two victims because they assaulted his girlfriend).

3. *Three Members of Sect Acquitted for Conspiracy, Murder for Hire*, CHI. TRIB., Jan. 22, 1993, at 4M (reporting that members of religious cult shot eight-year-old girl's father for leaving cult, then shot girl for witnessing father's death).

4. Jonetta R. Barras, *Killing Triggers Stricter Wording in Bail Reform Bill*, WASH. TIMES, Feb. 5, 1992, at B3 (quoting D.C. council member as stating that protecting witnesses "is becoming a very big problem").

5. *Id.* (discussing D.C. Council's motivation for taking further steps toward preventing criminal defendants from intimidating or harming adverse witnesses).

elimination of witnesses through murder⁶ or intimidation⁷ has plagued the criminal justice system in recent decades.⁸

When a material witness to a crime becomes unavailable, preservation of the witness' statements for use at trial is critical because the prosecution of the defendant often will fail without the absent witness' testimony.⁹ Admission of such statements, however, presents a number of problems. Because the witness made the accusation out of court and the prosecution would be offering it for the truth of the witness' statement that the defendant is guilty, the statement constitutes hearsay.¹⁰ Consequently, the statement is inadmissible at trial¹¹ unless it falls within certain delineated exceptions to the hearsay rule.¹² In addition, defendants in criminal trials have a right, under the Confrontation Clause of the Sixth Amendment,¹³ to

6. See, e.g., Bill Bryan, *Murder Suspect Facing Charge in Second Killing*, ST. LOUIS POST-DISPATCH, Jan. 8, 1993, at 3A (quoting murder investigator as stating, "We had believed the killing in the park was over a drug dispute, but now we know that the youth was killed because he had been a witness to [another] murder"); *World News Tonight with Peter Jennings* (ABC television broadcast, Nov. 24, 1992) (reporting that three teenagers killed boy because he had witnessed robbery).

7. See, e.g., Richard Seven, *Trial Testimony Turns to Victim's Ex-Associate—Bookkeeper Links Rift to Slaying*, SEATTLE TIMES, Nov. 5, 1992, at G3 (describing how witness changed his story regarding his knowledge of murder after receiving threats of violence from defendant); Larry Speer, *Ventura County News Roundup: Oxnard; Man Charged with Threatening Witness*, L.A. TIMES, Apr. 7, 1992, at B2 (discussing intimidation of witness in connection with slayings outside convenience store).

8. See Michael H. Graham, Lecture, *Witness Intimidation*, 12 FLA. ST. U. L. REV. 239, 241-42 (1984) (discussing studies of 1960s, 1970s, and 1980s that reported abundance of witness intimidation that caused witnesses not to testify at trial).

9. See *id.* at 242 (discussing how witness intimidation has proved fatal to many prosecutions and defendants' view of intimidation as "innovative defense").

10. See FED. R. EVID. 801(c) (defining "hearsay" as "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"); FED. R. EVID. 801(a) (defining "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion"); FED. R. EVID. 801(b) (defining "declarant" as "a person who makes a statement"); see also JoAnne A. Epps, *Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?*, 77 KY. L.J. 7, 12 (1988-89) (defining "hearsay" as "any out-of-court statement offered for the truth of its contents").

11. See FED. R. EVID. 802 (stating that hearsay evidence is inadmissible "except as provided by [the Federal Rules of Evidence] or by other rules prescribed by the Supreme Court").

12. See FED. R. EVID. 804(b) (setting forth exceptions for admitting hearsay from unavailable witness, which are: (1) former testimony, (2) dying declarations, (3) statements against interest, (4) statements of personal or family history, and (5) other exceptions); see also Graham, *supra* note 8, at 249 (noting that 27 states have addressed admissibility of prior out-of-court statements by enacting rules of evidence based on Federal Rules). Common-law standards, however, affect the admissibility of out-of-court statements by witnesses who are unavailable because of the defendant's misconduct. Graham, *supra* note 8, at 249. See generally Glen Weissenberger, *Federal Rule of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079 (1987) (providing general overview of admission of hearsay evidence).

13. U.S. CONST. amend. VI; see also *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (extending right of confrontation to state criminal prosecutions under Fourteenth Amendment).

cross-examine opposing witnesses.¹⁴ The witness' absence from trial, therefore, poses a serious constitutional question beyond mere evidentiary considerations.

Several courts in various state and federal jurisdictions have struggled with the issue of how to preserve the witness' statements when the defendant has procured the witness' unavailability.¹⁵ These courts have adhered to a principle that, in situations where a defendant procures a witness' unavailability, he or she waives the right to assert a confrontation argument or raise hearsay objections against admission of that witness' out-of-court statements into evidence.¹⁶ Based on concerns over truthfulness and accuracy, however, the courts traditionally limit application of this principle to prior sworn testimony, such as declarations made during a previous grand jury appearance.¹⁷ A dilemma arises when the defendant silences an

14. See *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980) (noting that Confrontation Clause envisions personal examination and cross-examination of witnesses presented against accused).

15. See, e.g., *United States v. Aguiar*, 975 F.2d 45, 47-48 (2d Cir. 1992) (describing defendant's letters threatening to expose adverse witness' criminal activity if he testified against defendant); *Rice v. Marshall*, 709 F.2d 1100, 1101-02 (6th Cir. 1983) (reviewing case where defendant intimidated witness into silence), *cert. denied*, 465 U.S. 1034 (1984); *United States v. Thevis*, 665 F.2d 616, 627 (5th Cir.) (considering defendant's murder of prosecution witness in admitting witness' FBI and grand jury testimony), *cert. denied*, 459 U.S. 825 (1982); *United States v. Balano*, 618 F.2d 624, 626 (10th Cir. 1979) (finding that defendant waived constitutional right of confrontation by threatening witness' life), *cert. denied*, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1352-60 (8th Cir. 1976) (reviewing threat that caused key witness' absence and discussing admission of witness' grand jury testimony), *cert. denied*, 431 U.S. 914 (1977); *State v. Jarzbeck*, 529 A.2d 1245, 1252 (Conn. 1987) (resolving questions that arose after defendant's threats, made during commission of crime, prevented minor victim from testifying); *State v. Gettings*, 769 P.2d 25, 28-29 (Kan. 1989) (discussing admissibility of evidence where defendant was involved in murder of adverse witness); *State v. Olson*, 291 N.W.2d 203, 207 (Minn. 1980) (interpreting applicable law when witness refused to testify for fear of defendant's retribution); *State v. Sheppard*, 484 A.2d 1330, 1343 (N.J. Super. Ct. Law Div. 1984) (addressing implications of child abuse victim's inability to testify because of defendant's intimidation); *Holtzman v. Hellenbrand*, 460 N.Y.S.2d 591, 597 (App. Div. 1983) (considering government allegation that defendant induced his wife to refuse to testify at his trial); *State v. Carroll*, 513 A.2d 1159, 1162 (Vt. 1986) (deciding that absent any effort on defendant's part to intimidate witness, witness' unavailability was not sufficient to waive Sixth Amendment confrontation rights).

16. See, e.g., *United States v. Mastrangelo*, 693 F.2d 269, 272 (2d Cir. 1982) (stating that, if defendant waives his Sixth Amendment rights, he waives his hearsay objections as well); *Thevis*, 665 F.2d at 632-33 (articulating rule that confrontation waiver includes waiver of hearsay objections); *Balano*, 618 F.2d at 626 (noting that valid waiver of constitutional confrontation right also waives objection under rules of evidence); *State v. Peirce*, 364 N.W.2d 801, 806-07 (Minn. 1985) (implying that confrontation waiver allows admission of hearsay).

17. See, e.g., *Mastrangelo*, 693 F.2d at 273-74 (concluding that defendant's knowledge of plot to kill witness and failure to warn appropriate authorities would constitute waiver of confrontation rights and prior grand jury testimony could be admitted); *Thevis*, 665 F.2d at 630 (finding defendant waived objection to admission of absent witness' grand jury transcripts by procuring witness' absence); *Balano*, 618 F.2d at 626 (rejecting challenge of admission of prior grand jury testimony where defendant waived confrontation right by threatening witness); *Carlson*, 547 F.2d at 1355-60 (admitting absent witness' grand jury testimony where defendant procured witness' unavailability); *United States v. Gallo*, 653 F. Supp. 320, 332-33 (E.D.N.Y.

opposing witness before the witness has provided such testimony.¹⁸

This Comment discusses the standards courts apply to the admission of hearsay evidence when the accused has prevented a witness from testifying at trial. The central question is whether, and to what extent, a defendant should forfeit his or her constitutional right to confront opposing witnesses following such misconduct. Part I reviews the role of the Confrontation Clause and the hearsay rule in the adjudication of unavailable witness cases, focusing on those situations where the defendant has caused the witness' absence. Part II explores the different evidentiary burdens courts impose on the prosecution to prove that a defendant procured the unavailability of a witness. Part III examines admissibility standards as they apply to an absent witness' statements following a finding of procurement. Part IV recommends that Congress amend the Federal Rules of Evidence to provide a more relaxed approach to admission of statements by witnesses who cannot appear at trial due to a defendant's conduct. The Comment concludes that the most equitable response to the problem of defendant-procured witness unavailability is the complete abrogation of the defendant's ability to object on confrontation or hearsay grounds to the admission of any of that witness' out-of-court statements, including unsworn, *ex parte*, and extrajudicial declarations.

I. BACKGROUND

The rule against the admission of hearsay evidence and the requirements of the Confrontation Clause of the Sixth Amendment

1986) (allowing admission of witness' statements from both grand jury testimony and bail hearings where defendant procured witness' absence); *Peirce*, 364 N.W.2d at 807 (affirming admission into evidence at defendant's trial, testimony given by co-defendant at his trial that defendant threatened him with harm if he testified); *Hellenbrand*, 460 N.Y.S.2d at 595-97 (holding that only grand jury testimony is admissible as result of procurement waiver). If the procuring defendant confronted the absent witness at a previous proceeding, then the witness' prior testimony may be admissible regardless of a procurement waiver through Federal Rule 804(b)(1):

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

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

18. See Graham, *supra* note 8, at 281-82 (acknowledging admissibility problem and touting need for special judicial proceedings that occur soon after formal charges in order to qualify witness' declarations for admission before procurement).

each present an obstacle to the admission of out-of-court statements at trial. The U.S. Supreme Court discussed the interplay between the hearsay rule and the Confrontation Clause in *Ohio v. Roberts*.¹⁹ Although the Court determined that the Founders enacted the Confrontation Clause to exclude some hearsay, it concluded that their intention could not have been to eradicate the common-law hearsay exceptions, which the Federal Rules of Evidence subsequently codified.²⁰ Thus, a court may admit some statements based on hearsay where the Confrontation Clause bows to competing interests, such as effective law enforcement.²¹ Accordingly, when ruling on the admissibility of a witness' out-of-court statements, a court must weigh the strength of the Confrontation Clause against other established policies.²²

A. *The Admissibility of Hearsay Evidence*

Hearsay evidence is generally inadmissible at trial.²³ Originating in common law,²⁴ this rule was designed to curb the abuses inherent in presenting a jury with a witness' prior out-of-court statements where the accuracy, truth, clarity, and credibility of the statements have not been tested by cross-examination.²⁵ Exceptions to the rule excluding hearsay, however, developed early in the common law.²⁶

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

20. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (finding that literal reading of Confrontation Clause would require exclusion of any statement made by nonpresent declarant including long recognized hearsay exceptions).

21. *Id.* at 66 (naming development and formulation of rules of evidence for use in criminal cases as another important interest that may deserve accommodation).

22. See S. Douglas Borisky, Note, *Reconciling the Conflict Between the Co-Conspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1314 (1985) (proposing that consideration of policies underlying Confrontation Clause and hearsay exceptions permit admission of trustworthy evidence and encourage accurate verdicts).

23. See FED. R. EVID. 802 (noting that hearsay may be admitted only as provided by rules of evidence or Supreme Court rulings in accordance with statutory authority or act of Congress).

24. See 5 JOHN H. WIGMORE, EVIDENCE § 1364, at 18 (John H. Chadbourne rev. ed. 1974) (dating origin of hearsay exclusion to between 1675 and 1690); see also *Pickering v. Barkley*, 12 Vin. Abr. Evidence 175, 175 (1673) (exemplifying desire to have declarant brought into court rather than merely presenting declarant's statement); *Ireland's Trial*, 7 How. St. Tr. 79, 105 (1678) (declaring that certain writing is not admissible unless writer can testify in court); *Rutter v. Hebden*, 1 Keb. 754, 754 (1676) (objecting to argument that statement of witness cannot be admitted unless heard in court).

25. See 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 800-802 (1979) [hereinafter WEINSTEIN] (discussing hearsay rule's purpose of creating ideal conditions through witness' testimony given under oath, in presence of jury, and subject to cross-examination); Epps, *supra* note 10, at 13 (explaining that inability to cross-examine declaring witness originally made admission of hearsay evidence offensive).

26. See 5 WIGMORE, *supra* note 24, § 1397, at 158-59 (citing "dying declaration" as early example of hearsay exception); see also *Woodcock's Case*, Leach Cr. C. 500, 501 (4th ed. 1789) (explaining general principle of "dying declaration" exception in late 18th century). The dying declaration was one of the earliest hearsay exceptions to develop. See Epps, *supra* note 10, at 14

In 1975, Congress officially incorporated the common-law rule against admission of hearsay evidence into the Federal Rules of Evidence²⁷ and simultaneously codified many of the common-law exceptions.²⁸ Although the rules apply only to federal courts, most states have patterned their own evidentiary rules after the federal system.²⁹ The exceptions provide for the admission of hearsay evidence when a witness made statements under conditions that denote guarantees of trustworthiness³⁰ and under various circumstances where the declarant is unavailable for trial.³¹ The hearsay rules do prohibit the proponent of hearsay evidence from using an unavailability exception to admit the evidence when that party caused the declarant to be unavailable to testify at trial.³² The rules do not, however, provide an exception for the admission of prior statements by a witness whom the defendant has caused to be unavailable to testify.³³

B. *The Confrontation Clause*

The Confrontation Clause of the Sixth Amendment,³⁴ like the

& n.26 (noting belief that dying declaration was only established exception to hearsay rule at time of Sixth Amendment's ratification) (citing *F. HELLER, THE SIXTH AMENDMENT* 22-24, 104 n.6 (1951)). For later cases developing exceptions to the hearsay rule, see *Dutton v. Evans*, 400 U.S. 74, 88 (1970) (plurality opinion) (discussing co-conspirator exception); *California v. Green*, 399 U.S. 149, 168 (1970) (discussing prior testimony exception).

27. FED. R. EVID. 802; see Pub. L. No. 93-595, 88 Stat. 1926, 1939 (1975) (codified as amended at 28 U.S.C. app. at 775 (1988)).

28. FED. R. EVID. 803, 804; see Pub. L. No. 93-595, 88 Stat. 1926, 1939-43 (1975) (codified as amended at 28 U.S.C. app. at 776-805 (1988)).

29. Cf. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE xxv (2d ed. 1987) (noting that states that have rules of evidence resembling Federal Rules are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).

30. See FED. R. EVID. 803 (listing 24 types of statements that rule 803 excepts from hearsay rule, including "present sense impressions" (803(1)), "excited utterances" (803(2)), "recorded recollections" (803(5)), "public records" (803(8)), "family records" (803(13)), and "learned treatises" (803(18))); see also FED. R. EVID. 803 advisory committee's notes (stating that circumstances surrounding making of certain statements provide independent indicia of trustworthiness for purposes of rule 803 hearsay exceptions).

31. See FED. R. EVID. 804 (providing five situations that constitute unavailability for purposes of exception to hearsay rule); see also *Graham*, *supra* note 8, at 249 (discussing unavailability exceptions to federal hearsay rule).

32. See FED. R. EVID. 804(a) (stating that declaring witness is not to be considered unavailable where proponent of statement procured witness' absence).

33. *Id.* The reference to procurement of absence is contained within the federal rules' definition of "unavailability" and is not related to any specific hearsay exception. *Id.*

34. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."); see also *Epps*, *supra* note 10, at 17-18 n.44 (noting that 47 states also have constitutional clauses similar or identical to U.S. Constitution's Confrontation Clause, including Alabama (ALA. CONST. art. I, § 6), Connecticut

hearsay rule,³⁵ is designed to protect the right of cross-examination.³⁶ The Confrontation Clause increases the likelihood that an adverse witness is making a truthful accusation by requiring the witness to make the accusation in the presence of the defendant.³⁷ The clause also promotes truthfulness by forcing the witness to make accusations under oath.³⁸

The Supreme Court, however, has indicated that the admission of hearsay evidence does not automatically violate the defendant's right to confront adverse witnesses.³⁹ For example, in *Dutton v. Evans*,⁴⁰ the Court allowed a co-conspirator's spontaneous out-of-court

(CONN. CONST. art. I, § 10), Georgia (GA. CONST. art. I, § 1), Iowa (IOWA CONST. art. I, § 10), Maine (ME. CONST. art. I, § 6), New Jersey (N.J. CONST. art. I, ¶ 10), Oklahoma (OKLA. CONST. art. II, § 20), Rhode Island (R.I. CONST. art. I, § 10), South Carolina (S.C. CONST. art. I, § 18), Texas (TEX. CONST. art. I, § 10), Virginia (VA. CONST. art. I, § 8), and Wyoming (WYO. CONST. art. I, § 10)); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (making right to confront witnesses applicable to states through Fourteenth Amendment).

35. See *Idaho v. Wright*, 497 U.S. 805, 814 (1990) (recognizing common goal of Confrontation Clause and hearsay rule but noting that Confrontation Clause bars some evidence that is admissible hearsay); *California v. Green*, 399 U.S. 149, 155 (1970) (stating that values treated under hearsay rule and Confrontation Clause are similar but not completely overlapping); see also *United States v. Thevis*, 665 F.2d 616, 632 (5th Cir.) (stating that both Confrontation Clause and hearsay rule seek testing of evidence through personal confrontation), *cert. denied*, 459 U.S. 825 (1982). Both *Green*, 399 U.S. at 155, and *Wright*, 497 U.S. at 814, assert, however, that the Confrontation Clause is not merely a codification of the hearsay rule. But see Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 558 (1992) (describing emerging congruence of Confrontation Clause and hearsay rules); Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521, 525 (1992) (stating that Supreme Court has permitted showing of reliable hearsay to substitute for right to cross-examine).

36. See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (emphasizing that primary interest secured by Confrontation Clause is right of examination); *Davis v. Alaska*, 415 U.S. 308, 315 (recognizing cross-examination as essence of right); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (mentioning that underlying rationale for constitutional confrontation is to give criminal defendant opportunity to cross-examine adverse witnesses); cf. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (noting that confrontation rights allow accused to test adverse witness' demeanor and credibility).

37. See *Roberts*, 448 U.S. at 63 (discussing qualities of "face to face" confrontation that promote trustworthiness); *Green*, 399 U.S. at 157 (discussing value of right to literal confrontation of opposing witnesses); see also 4 WEINSTEIN, *supra* note 25, at ¶¶ 800-11 to 800-12 ("The requirement of personal presence . . . undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial.").

38. See *Green*, 399 U.S. at 158 (stating that requiring witness to make accusation under oath is helpful in "impressing [the witness] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury"); *Wright v. Tatham*, 7 Ad. & El. 313 (Ex. Ch. 1837) (rejecting evidence that is not subject to proof "under the sanction of an oath").

39. See, e.g., *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970) (holding that co-conspirator's spontaneous statements against penal interest met hearsay exception, thus admission of statements did not violate Confrontation Clause); *Mattox*, 156 U.S. at 242-43 (finding that admission of dying declarations under exception to hearsay rule does not violate right of confrontation); cf. *United States v. West*, 574 F.2d 1131, 1137 (4th Cir. 1978) (stating that Supreme Court has never implied that cross-examination is only means to qualify prior recorded testimony for admission under Confrontation Clause).

40. 400 U.S. 74 (1970).

statements that were against his penal interest to bypass the protection of the Confrontation Clause because they fell within an exception to the hearsay rule.⁴¹ Similarly, in *Mattox v. United States*,⁴² the Court held that another hearsay exception, the dying declaration exception, did not violate a defendant's confrontation rights.⁴³ In fact, any hearsay evidence that falls within a firmly rooted hearsay exception⁴⁴ will satisfy the requirements of the Confrontation Clause.⁴⁵ Additionally, hearsay evidence that falls within a hearsay exception that is not firmly rooted will satisfy the Confrontation Clause if it has particularized guarantees of trustworthiness.⁴⁶ The constitutional right to cross-examine an opposing witness, therefore,

41. *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970) (noting that reliability of co-conspirator's statements was strengthened because they expressed no assertion about past fact, and were corroborated by other testimony).

42. 156 U.S. 237 (1895).

43. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

44. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (defining firmly rooted hearsay exceptions as those that "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection'" (quoting *Mattox*, 156 U.S. at 244)).

45. *White v. Illinois*, 112 S. Ct. 736, 743 (1992) (holding that Confrontation Clause is satisfied where proffered hearsay is of sufficient reliability to come within firmly rooted exception to hearsay rule); *Idaho v. Wright*, 497 U.S. 805, 817 (1990) (agreeing that judicial and legislative assessments have found indicia of reliability in firmly rooted exceptions sufficient to satisfy Confrontation Clause); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (asserting that co-conspirator exception to hearsay rule is firmly rooted hearsay exception and that no independent inquiries into reliability of evidence are required); *Roberts*, 448 U.S. at 66 (affirming that firmly rooted hearsay exceptions carry indicia of reliability that satisfy requirements of Confrontation Clause); *Mattox*, 156 U.S. at 242-43 (recognizing that dying declarations are deeply rooted hearsay exception and are admissible notwithstanding Confrontation Clause).

46. See *Wright*, 497 U.S. at 816 (discussing ways in which hearsay statements can be sufficiently reliable to merit admission); *Bourjaily*, 483 U.S. at 183-84 (mentioning that independent inquiry into reliability is necessary to admit statements not within firmly rooted exception); *Roberts*, 448 U.S. at 66 (holding that reliable hearsay is admissible without use of firmly rooted exception).

Federal Rules of Evidence 803(24) and 804(b)(5) provide for the admission of reliable hearsay that does not meet a firmly rooted exception. FED. R. EVID. 803(24), 804(b)(5). The texts of the two rules are identical, but the latter rule is specifically applicable to declarations of absent witnesses:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(5) Other exceptions. 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 purpose of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 804(b)(5). This rule, sometimes referred to as a "catchall" hearsay exception, has received criticism for allowing the admission of untrustworthy statements. See generally Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 LOY. L.A. L. REV. 925 (1992) (reviewing impact of rule 804(b)(5)).

does not require complete exclusion of all out-of-court statements made by an absent witness.

C. Waiving the Right of Confrontation and Objections to Hearsay Evidence

Despite the protection that the Confrontation Clause provides for defendants, courts can find that the defendant waived his or her right to cross-examine an opposing witness at trial.⁴⁷ A defendant can make such a waiver voluntarily.⁴⁸ To do so, he or she ordinarily would have to make "an intentional relinquishment of a known right or privilege."⁴⁹ A defendant waives his or her confrontation rights, for example, when the defendant pleads guilty.⁵⁰

An implied waiver of confrontation rights is also possible. In *Taylor v. United States*,⁵¹ the Supreme Court ruled that a defendant who is voluntarily absent from trial indirectly waives the right to confront witnesses.⁵² Similarly, in *Illinois v. Allen*,⁵³ the Court held that a defendant who is removed from the courtroom for engaging in "speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial" effectively waives the right of confrontation.⁵⁴ Whatever the reason for the waiver, the Supreme Court has stressed that because confrontation is a right personal to the accused, the accused must

47. See, e.g., *Taylor v. United States*, 414 U.S. 17, 17-18 (1973) (refusing to recognize defense argument that defendant's voluntary absence from trial violated his Sixth Amendment right to confront witnesses testifying during his absence); *Illinois v. Allen*, 397 U.S. 337, 346-47 (1970) (holding that right of confrontation is not absolute).

48. See, e.g., *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (noting that in order to establish effective waiver of confrontation rights, prosecution must establish that accused intentionally relinquished his or her right); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (recognizing that defendants can voluntarily relinquish confrontation rights); see also 5 WIGMORE, *supra* note 24, § 1398, at 142-43 (discussing ability of accused to waive right of confrontation).

49. *Johnson*, 304 U.S. at 464 (recognizing that courts "indulge every reasonable presumption against [a constitutional] waiver") (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

50. See *Boykin v. Alabama*, 395 U.S. 238, 240-41 (1969) (noting that to act as waiver of confrontation rights, accused must "intelligently and knowingly plead guilty"); see also *United States v. Stephens*, 609 F.2d 230, 282 (5th Cir. 1980) (affirming that stipulating to evidence expressly waives right to confront witness who brings it); *United States v. Martin*, 489 F.2d 674, 678 (9th Cir. 1973) (finding that attorneys' stipulation to evidence on defendant's behalf was valid waiver of defendant's confrontation rights), *cert. denied*, 417 U.S. 948 (1974).

51. 414 U.S. 17 (1973).

52. *Taylor v. United States*, 414 U.S. 17, 20 (1973) (finding that petitioner, who had duty to appear and who attended opening session of trial, was unlikely to harbor any doubts about his right to be present at trial).

53. 397 U.S. 337 (1970).

54. *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970).

personally waive the right.⁵⁵

The Supreme Court has held that a defendant who procures a witness' unavailability at trial waives his or her confrontation rights.⁵⁶ The Court has viewed such a procurement of absenteeism as a much more direct kind of waiver than other instances of misconduct because it involves the witness' actual ability to appear for confrontation.⁵⁷ Compared to other kinds of confrontation waivers, which involve a defendant's relinquishment only of the right to be present while an attorney cross-examines the opposing witness,⁵⁸ a procurement waiver is unique in that the witness is not available to answer the attorney's questions.⁵⁹ Several courts have held that a rule preventing defendants from asserting their right to confront witnesses after they personally have secured the witness' unavailability is necessary to

55. See *Faretta v. California*, 422 U.S. 806, 819-20 (1975) (emphasizing that counsel is present only to assist accused in his or her defense and cannot waive constitutional rights on accused's behalf). But see *United States v. Martin*, 489 F.2d 674, 678 (9th Cir. 1973) (finding attorney's stipulation to evidence on defendant's behalf was valid waiver of defendant's confrontation right where defendant was present when agreement was reached but did not make his reservations known at that time), *cert. denied*, 417 U.S. 948 (1974).

56. *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878). More recent federal and state court opinions have perpetuated the rule that a defendant waives confrontation rights when he or she procures a witness' absence. See, e.g., *Steele v. Taylor*, 684 F.2d 1193, 1203-04 (6th Cir. 1982) (finding that defendant's use of force, threats, persuasion, control, and direction regarding witness' testimony constituted instances of waiver-inducing wrongful conduct), *cert. denied sub nom. Kilbane v. Marshall*, 460 U.S. 1053 (1983); *United States v. Thevis*, 665 F.2d 616, 633 (5th Cir.) (finding that defendant waived confrontation rights when he murdered witness prior to trial), *cert. denied*, 459 U.S. 825 (1982); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979) (finding waiver of confrontation rights where defendant's intimidation resulted in witness' absence from trial), *cert. denied*, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976) (finding that defendant's threats, which resulted in witness' absence from trial, constituted waiver of confrontation rights), *cert. denied*, 431 U.S. 914 (1977); *State v. Gettings*, 769 P.2d 25, 29 (Kan. 1989) (finding that defendant waived confrontation rights by being involved in pretrial murder of witness); *State v. Olson*, 291 N.W.2d 203, 207 (Minn. 1980) (finding waiver where witness feared retribution and therefore did not testify after receiving threats from defendant).

57. In *Reynolds*, the Court stated:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the defendant's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Reynolds, 98 U.S. at 158.

58. See *Carlson*, 547 F.2d at 1358 n.11 (noting that in *Taylor v. United States*, 414 U.S. 17 (1973), and *Illinois v. Allen*, 397 U.S. 337 (1970), defendants lost right to personally confront witnesses but maintained right to confront witnesses through counsel even after waiver of confrontation rights).

59. *Id.*

sustain "the very system of justice the confrontation clause was designed to protect."⁶⁰ The resulting court-imposed waiver is rooted in the common-law principle that one should not benefit from his or her own wrongdoing.⁶¹ Under the same rationale, courts have found that a confrontation waiver is *a fortiori* a waiver of the defendant's right to assert hearsay objections.⁶²

The Fifth Circuit found the existence of such waivers in *United States v. Thevis*.⁶³ In *Thevis*, the defendant, while in prison awaiting trial, confessed to murdering an adverse witness a few days before the witness was to enter a witness-protection program.⁶⁴ The court held that, through his actions, the defendant waived his right to confront the witness along with his hearsay objections, and admitted the witness' prior grand jury testimony.⁶⁵

Similarly, in *United States v. Mastrangelo*,⁶⁶ the defendant argued on appeal that admission of prior grand jury testimony given by an unavailable witness was inadmissible hearsay and violated his confrontation right.⁶⁷ The defendant was appealing the lower court's decision to admit prior grand jury testimony given by an unavailable witness based on the court's belief that the defendant "either directly arranged for the killing of the witness or was advised of the possible

60. See *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982) (affirming that defendant's involvement in murder of witness would preclude assertion of confrontation rights); see also *Balano*, 618 F.2d at 629 (stating that permitting defendant to benefit by procuring witness' absence would contravene purpose of Confrontation Clause, public policy, and common sense); *Carlson*, 547 F.2d at 1359 (noting that Sixth Amendment confrontation right is not absolute in situations of defendant misconduct); cf. *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) (discussing law's preference for live testimony over hearsay, and emphasizing that defendant cannot take advantage of that preference by making preferred condition impossible).

61. *Balano*, 618 F.2d at 629 (establishing roots of procurement waiver in common-law doctrine); 5 WIGMORE, *supra* note 24, § 1405(4) (relating long-standing interest in preventing defendants from judicially profiting through wrongful acts); see Kenneth Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 139 (1972) (asserting that defendant who is responsible for murdering hostile witness should be prevented from using right of confrontation as means of blocking that witness' statements in court).

62. See *supra* note 16 (listing cases that have abrogated defendant's ability to raise hearsay objection after finding waiver of confrontation rights).

63. 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

64. *United States v. Thevis*, 665 F.2d 616, 624 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982). The defendant originally was charged with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (1988). *Thevis*, 665 F.2d at 621.

65. *Thevis*, 665 F.2d at 632-33.

66. 693 F.2d 269 (2d Cir. 1982).

67. *United States v. Mastrangelo*, 693 F.2d 269, 270 (2d Cir. 1982) (indicating that defendant was appealing his conviction on various drug charges). The witness in this case was chased, shot, and killed by two men on the street while on his way to the defendant's trial. *Id.* at 271 (relating appellate court's prior decision that defendant was only possible beneficiary of witness' murder).

killing of the witness and acquiesced."⁶⁸ The Second Circuit agreed with the trial court, stating that if the trial court's impression was correct, the defendant had waived his admissibility objections.⁶⁹ The court then remanded the case for a full evidentiary hearing on the issue of the defendant's involvement in the witness' death.⁷⁰

In *State v. Corrigan*,⁷¹ a defendant repeatedly threatened an opposing witness, who was also his wife, until she repudiated sworn statements she had made accusing the defendant of arson.⁷² The Kansas Court of Appeals reviewed evidence that the defendant first urged the witness to remain silent, then threatened to take the witness' newborn baby away and have the witness committed to a mental institution if she testified against him.⁷³ Finding the evidence compelling, the court ruled that the defendant wrongfully prevented the witness from testifying against him and therefore could not object to admission of her hearsay statements.⁷⁴

The right to raise confrontation and hearsay objections are important truthfinding mechanisms for courts to apply in the interest of justice.⁷⁵ Nevertheless, both mechanisms clearly may yield to stronger state interests and public policy considerations.⁷⁶ The Supreme Court has asserted that a defendant can waive these rights through misconduct as well as by consent.⁷⁷ A waiver by misconduct

68. *Id.*

69. *Id.* at 273-74 (stating that knowledge of plan to kill witness is sufficient to constitute waiver of confrontation rights).

70. *Id.* at 272. At Mastrangelo's second trial for drug trafficking, the court did not reach the defendant-procurement issue because it found that the prior testimony was reliable enough to overcome the defendant's objections under an exception to the hearsay rule. *United States v. Mastrangelo*, 533 F. Supp. 389, 390-91 (E.D.N.Y. 1982) (noting that trial court perceived statements to be surrounded by particularized guarantees of trustworthiness and admitted them under residual hearsay exception provided in rule 804(b)(5)).

71. 691 P.2d 1311 (Kan. Ct. App. 1984).

72. *State v. Corrigan*, 691 P.2d 1311, 1315-16 (Kan. Ct. App. 1984) (addressing admissibility of statements witness made to fire investigators).

73. *See id.* (mentioning that defendant informed witness that if she testified, she and her child "would have to survive on welfare").

74. *Id.* at 1316.

75. *See* 5 WIGMORE, *supra* note 24, at § 1395 (discussing common-law sanctioning of defendant's confrontation right and noting that main purposes of right are to provide opportunity for cross-examination and to allow judge and jury to view witness' demeanor while testifying).

76. *See supra* notes 51-75 and accompanying text (describing conditions under which courts have overruled confrontation rights and hearsay objections).

77. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 343 (1970) (stating that interfering with trial through wrongful conduct will abrogate accused's confrontation right); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (holding that in certain situations, defendant's wrongful conduct can constitute confrontation waiver), *overruled on other grounds by Malloy v. Hogan*, 370 U.S. 1 (1969); *Diaz v. United States*, 223 U.S. 442, 458 (1912) (asserting that law does not allow persons to profit from their own misconduct); *Reynolds v. United States*, 98 U.S. 145, 158 (1878) (expressing logic in revoking right of confrontation where defendant misconduct is involved),

exists if the prosecution can show that a defendant procured a prosecution witness' unavailability through complicity in threats or murder.⁷⁸

II. PROVING PROCUREMENT

For a court to find a waiver of the right to raise hearsay objections and the Sixth Amendment right to confront adverse witnesses, the government first must prove that the defendant did procure the witness' absence.⁷⁹ Jurisdictions have split, however, on the evidentiary standard required to prove that the defendant was at fault.⁸⁰

overruled on other grounds by Thomas v. Review Bd. of Ind. Employment Div., 450 U.S. 707 (1981); *see also* Steele v. Taylor, 684 F.2d 1193, 1200-01 (6th Cir. 1982) (identifying forms of misconduct that constitute confrontation waiver), *cert. denied sub nom.* Kilbane v. Marshall, 460 U.S. 1053 (1983).

78. *See* United States v. Balano, 618 F.2d 624, 629-30 (10th Cir. 1979) (holding that defendant's role in intimidation of witness was sufficient to constitute waiver of confrontation rights); State v. Corrigan, 691 P.2d 1311, 1316 (Kan. Ct. App. 1984) (finding defendant's attempts to intimidate witness constituted procurement and prohibited defendant from raising confrontation objections).

79. *See* United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (stating that burden of proof in procurement-waiver cases is clearly on government); United States v. Thevis, 665 F.2d 616, 633 n.17 (5th Cir.) (listing elements government must show to prove procurement waiver), *cert. denied*, 459 U.S. 825 (1982); Steele, 684 F.2d at 1202 (stating that proponent of hearsay must prove procurement); Holtzman v. Hellenbrand, 460 N.Y.S.2d 591, 597 (App. Div. 1983) (delegating responsibility of proving procurement to prosecution).

In at least one case, the action of the defendant was not the focus of the government's burden. In *State v. Olson*, the Minnesota Supreme Court imputed a convicted felon's intimidation of a witness, which caused the witness' absence from another defendant's trial, to the defendant "insofar as he was acting as [the felon's] co-conspirator." *State v. Olson*, 291 N.W.2d 203, 208 (Minn. 1980). Accordingly, the court found that the defendant had waived his confrontation rights just as if he had procured the witness' absence directly. *Id. But cf.* Motes v. United States, 178 U.S. 458, 474 (1900) (holding that waiver of confrontation rights was not applicable to defendants where reason for witness' unavailability arose from federal authorities' negligence); State v. Lomax, 608 P.2d 959, 967 (Kan. 1980) (rejecting waiver theory where threats did not come from defendant); State v. Hansen, 312 N.W.2d 96, 105 (Minn. 1981) (stating that "[t]o find a waiver based on a witness' reluctance to testify, absent any threats attributable to defendant," would destroy principles of Sixth Amendment) (emphasis added); Regina v. Scaife, 117 Eng. Rep. 1271, 1273 (1851) (ruling unanimously that government could use absent witness' statements only against defendant who caused absence, not against codefendant who took no part in misconduct and remanding for jury to consider witness' evidence only against procuring defendant).

Surprisingly, very few courts have held that the government has the burden of proving that the procuring defendant was acting specifically to prevent the witness from testifying. *See Thevis*, 665 F.2d at 633 n.17 (holding that government must show defendant caused witness' unavailability for purpose of preventing that witness from testifying at trial).

80. *Compare Thevis*, 665 F.2d at 631 (requiring clear and convincing evidence of defendant's involvement in causing unavailability of witness) and *Hellenbrand*, 460 N.Y.S.2d at 597 (requiring that prosecution prove by clear and convincing evidence that defendant procured witness' absence) with *Balano*, 618 F.2d at 629 (holding that courts must find by preponderance of evidence that defendant's conduct caused witness to be unavailable) and *State v. Sheppard*, 484 A.2d 1330, 1348 (N.J. Super. Ct. Law Div. 1984) (allowing preponderance of evidence standard in cases of waiver by misconduct).

Most courts choose⁸¹ either the "preponderance of the evidence" standard or the stricter "clear and convincing evidence" standard for proving procurement.⁸² Preliminary suppression hearings are often the prosecutor's forum for proving procurement.⁸³ An evaluation of Supreme Court opinions regarding preliminary suppression hearings indicates that the Court has required clear and convincing evidence in some cases⁸⁴ and has accepted proof by a preponderance of the evidence⁸⁵ in others. Thus, the Court has not provided the lower courts with a uniform standard of proof to apply in defendant procurement-waiver cases.⁸⁶

Opinions advocating use of the clear and convincing evidence standard for the purpose of proving procurement maintain that because the reliability of the absent witness' out-of-court statements is uncertain,⁸⁷ the defendant's right to confront adverse witnesses is crucial in order to ferret-out unreliable statements.⁸⁸ The right to confront adverse witnesses through cross-examination is "so integral

81. Both the Federal Rules of Evidence and the common law provide judges with the discretion to make determinations regarding the admissibility of evidence in preliminary hearings. See FED. R. EVID. 104(a) (stating that judges are "not bound by the rules of evidence" when ruling on admissibility of evidence in preliminary hearings); *Bourjaily v. United States*, 483 U.S. 171, 181 (1987) (noting that judge has discretion to make admissibility determinations); *United States v. Matlock*, 415 U.S. 164, 175 (1971) (stating that judge should receive evidence and assign weight based on judgment and experience); *Steele*, 684 F.2d at 1202 (describing common-law procedure of granting trial judges discretion in making preliminary evidentiary findings and reflection of this procedure in federal rules).

82. See *supra* note 80 (listing examples of courts that have chosen between standards); see also *Steele*, 684 F.2d at 1202 (stating that federal courts have imposed less stringent standards, usually choosing between preponderance and clear and convincing standards, for proving procurement).

83. See *Mastrangelo*, 693 F.2d at 273 (agreeing with defendant's assessment of need for evidentiary hearing on issue of waived confrontation rights and holding that government must bear burden of proof in proving procurement); *Balano*, 618 F.2d at 629 (discussing government's need to show through hearing defendant's alleged procurement); *State v. Gettings*, 769 P.2d 25, 30-31 (Kan. 1989) (stating pretrial hearing steps taken by government to admit taped conversation to prove defendant procurement); cf. *Hellenbrand*, 460 N.Y.S.2d at 597 (listing procedural steps for procurement-waiver cases).

84. See, e.g., *United States v. Wade*, 388 U.S. 218, 240 (1967) (requiring clear and convincing evidence standard where reliability of evidence is in question).

85. See, e.g., *United States v. Matlock*, 415 U.S. 164, 177-78 (1974) (allowing preponderance of evidence standard where constitutionality of search is in question); *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (accepting preponderance of evidence standard where voluntariness of defendant's confession is in question).

86. See *Mastrangelo*, 693 F.2d at 273 (discussing varied burden of proof standards in Supreme Court precedent).

87. See, e.g., *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.) (justifying use of clear and convincing evidence test by stressing its truth-seeking quality), *cert. denied*, 459 U.S. 825 (1982); *Hellenbrand*, 460 N.Y.S.2d at 597 n.2 (basing choice of clear and convincing evidence test on state legislature's aversion to hearsay evidence).

88. See *Thevis*, 665 F.2d at 631 (basing choice of clear and convincing evidence standard on Supreme Court's emphasis on protection of confrontation rights); see also *supra* note 36 (relating importance that Supreme Court places on right to cross-examine).

to the accuracy of the fact-finding process and the search for truth"⁸⁹ that a waiver of the right to cross-examine should be found only after the government has met a rigid burden of proof.⁹⁰

The rationale supporting the use of the less stringent preponderance of the evidence standard⁹¹ stresses the role of the defendant's own misconduct in creating the problem.⁹² The courts that employ this standard recognize that applying a higher standard could encourage defendants to silence adverse witnesses because the chances of benefiting from such an act improve as the chances that the prosecution will prove the act deteriorate.⁹³ These courts maintain that the prosecution's burden does not need to be severe because the prosecution's claim of a procurement waiver by a defendant often contains "tangible support,"⁹⁴ such as the untimely murder of a key witness.⁹⁵ Furthermore, the federal rule of evidence that addresses admissibility determinations regarding preliminary factual issues⁹⁶ only requires the court to apply the preponderance

89. *Thevis*, 665 F.2d at 631.

90. See *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (noting that absence of confrontation casts doubt on integrity of fact-finding process during trial); cf. 5 WIGMORE, *supra* note 24, § 1367 (describing cross-examination as "the greatest legal engine ever invented for the discovery of the truth").

91. See *Bourjaily v. United States*, 483 U.S. 171, 175 (stating that preponderance standard means that courts must find it more probable than not that "technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration" before admitting evidence). In *Steele v. Taylor*, the court described the use of the preponderance of the evidence standard in procurement-waiver cases as follows:

[T]he proponent of the hearsay statement has the burden of persuasion of showing procurement by a preponderance, but once evidence is produced that demonstrates good reason to believe the defendant has interfered with the witness, adverse inferences may be drawn from the failure of the defense to offer credible evidence to the contrary.

Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied sub nom. Kilbane v. Marshall*, 460 U.S. 1053 (1983).

92. See, e.g., *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982) (refusing to impose on government more than its usual burden of proof by preponderance of evidence where waiver by defendant's own misconduct is present); *State v. Sheppard*, 484 A.2d 1330, 1348 (N.J. Super. Ct. Law Div. 1984) (noting that issue of waiver by misconduct is distinct from right of confrontation and supports use of preponderance of evidence as standard for proving procurement); *State v. Frambs*, 460 N.W.2d 811, 814 (Wis. Ct. App. 1990) (advancing preponderance of evidence standard, in light of *Mastrangelo* and *Balano* decisions, as correct standard to apply toward proving confrontation waiver by misconduct).

93. See *Mastrangelo*, 693 F.2d at 273 (asserting that little reason exists to "encourage behavior which strikes at the heart of the system of justice itself"); *Steele*, 684 F.2d at 1202 (stating that purpose of waiver rule is to remove strong incentives to silence opposing witnesses).

94. *Mastrangelo*, 693 F.2d at 273.

95. *Id.* According to the court in *Mastrangelo*, the use by many courts of a less rigid burden reflects the fact that the law is not particularly adverse to government claims of confrontation waiver and that such claims are usually trustworthy. *Id.* (citing CHARLES T. MCCORMICK, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 340 (2d ed. 1972)).

96. FED. R. EVID. 104(a) (stating in relevant part that courts are not bound by Federal Rules of Evidence in determining admissibility of evidence in preliminary proceedings).

of the evidence standard.⁹⁷ The Supreme Court has stated that these admissibility determinations with respect to the finding of preliminary facts have been reliable without the use of a higher standard.⁹⁸ Accordingly, the preponderance of the evidence standard is the more appropriate test for use in procurement-waiver cases.

Although some courts have entertained the thought of using other evidentiary standards in these cases, such as a *prima facie* standard,⁹⁹ a floating standard to be determined on a case-by-case basis,¹⁰⁰ or a "reasonable doubt" standard,¹⁰¹ adoption of these standards has not followed. One might argue that the government should have to prove procurement beyond a reasonable doubt because a court would require such proof for a jury to return a guilty verdict on a federal charge of witness tampering.¹⁰² This argument, however, fails to note the distinction between procurement as a substantive crime and procurement as an evidentiary principle.¹⁰³ Procurement in the context of substantive criminal law is the crime of witness tampering and is subject to all the provisions and limitations statutorily imposed

97. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (stating that preponderance of evidence standard is traditional requirement "regarding admissibility determinations that hinge on preliminary factual questions"); see also *Steele*, 684 F.2d at 1203 (noting that preliminary admissibility questions under co-conspirator exception to hearsay rule, identical to those under Confrontation Clause, involve use of preponderance of evidence standard).

98. *Bourjaily*, 483 U.S. at 175-76. In *Bourjaily*, the Court noted that parties offering evidence regarding disputed facts relevant to Federal Rule of Evidence 801(d)(2)(E) (i.e., co-conspirator admissions) need only meet a preponderance standard. *Id.* at 176.

99. See, e.g., *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979) (stating that *prima facie* standard is too low and would "emasculate the Confrontation Clause"), *cert. denied*, 449 U.S. 840 (1980).

100. See *State v. Corrigan*, 691 P.2d 1311, 1315 (Kan. Ct. App. 1984) (declining to choose standard for finding procurements because evidence met both preponderance and clear and convincing tests); *State v. Peirce*, 364 N.W.2d 801, 807 (Minn. 1985) (rejecting use of specific standard and instead accepting proof of procurement based on government's performance in that particular case).

101. See *Balano*, 618 F.2d at 629 (depicting reasonable doubt standard as capable of preventing successful proof of waiver despite outrageous defendant misconduct).

102. See 18 U.S.C. § 1512 (1988 & Supp. IV 1992) (codifying crime of witness tampering).

103. Cf. *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979) (drawing substantive evidentiary distinction between crime of conspiracy and co-conspirator hearsay exception). The court in *Gil* held that where a defendant is acquitted on a conspiracy charge, his or her statements can still meet the co-conspirator exception to the hearsay rule even though involvement in a conspiracy is an element of the exception. *Id.*; see also *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976) (distinguishing evidentiary co-conspirator rule and substantive crime of conspiracy).

No court addressing the evidentiary issue of procurement waiver has incorporated a witness-tampering analysis into its discussion. Cf. *United States v. Aguiar*, 975 F.2d 45, 48 (2d Cir. 1992) (determining validity of witness-tampering conviction only after completion of procurement-waiver holding).

by Congress.¹⁰⁴ Procurement in the context of a "procurement waiver," however, is merely an element of a rule of evidence designed to combat defendant misconduct based on the concept that the law should not allow litigants to benefit from their own wrongdoing.¹⁰⁵ Although the allegations for each inevitably will be similar, the adjudication of a substantive witness-tampering charge is distinct from the establishment of a procurement waiver.¹⁰⁶

The selection of an evidentiary standard for proving procurement thus involves balancing the defendant's confrontation rights against the interest of law enforcement.¹⁰⁷ The balance necessarily falls away from a heavy burden because such a burden would encourage defendants to take advantage of the Confrontation Clause by forcing adverse witnesses to be unavailable for trial. Accordingly, the law should require the accused to relinquish his or her confrontation right pursuant to a showing by a preponderance of the evidence that the accused procured the unavailability of a witness.

III. WHICH STATEMENTS BECOME ADMISSIBLE?

Whatever the prosecution's burden of persuasion for proving a waiver may be, and assuming that the prosecutor meets it, the admissibility of the absent witness' out-of-court statements may still be at issue. Traditionally, the only type of hearsay statements that are admissible following a finding of procurement have been sworn declarations that the witness made at previous judicial proceedings.¹⁰⁸ Consequently, a prosecutor, whose key witness fell silent before attending such a proceeding, has little precedent under which

104. See 18 U.S.C. § 1512 (listing elements of witness-tampering charge, including criminal intent and unlawful action).

105. See *supra* notes 60-61 and accompanying text (describing rationale of procurement-waiver rule).

106. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (differentiating between admissibility determinations and substantive issues). The Court in *Bourjaily* stated:

We have traditionally required that [preliminary factual issues regarding admissibility determinations] be established by a preponderance of proof. Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations. The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues

Id.

107. Cf. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (stating that government interest in law enforcement "may warrant dispensing with confrontation at trial"). See generally CHARLES T. MCCORMICK, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE §§ 252-253 (4th ed. 1992) (outlining balancing tests used by Supreme Court with respect to confrontation right).

108. See *supra* note 17 (citing cases in which courts have admitted only prior testimony in procurement-waiver cases).

to admit the witness' out-of-court statements.

A. *The Focus on Prior Sworn Testimony*

Because courts have held that a proven waiver of confrontation rights is *a fortiori* a waiver of the right to raise hearsay objections regarding the unavailable witness' statements,¹⁰⁹ courts have also dispensed with the reliability requirements that they typically demand of hearsay statements absent a confrontation waiver.¹¹⁰ The parameters of the waiver are more limited than they first appear, however, because most cases applying the "*a fortiori*" rule exclusively concern the absent witness' prior testimony.¹¹¹

The focus on sworn statements, such as those made in a grand jury proceeding,¹¹² correlates to the reliability inquiry that some courts have implemented toward the absent witness' statements to counterbalance the defendant's waiver of confrontation rights.¹¹³ Courts typically require either a traditional hearsay exception¹¹⁴ or other

109. See, e.g., *United States v. Mastrangelo*, 693 F.2d 269, 272 (2d Cir. 1982); *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *United States v. Balano*, 618 F.2d 624, 626 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); *State v. Corrigan*, 691 P.2d 1311, 1314 (Kan. Ct. App. 1984).

110. See, e.g., *Mastrangelo*, 693 F.2d at 272 (indicating that trustworthiness test of Federal Rules of Evidence does not apply where confrontation waiver is established); *Balano*, 618 F.2d at 626 (implying that reliability determination required by Federal Rules of Evidence is not necessary when valid waiver exists); *State v. Gettings*, 769 P.2d 25, 30 (Kan. 1989) (noting that strict reliability standards are not required where defendant has waived confrontation right); *Peirce*, 364 N.W.2d 801, 807 (Minn. 1985) (refusing to decide on reliability issue due to finding of procurement).

111. See *supra* note 17 and accompanying text (listing cases that have applied waiver rule only to admission of prior testimony).

112. In *United States v. Balano*, the Tenth Circuit questioned the trustworthiness of grand jury testimony: "In characterizing grand jury testimony for Confrontation Clause purposes, we should recognize that grand juries have largely lost their function as protectors of individual rights and have become agents of the prosecution." *Balano*, 618 F.2d at 627 n.5 (citing MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 99-102 (1977)); see also *United States v. Guinan*, 836 F.2d 350, 357-58 (7th Cir. 1988) (allowing testimony that IRS agent had written and estranged wife read verbatim during husband's grand jury hearing); *Berger*, *supra* note 35, at 610 (noting that prosecutors elicit and often prepare grand jury testimony).

113. See *Thevis*, 665 F.2d at 633 n.17 (stating that despite government's proof of procurement, statements should still be scrutinized by court for reliability before admission); *Steele v. Taylor*, 684 F.2d 1193, 1204 (6th Cir. 1982) (stating that although prosecution had established procurement, statements in question had additional earmarks of reliability because they were signed and made voluntarily), *cert. denied sub nom. Kilbane v. Marshall*, 460 U.S. 1053 (1983); *State v. Gettings*, 769 P.2d 25, 29-30 (Kan. 1989) (conducting reliability discussion after finding of waiver); *Peirce*, 364 N.W.2d at 807 (mentioning that absent witness' prior testimony was not subject to cross-examination, but was consistent with prior statements); *State v. Sheppard*, 484 A.2d 1330, 1348-49 (N.J. Super. Ct. Law Div. 1984) (relying on truthful nature of videotaped statements).

114. See, e.g., *Black v. Woods*, 651 F.2d 528, 531 (8th Cir.) (mentioning that unavailable witness' statement previously met "admissions against penal interest" hearsay exception), *cert. denied*, 454 U.S. 847 (1981); *Gettings*, 769 P.2d at 30 (asserting that absent witness' statement

indicia of reliability,¹¹⁵ as required by the Supreme Court regarding hearsay from a generally unavailable declarant,¹¹⁶ in order to justify evidentiary admissions following findings of procurement. The infrequency with which courts find a procurement waiver and admit statements other than prior sworn testimony, together with the additional reliability findings that most courts require to admit hearsay evidence,¹¹⁷ erects a barrier against the admission of any unsworn, ex parte, or extrajudicial statements,¹¹⁸ regardless of the existence of a confrontation waiver.

When a court places emphasis on reliability considerations in a procurement-waiver case, however, the court fails to take the defendant's subversive misconduct sufficiently into account. As the court in *Thevis* stated, "when confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived."¹¹⁹ Extending that logic, if hearsay objections truly were *a fortiori* waived, a procuring defendant essentially has removed his or her own protection against unreliable statements.¹²⁰ Of course, allowing a jury to hear a statement that is both totally uncorroborated and unreliable on its face would bring the integrity of the judicial process into question.¹²¹

Nevertheless, to require more than minimal indicia of reliability

qualified as "statement against penal interest" hearsay exception). See also FED. R. EVID. 804(b)(3) (articulating "statements against interest" exception to hearsay rule).

115. See, e.g., *Rice v. Marshall*, 709 F.2d 1100, 1104 (6th Cir. 1983) (explaining in indicia of reliability analysis that absent witness' statement was signed and voluntarily made and therefore admissible in procurement-waiver case), *cert. denied*, 465 U.S. 1034 (1984); *Steele*, 684 F.2d at 1204 (holding that absent witness' statements pass "indicia of reliability" test because they were written statements that witness signed and made voluntarily); *Peirce*, 364 N.W.2d at 807 (noting reliability of absent witness' statements by mentioning their consistency with witness' prior statements); *Sheppard*, 484 A.2d at 1348 (relying heavily, for admission purposes, on reliable nature of videotaped statement).

116. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (requiring that statements admitted over hearsay objections have "indicia of reliability").

117. General concern for the reliability of hearsay evidence suggests that such findings are indeed necessary. See *Berger*, *supra* note 35, at 613 (opining that curtailment of confrontation contravenes Sixth Amendment by preventing prosecution's effect on witness' hearsay evidence from being sufficiently examined by jury); *Epps*, *supra* note 10, at 16-17 (criticizing admission of hearsay without concern for reliability); *Graham*, *supra* note 8, at 281 (relating need for proceedings where only trustworthy out-of-court statements are admitted after procurement waiver). But see *supra* note 110 (citing cases that concluded reliability determinations are unnecessary after procurement waiver).

118. See *State v. Hansen*, 312 N.W.2d 96, 103 (Minn. 1981) (discussing traditional belief that ex parte statements made during police questioning are inherently unreliable).

119. *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

120. But see *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) (suggesting that due process protects defendants from unavailable hearsay even after procurement).

121. See *Aguiar*, 975 F.2d at 47 (stating that facially unreliable hearsay is inadmissible because probative value does not outweigh prejudicial effect); *Thevis*, 665 F.2d at 633 n.17 (noting that admission of totally unreliable evidence may violate due process).

would effectively grant the procuring defendant a reprieve by restoring the same rights that the waiver logically precludes. Moreover, it would suggest that the defendant assumes no evidentiary risk in wrongfully disposing of a declarant of unsworn, ex parte, extrajudicial statements.¹²² Such a scheme can only strengthen incentive for criminal defendants to quickly secure the unavailability of an opposing witness before the witness improves the inherent reliability of his or her declarations.

When a defendant relinquishes the confrontation right through procurement, courts should recognize that the government's need for evidence outweighs the defendant's right to test the reliability of that evidence.¹²³ Although the scale tips in the government's favor, this balance does not leave reliability concerns unaddressed. The procuring defendant actually acknowledges the reliability of the absent witness' information when he or she endeavors to derail the witness' court appearance—an act the defendant would be less likely to commit if the witness' information is false or untrustworthy. More important, the procurement waiver, unlike most hearsay exceptions,¹²⁴ is not based on a finding of reliability. Rather, it rests on the need to prevent defendants from profiting through sabotage of the judicial system.¹²⁵ Unsworn, ex parte, and extrajudicial statements that demonstrate minimum indicia of reliability, therefore, should not be excluded from procurement-waiver cases.¹²⁶

In *Black v. Woods*¹²⁷ and *State v. Gettings*,¹²⁸ two cases involving procurement waivers, the courts did allow admission of such state-

122. See *Graham*, *supra* note 8, at 283 (stating that defendant will be less likely to jeopardize witness if he or she realizes that witness' original statements will be admissible at trial even after witness becomes unavailable to testify, declines to testify, or changes his or her testimony as result of intimidation).

123. See *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (stating that defendant's confrontation rights may be subordinated to government's interest in law enforcement); *Thevis*, 665 F.2d at 632-33 (balancing interests of defendant and government in admission of out-of-court statements in procurement-waiver case and finding that government's interest in obtaining evidence outweighed defendant's interest).

124. See *White v. Illinois*, 112 S. Ct. 736, 743 (1992) (indicating that "firmly-rooted" hearsay exceptions satisfy requirements of Confrontation Clause because they bear sufficient guarantees of reliability); *Roberts*, 448 U.S. at 66 (stating that certain hearsay exceptions are based on foundations of inherent reliability and therefore satisfy constitutional requirements).

125. See *supra* notes 60-61 and accompanying text (discussing rationale for procurement waiver).

126. But see *State v. Hansen*, 312 N.W.2d 96, 103 (Minn. 1981) (declaring traditional sentiment against use of unsworn, ex parte evidence at trial because courts consider it inherently untrustworthy).

127. 651 F.2d 528 (8th Cir.), *cert. denied*, 454 U.S. 847 (1981).

128. 769 P.2d 25 (Kan. 1989).

ments. In *Woods*, the Eighth Circuit reviewed a decision¹²⁹ to admit two accusatory statements that the defendant's accomplice made to police before refusing to testify at the murder trial.¹³⁰ The court found that the defendant had physically abused the accomplice, had threatened to kill her if she testified against him, and had already killed another potential witness.¹³¹ Accordingly, the Eighth Circuit agreed that the accomplice had a reasonable fear of testifying¹³² and subsequently affirmed the admission of her unsworn statements under the procurement-waiver theory.¹³³

In *Gettings*, the unavailable witness gave a taped statement to a police investigator that linked the defendant to incidents of burglary and arson in which the witness also was involved.¹³⁴ The witness, however, was shot and killed before the defendant's trial.¹³⁵ Pursuant to a finding that the defendant was involved in the shooting, the Supreme Court of Kansas approved admission of the unsworn statements against him.¹³⁶

Although the decisions in both *Woods* and *Gettings* hinted that procurement waiver covers admission of unsworn statements made to criminal investigators, the courts each pointed out that the statements simultaneously met a hearsay exception, specifically the exception for statements against interest.¹³⁷ The opinions thus dilute the effect

129. *State v. Black*, 291 N.W.2d 208 (Minn. 1980), *aff'd sub nom. Black v. Woods*, 651 F.2d 528 (8th Cir.), *cert. denied*, 454 U.S. 847 (1981).

130. *Black v. Woods*, 651 F.2d 528, 530-31 (8th Cir.), *cert. denied*, 454 U.S. 847 (1981).

131. *Id.* at 531. At her own trial, the accomplice stated, "I mean, if he'd kill [another witness] just because she was going to testify against him for a robbery, what was he going to do to me if I knew about him murdering somebody?" *Black*, 291 N.W.2d at 214.

132. *Woods*, 651 F.2d at 531. Procurement-waiver cases have not specified the standard under which they judge the legitimacy of the absent witness' fears. The court in *Woods* appears to use an objective standard, justifying the waiver by stating the absent witness' motivation for not testifying and commenting on the reasonableness of that motivation. *See id.* (finding that defendant forfeited confrontation right by pattern of conduct resulting in witness' inability to testify). *But see* *United States v. Carlson*, 547 F.2d 1346, 1353 (8th Cir. 1976) (appearing to use subjective standard by mentioning only intimidated witness' personal reason for not testifying), *cert. denied*, 431 U.S. 914 (1977).

133. *Woods*, 651 F.2d at 531-32.

134. *State v. Gettings*, 769 P.2d 25, 27 (Kan. 1989).

135. *Id.* at 27-28.

136. *Id.* at 30 (admitting unsworn statements, but noting that jury was given cautionary instructions that unsworn statements should not be given too much weight if uncorroborated by other evidence).

137. *See Woods*, 651 F.2d at 531 (stating that absent witness' statements met "statement against interest" hearsay exception because witness was participant in multiple murder); *Gettings*, 769 P.2d at 30 (labeling witness' declaration "statement against penal interest" because witness participated in arson with defendant). Statements against interest are an exception to the hearsay rule under Federal Rule of Evidence 804(b)(3), which provides:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

of a confrontation waiver, blur the precedential value of their admission of unsworn statements based on a procurement waiver, and bring into doubt whether statements beyond prior sworn testimony would be admissible after procurement if they did not meet additional hearsay admission requirements. Fortunately, the Second Circuit recently clarified hearsay admissions under the procurement-waiver rule in *United States v. Aguiar*.¹³⁸

B. United States v. Aguiar: A Model for Procurement-Waiver Admissions

In 1992, the Second Circuit in *Aguiar* came to terms with the problematic de facto emphasis on admission of prior sworn testimony in procurement-waiver cases. The case involved a defendant who appealed his conviction of narcotics possession,¹³⁹ narcotics importation,¹⁴⁰ conspiracy,¹⁴¹ and witness tampering.¹⁴² At the trial level, a key witness, who assisted the defendant in his drug activity,¹⁴³ entered into a plea agreement with government agents and, during ex parte questioning by investigators, confirmed the defendant's criminal conduct.¹⁴⁴ The witness, however, withdrew from his plea agreement and refused to testify¹⁴⁵ after receiving written and verbal threats from the defendant.¹⁴⁶ The trial court, following a preliminary evidentiary hearing, admitted the unsworn hearsay statements

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(b)(3).

138. 975 F.2d 45 (2d Cir. 1992).

139. See *United States v. Aguiar*, 975 F.2d 45, 46 (2d Cir. 1992) (citing violation of 21 U.S.C. § 841(a)(1) (1988 & Supp. III 1991)).

140. See *id.* (citing violation of 21 U.S.C. §§ 952(a), 960 (1988 & Supp. III 1991)).

141. See *id.* (citing violation of 21 U.S.C. § 963 (1988)).

142. See *id.* (citing violation of 18 U.S.C. § 1512(b)(1) (1988 & Supp. III 1991)).

143. See *id.* (stating that police arrested witness just prior to defendant's arrest, while witness was waiting at airport with heroin for defendant).

144. *Id.* at 46-47. The witness informed the government that the defendant hired him to transport heroin from Brussels for use by the defendant, who paid the witness' expenses. *Id.*

145. *Id.* at 47 (describing how witness made this decision "even though he was granted immunity and faced civil and criminal contempt charges" for failing to testify).

146. *Id.* The defendant sent letters to the witness threatening to tell his fellow prisoners that he was a government informer and to "expose criminal conduct by the witness, including murder." *Id.* The letters also told the witness to falsify his testimony and to have his lawyer promptly clear the defendant of the charges. *Id.* In addition, the court noted that the witness feared for his family's safety. *Id.*

made by the witness¹⁴⁷ and convicted the defendant.¹⁴⁸

Affirming the conviction, the Second Circuit first reviewed the procedure for proving procurement, endorsing the use of the less rigid preponderance of the evidence standard.¹⁴⁹ Next, the court addressed the defendant's argument that the jurisdiction's procurement-waiver precedent¹⁵⁰ allowed only for the admission of grand jury testimony and could not apply to the absent witness' unsworn statements.¹⁵¹ In response, the court held that through his wrongful procurement, the defendant waived the right to object to the admission of the absent witness' out-of-court statements.¹⁵²

The defendant next argued that the lower court violated the Due Process Clause¹⁵³ because the court failed to make further findings regarding the independent reliability of the statement after it established that the defendant had waived his confrontation rights.¹⁵⁴ The court of appeals replied that the jury below received adequate limiting instructions¹⁵⁵ regarding the statements, and that the events that took place just prior to the defendant's arrest¹⁵⁶

147. See *id.* (holding admission of unsworn hearsay statements appropriate where limiting instructions to jury were given regarding statements); cf. *State v. Moore*, 622 P.2d 631, 632 (Kan. 1981) (expressing concern regarding possible unreliability of accomplice testimony and suggesting that possible unreliability be offset by cautionary instructions to jury).

148. *Aguir*, 975 F.2d at 46.

149. See *id.* at 47 (noting that when court determines that defendant procured absence of witness under preponderance of evidence standard, defendant waives Sixth Amendment rights and hearsay objections because probative value outweighs prejudicial effect). In proving procurement, the government in *Aguir* produced evidence of the witness' fears and the threatening letters that the defendant sent to him. *Id.*

150. *Id.* (citing *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), which held that if defendant procured witness' silence, defendant is barred from asserting Confrontation Clause rights to prevent grand jury testimony of witness from being used as evidence at trial).

151. See *id.* (stating that defendant in *Aguir* attempted to distinguish *Mastrangelo* because that case involved sworn grand jury testimony, whereas his case involved unsworn hearsay).

152. *Id.* (clarifying that *Mastrangelo's* reasoning is not limited to admission of grand jury testimony and stating that "[a] defendant who procures a witness's absence waives the right of confrontation for all purposes with regard to that witness, not just to the admission of sworn hearsay statements").

153. U.S. CONST. amend. XIV, § 1.

154. *Aguir*, 975 F.2d at 47. In *United States v. Thevis*, 665 F.2d 616, 633 (5th Cir.), cert. denied, 459 U.S. 825 (1982), the defendant made the same due process objection. The court in *Thevis* reaffirmed the constitutionality of admitting unsworn, out-of-court statements by referring to corroborating evidence. *Id.* The court found that the corroborating evidence was not "totally lacking" in reliability, and therefore, the conviction based on such evidence did not violate due process. *Id.*

155. See *Aguir*, 975 F.2d at 48 (holding that simple, clear, and lengthy burden of proof instruction by trial court judge was sufficient because additional instruction would have confused issue of "lawful conduct").

156. After the police concealed a recording device on the witness, the witness approached the defendant in the airport with a bag containing heroin. *Id.* at 46. The defendant asked if everything was alright and inquired about the bag. *Id.* The defendant then took the bag, whereupon the police arrested him. *Id.*

sufficiently corroborated the statements to justify their admission.¹⁵⁷ *Aguilar* is thus one of the few cases that explicitly addresses the problem of admitting hearsay statements where a defendant causes the declaring witness to be unavailable to testify at trial before he or she makes the statements under oath.

Significantly, the court in *Aguilar* could have followed the lead of the *Woods* and *Gettings* decisions and bolstered the reliability of the absent witness' statements by declaring that they were statements against interest.¹⁵⁸ The witness did implicate himself in his description of the defendant's crime.¹⁵⁹ The fact that the court did not focus on this issue in its opinion separates this decision from others¹⁶⁰ and strengthens its holding that a waiver by procurement addresses all of the absent witness' prior statements and not just those that simultaneously meet a traditional hearsay exception.

Although the procurement-waiver theory itself does not impose such extraneous limitations on what kinds of statements become admissible after a finding of procurement, courts have historically imposed such limits.¹⁶¹ Procurement-waiver decisions have focused on the absent witness' prior testimony and implied that, despite the defendant's waiver of his or her confrontation rights and hearsay objections, the witness' statement is lost absent indicia of reliability akin to that of traditional hearsay exceptions.¹⁶² *United States v. Aguilar* dissolves this shield for the case of procuring defendants and in so doing presents courts with a guide for the adjudication of procurement-waiver cases.

157. See *id.* at 47-48 (finding that both luggage and defendant's threatening letter to witness sufficiently corroborated witness' testimony). The court explained that admitting unsworn hearsay might violate due process if the statements are *facially* unreliable. *Id.* The court added, however, that such statements are usually precluded by Federal Rule of Evidence 403, which states in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." FED. R. EVID. 403. Even when a defendant prevents a witness from testifying, he or she maintains the right to object to the admission of the witness' hearsay statements under this rule. *Aguilar*, 975 F.2d at 47; see also *Thevis*, 665 F.2d at 633 n.17 (testing admissibility of absent witness' statements in procurement-waiver case under Federal Rule of Evidence 403).

158. See *supra* note 137 (discussing admissibility of hearsay under statements against interest exception in *Woods* and *Gettings*).

159. See *Aguilar*, 975 F.2d at 46 (explaining that witness admitted being hired by defendant to smuggle heroin into United States).

160. See *supra* notes 127-37 and accompanying text (discussing opinions that have applied "statements against interest" hearsay exception in procurement-waiver decisions).

161. See discussion *supra* part III.A (discussing need for indicia of reliability, despite waiver of confrontation rights, if hearsay is to be admissible).

162. See, e.g., *Black v. Woods*, 651 F.2d 528, 531 (discussing need for reliability to meet requirement of Confrontation Clause); *State v. Gettings*, 769 P.2d 25, 29-30 (asserting that statement against penal interest with corroboration meets reliability requirement).

IV. RECOMMENDATION

Neither the courts nor the Federal Rules of Evidence prohibits the admission of unsworn, ex parte, or extrajudicial statements after a finding of procurement. The problem is that courts, in their procurement-waiver decisions, have not squarely addressed this issue.¹⁶³ Although *Aguilar* demonstrates that a court may implement the common-law procurement waiver toward such declarations, the clearest and most effective solution would be congressional codification of *Aguilar* in the form of an amendment to the Federal Rules of Evidence. Specifically, Congress should create a new exception to the hearsay rule based on a procurement waiver.¹⁶⁴ The creation of a new exception would generate uniform treatment of procurement waivers¹⁶⁵ and would prevent courts from resorting to less appropriate rules regarding admission of the absent witness' statements.¹⁶⁶

The rule would establish a low threshold admissibility test based primarily on the corroboration of applicable statements.¹⁶⁷ The court would apply the exception when a defendant objected to the admission of an absent witness' declarations and when the government claimed the procurement-waiver exception. Under the proposed rule, the presiding judge would then require the govern-

163. See *supra* notes 109-37 and accompanying text (discussing failure of courts that have confronted defendant procurement cases to admit evidence based on procurement-waiver rule).

164. Rule 804(b), which contains the hearsay exceptions for situations in which the declarant is unavailable, FED. R. EVID. 804(b), would be an appropriate place for Congress to insert this new exception. An aspect of the defendant-procurement exception that would distinguish it from the others, however, is its narrow prerequisite that the defendant advance the conditions that cause the declarant's unavailability. See FED. R. EVID. 804(a) (listing diverse conditions under which declarant is defined as "unavailable" for purpose of existing unavailability exceptions of rule 804(b)).

There is another possible location for a defendant-procurement rule. Because the rule takes part of its justification from the assumption that the procuring defendant acted to prevent disclosure of truthful information, one could say that the defendant thus adopted the absent witness' statement as true. A defendant-procurement provision would fit, therefore, under the "adoptive admissions" subsection of rule 801(d)(2). See FED. R. EVID. 801(d)(2)(B) (excluding from definition of "hearsay" statement of which defendant "has manifested an adoption or belief in its truth"). A defendant-procurement rule in this position would cause the absent witness' statements to be admitted as nonhearsay rather than as an exception to the hearsay rule.

165. The extent to which a new federal rule would provide uniformity in procurement-waiver situations, of course, would depend on whether states follow the federal example as they have in the past. See Lilly, *supra* note 29, at xxv (listing 31 states that have based their evidentiary rules on Federal Rules of Evidence).

166. See *supra* notes 127-37 and accompanying text (discussing cases that have applied "statements against interest" exception in procurement-waiver situations).

167. Courts, other than the Second Circuit in *Aguilar*, have relied on corroborative evidence for trustworthiness in procurement-waiver cases. See, e.g., *United States v. Thevis*, 665 F.2d 616, 633 (5th Cir.) (finding that witness' testimony was sufficiently corroborated by other evidence), cert. denied, 459 U.S. 825 (1982); *State v. Gettings*, 769 P.2d 25, 30 (Kan. 1989) ("Other testimony corroborated parts of [the absent witness'] statement.").

ment to prove, by a preponderance of the evidence,¹⁶⁸ the defendant's involvement in preventing the witness from testifying at trial. Where the court finds wrongful procurement, the rule would require the court to reject the defendant's Confrontation Clause or hearsay rule objections regarding admission of *any* of the absent witness' relevant out-of-court statements.¹⁶⁹ The rule would protect the defendant's remaining due process rights by directing the court to suppress those statements that are uncorroborated or facially unreliable.¹⁷⁰ Furthermore, as with all proffered evidence, the court would admit the statements only if their probative value outweighed their prejudicial effect.¹⁷¹ If the statements pass these tests, they would become admissible under the federal rules. The court should then instruct the jury regarding hearsay and unsworn statements¹⁷² and leave the determination of reliability to its judgment.

Congressional enactment of a procurement-waiver rule that moves away from the traditional emphasis on sworn testimony would not incite the prosecution to introduce a stampede of insidious statements to the jury. Instead, the new standard would ensure that the available evidence corroborates the hearsay before allowing the common-law procurement-waiver rule to reach its end result—the defendant's inability to raise hearsay or Confrontation Clause objections regarding any of the absent witness' statements. The defendant would, however, retain the traditional rights to object on other grounds, offer evidence to impeach the credibility of the absent witness,¹⁷³ cross-examine the person who took the statements,¹⁷⁴ and attack the reliability of the absent witness' statements during closing arguments.

The most effective response to the recurring problem of defendant

168. See *supra* notes 91-98 and accompanying text (discussing rationale behind choosing preponderance of evidence standard for proving procurement).

169. See *United States v. Aguiar*, 975 F.2d 45, 46 (2d Cir. 1992) (specifying that procurement waivers apply to *all* declarations of unavailable witness).

170. See *supra* note 157 (describing *Aguiar's* concern with due process after finding of procurement waiver).

171. See *supra* note 157 (discussing probative-prejudicial balancing test of rule 403).

172. The court in *State v. Gettings*, faced with a procurement-waiver admission of an accomplice's unsworn statements, instructed the jury as follows:

A person who is in the company of the defendant when such defendant is alleged to have committed a crime may identify such defendant as the person who committed the crime. However, you should consider with caution an unsworn statement made by such person if such unsworn statement is not supported by other evidence and such person is arrested and interrogated concerning such crime.

State v. Gettings, 769 P.2d 25, 30 (Kan. 1989).

173. See *United States v. Thevis*, 665 F.2d 616, 631 n.14 (5th Cir.) (noting that defendant may still cross-examine witnesses regarding credibility of their testimony), *cert. denied*, 459 U.S. 825 (1982).

174. See *Gettings*, 769 P.2d at 30 (approving of defendant's ability to cross-examine officer who took absent witness' statements).

procurement is to admit any statement that would have been admissible had the defendant permitted the witness to testify.¹⁷⁵ Congressional enactment of an appropriate rule of evidence based on *Aguilar's* format would promote this response and ensure that, unless the statements are "so totally lacking in reliability that a conviction would violate due process,"¹⁷⁶ courts do not become distracted by the unsworn status of relevant evidence. A defendant's participation in the intimidation or murder of a witness before the witness' statements could reach sworn status in itself serves as testament to the reliability of the witness' information.

CONCLUSION

The Confrontation Clause and the rule against hearsay protect the accused from untrustworthy accusations, primarily by ensuring that the accused has a right to cross-examine adverse witnesses. When the government proves that a defendant deliberately prevented such a witness from appearing at trial, the law mandates that the defendant has waived his right to object to admission of the witness' out-of-court statements. Courts, however, have concentrated on the absent witness' prior sworn testimony in applying this rule, leaving scarce precedent for situations where the defendant forces a witness, through intimidation or murder, into silence after having made only unsworn, *ex parte*, extrajudicial statements. If these declarations, from that point forward, are "inherently untrustworthy," the defendant, by purposefully dismantling the law's truth-seeking mechanism, is responsible and, in effect, assumed the attached risks.

To prevent a defendant who has procured the unavailability of a witness from benefiting from the misdeed, Congress should adopt a new exception to the hearsay rule based on a procurement waiver. If a court determines that the absent witness' statements have minimal indicia of reliability, then the witness' relevant statements should be admitted, regardless of whether he or she made them during a grand jury proceeding or during police questioning. Such a rule appropriately would create difficulty for the defense, rather than for the prosecution, once the defendant prevents a prosecution witness from testifying.

175. See *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) (stating that in case of procurement, witness' prior statements are admissible if such statements would have been admissible had witness been available to testify at trial), *cert. denied sub nom. Kilbane v. Marshall*, 460 U.S. 1053 (1983).

176. *Thevis*, 665 F.2d at 633.

