FORFEITURE BY WRONGDOING AND THOSE WHO ACQUIESCE IN WITNESS INTIMIDATION: A REACH EXCEEDING ITS GRASP AND OTHER PROBLEMS WITH FEDERAL RULE OF EVIDENCE 804(B)(6)

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I. INTRODUCTION

Congress amended Federal Rule of Evidence 804 in 1997 to add a new exception to the rule against hearsay entitled Forfeiture by Wrongdoing.[1] Rule 804(b)(6) states:

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1. There has been little discussion of the topic, and what little discussion there has been occurred mostly when the Rule was being considered by the Advisory Committee on the Civil Rules. The first to comment on the subject was Michael H. Graham. *See* MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 174-82 (1985) [hereinafter GRAHAM, WITNESS INTIMIDATION]. For other comments, see Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)*, 80 NEB. L. REV. 891 (2001); Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506 (1997) [hereinafter Friedman, *Chutzpa*]; John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835 (1996); Paul T. Markland, *The Admission of Hearsay Evidence Where Defendant Misconduct Causes the Unavailability of a Prosecution Witness*, 43 AM. U. L. REV. 995 (1994); Alycia Sykora, *Forfeiture by Misconduct: Proposed Federal Rule of Evidence 804(b)(6)*, 75 OR. L. REV. 855 (1996); David J. Tess, *Losing the Right to Confront: Defining Waiver to Better Address a Defendant's Actions*

> The following are not precluded by the hearsay rule if the declarant is unavailable as a witness:
> * * *
> (6) *Forfeiture by Wrongdoing.* A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.[2]

The rationale of the Rule and the justice of the result are obvious. Nonetheless, the simple concept and language of this new exception to the rule against hearsay conceals significant issues of interpretation, application, and possible impact on the defendant's Sixth Amendment right to confront witnesses.[3] A casual reading of the Rule suggests that the first issue is the meaning of "acquiesced in wrongdoing" because the answer determines the proof necessary to establish that the defendant has associated with another's intimidation of a witness so that both lose their rights to object to the evidence.[4] Other issues flow from the Rule's rationale as expressed in the title. Hearsay statements become admissible because the defendant forfeited his objection by his wrongdoing.[5] Unlike other hearsay exceptions, the misconduct exception[6] expressed in Rule 804(b)(6) is not based on any argument that the circumstances in which the statements were made make them reliable, thus raising troublesome issues about its impact on the truth-finding goals of evidence. Although promulgated as a federal rule of evidence, it obviously will have a significant impact on the development of state law counterparts. More importantly, the language of the Federal Rule will frame the inevitable challenge to the admission of hearsay statements founded on the Confrontation Clause. Heretofore, Sixth Amendment rights required a knowing voluntary waiver.[7] Thus, forfeiture

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and Their Effects on a Witness, 27 U. MICH. J.L. REFORM 877 (1994); Enrico B. Valdez & Shelley A. Nieto Dahlberg, *Tales from the Crypt: An Examination of Forfeiture by Misconduct and Its Applicability to the Texas Legal System*, 31 ST. MARY'S L.J. 99 (1999).

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

3. *See* U.S. CONST. amend. VI.

4. *See* FED. R. EVID. 804(b)(6).

5. *See id.*

6. The term "misconduct exception" is used as the designation for this new exception to the rule against hearsay. The choice is deliberate. The exception's central concept is the defendant's misconduct or wrongdoing. *See id.* Using forfeiture or waiver implies a favorable view of one of the two underlying legal rationales for the Rule when that choice has significant ramifications in the application of the Rule. Federal Rule of Evidence 804(b)(6) is the prototype for the exception, although there is substantial case law in some states, principally New York. *See infra* notes 62-69.

7. *See* Brookhart v. Janis, 384 U.S. 1, 4 (1966) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)) (noting in the context of the Sixth Amendment right of cross-examination, the presumption against waiver of constitutional rights and stating, "for a waiver to be effective it must

presents novel constitutional issues for the Court. Not to be overlooked are all the practical and procedural questions that arise in the application of the Rule in particular cases. The forfeiture rationale generates tremendous momentum to admit the hearsay statements against those who severely strain the judicial system by attacking witnesses, if only for purposes of deterrence and retribution. This aspect of the Rule makes it important to delineate the legitimate scope and limitations of the Rule to prevent its unwarranted expansion and misuse. Finally, the exception was aimed at the conduct of criminal defendants with little thought to other applications,[8] but it also reaches the prosecution, as well as civil litigants, creating the possibility for unintended consequences.[9]

Part II of this Article recapitulates the development of the misconduct exception from its English and American antecedents through its modern reincarnation as a tool against witness intimidation that became prevalent as the result of the war on organized crime and drugs. Part III describes the codification of the Rule and develops the elements of the exception and the general practice and procedure found in the Rule and case law. Part IV addresses the major issues that the new exception presents, including the meaning of "acquiescence," the reliability of evidence, and issues arising under the Confrontation Clause. Finally, Part VI will discuss the misconduct exception's impact on prosecutors and civil litigants.

II. THE DEVELOPMENT OF THE MISCONDUCT EXCEPTION TO THE HEARSAY RULE

A. *Admission of Prior Testimony Because of Defendant's Misconduct: The English and American Antecedents*

As early as 1666, English law recognized that an absent witness's deposition could be admitted in lieu of live testimony if the witness was unavailable because a party procured the absence, or because of the witness's death or distance from the court.[10] In *Lord Morley's Case*,[11] the judges agreed that a deposition taken before the coroner could be admitted if the jury found as a fact that the defendant caused the witness's absence.[12] At the trial, however, that

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be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege'").

8. *See* discussion *infra* Part III.A.2.
9. *See* discussion *infra* Part V.
10. *See* Lord Morley's Case, 6 State Trials 769, 770 (1666) (Eng.).
11. Lord Morley's Case, 6 State Trials 769 (1666) (Eng.).
12. *Id.* at 770-71.

proof failed and the witness's deposition was not admitted.[13] The procedure for admitting documentary evidence of an absent witness was well recognized thirty years later.[14] English evidence texts available in America in the early nineteenth century stated that procuring the witness's absence authorized the admission of a previous deposition.[15] Most of these statements, however, were in the context of two English statutes authorizing magistrates to take the deposition of a witness brought before them.[16] Likewise, scattered nineteenth century American precedent, relying on the English cases, stated and applied the rule.[17] Wigmore summarized the rule as follows:

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13. *Id.* at 776-77.

14. *See* Harrison's Case, 8 State Trials 832, 851-52 (1812); *see also* Proceedings in Parliament Against Sir John Fenwick, 13 Howell's State Trials 537, 578-83 (1696) (Eng.) (discussing admissibility of evidence that suggested defendant procured absence of witness, which evidence supported the admissibility of absent witness's deposition). Fenwick was indicted and arraigned for treason, but delayed his trial by promising to provide full disclosure, until one of the two necessary witnesses against him escaped with the help of Lady Fenwick. *Id.* at 537-83. A bill of attainder was then brought against Fenwick in Parliament. *Id.* at 546-48. All parties agreed that Fenwick could not be tried at Old Bailey without two live witnesses and that the absent witness's prior sworn statement could not be admitted against him at a trial, apparently because the acts of Lady Fenwick could not be attributed to her husband. *Id.* at 578-83. This trial problem anticipates the central issue under the misconduct exception—attributing the acts against a witness of one person to others. *See infra* notes 161-63 and accompanying text. Nevertheless, Parliament, in its legislative capacity, heard Goodman's sworn statement, voted the bill of attainder, and Fenwick lost his head. Proceedings in Parliament Against Sir John Fenwick, 13 Howell's State Trials, at 607-08, 755-58.

15. *See, e.g.*, JOHN F. ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES; WITH PRECEDENTS OF INDICTMENTS, &C. AND THE EVIDENCE NECESSARY TO SUPPORT THEM 84-85 (1824); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 585-86 (1841); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64 (1812); 1 S. M. PHILLIPPS, TREATISE ON THE LAW OF EVIDENCE 275-77 (1816).

16. *See, e.g., id.* at 276-77 (citing 1 & 2 Ph. & M. c.13.5.4.; 2 & 3 Ph. & M. c. 10).

17. Williams v. State, 19 Ga. 402, 403 (1856) ("[I]n case oath should be made that any witness who had been examined by the Crown, and was then absent, was detained by the means or procurement of the prisoner . . . the examination should be read . . . .") (citing Lord Morley's Case, 6 State Trials 770 (1666) (Eng.)); Bergen v. People, 17 Ill. 426, 427 (1856) ("It is true, if a party, . . . *spirits* away his adversary's witness, he ought not to profit thereby; or, at least, suitable penalties should be provided against such conduct, but it is for the legislature to correct the evil."); State v. Houser, 26 Mo. 431, 440 (1858) (stating the rule in *Lord Morley's Case*, as "in [the] case of death or absence by procurement of the prisoner or his friends, or in case of sickness from which there was no probability of recovery, the deposition could be used"); Drayton v. Wells, 10 S.C.L. (1 Nott & McC.) 409, 411 (1819) ("The books enumerate four cases only, in which the testimony of a witness who has been examined in a former trial, between the same parties, and where the point in issue was the same, may be given in evidence, on a second trial, from the mouths of other witnesses, who heard him give evidence: . . . 4th. Where the Court was satisfied that the witness had been kept away by the contrivance of the opposite party.").

> (4) If the witness has been by *the opponent procured* to absent himself—this ought of itself to justify the use of his deposition or former testimony whether the offering party has or has not searched for him, whether he is within or outside the jurisdiction, whether his place of abode is secret or open; for any tampering with a witness should once for all estop the tamperer from making any objection based on the results of his own chicanery.[18]

Significantly, all of these cases involved the admission of a prior deposition or prior trial testimony.[19] Strictly speaking, the exception only admitted the prior recorded testimony of an absent witness when the defendant procured the witness's absence, and was not a general exception to the hearsay rule authorizing the introduction of any statement by the declarant.[20]

The admission of out of court statements for their truth also raises constitutional questions under the Sixth Amendment right to confront witnesses.[21] The Supreme Court faced this constitutional question for the first

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18. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1405 (James H. Chadbourn rev. ed. 1974) (footnote omitted).

19. *See supra* notes 10-18 and accompanying text.

20. *See* Kroger, *supra* note 1, at 888-93 (arguing that the English and American precedents do not support the admission of uncrossed hearsay statements).

21. The relationship between the rule against hearsay and the Confrontation Clause is beyond the scope of this Article. In short, the Supreme Court has stated that the hearsay rule and the Confrontation Clause generally protect similar values and stem from the same roots. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980); California v. Green, 399 U.S. 149, 155-56 (1970). However, the Supreme Court has never equated the two. *See* Idaho v. Wright, 497 U.S. 805, 814 (1990). Nevertheless, "firmly rooted" hearsay exceptions satisfy the Confrontation Clause so that the evidence rules determine the constitutionality of admitting hearsay in most cases. Ohio v. Roberts, 448 U.S. at 66. Commentators are critical of the Court for linking the Confrontation Clause to the hearsay rule because the number of firmly rooted exceptions to the hearsay rule makes the Clause largely irrelevant. *See, e.g.*, Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 622 (1988) (asserting that the Court misunderstood the purpose of the Confrontation Clause and that evidence now controls the content of the Clause). When a newer exception is used, the Court has focused on the reliability of the hearsay statement, a task usually assigned to the law of evidence. *See id.* (arguing that the Confrontation Clause is a minor part of the rules of evidence). The literature on the Confrontation Clause is voluminous. One view gaining support is that the Clause is directed at those who are "witnesses against" the defendant, which may not include all hearsay declarants, but only those whose statements are created for testimonial purposes. *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996); John C. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191 (1999) [hereinafter Douglass, *Beyond Admissibility*]; Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998) [Friedman, *Principles*]. At least three current justices of the Supreme Court are open to a reevaluation of the Confrontation Clause—Justices Scalia, Thomas,

time in *Reynolds v. United States*.[22] The defendant in *Reynolds* was on trial in the Utah territory for bigamy.[23] The prosecution admitted the prior testimony of defendant's second wife when it was unable to subpoena her because the defendant, and others in his household, refused to reveal her location.[24] The defendant asserted this to be a violation of his Sixth Amendment right, as well as failure to lay the foundation for introducing the prior testimony.[25] The Court disposed of the constitutional claim by citing *Lord Morley's Case*.[26]

> 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 his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.[27]

Chief Justice Waite justified this result on an estoppel principle: "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong."[28] The evidence of the attempted service was sufficient, in the Court's view, to cast upon the defendant the burden of at least denying his involvement in the witness's absence.[29] The Court found that the "wife's" testimony at a prior trial for the same offense, with the defendant present at both trials, was properly admitted.[30]

Although *Reynolds* established that confrontation rights can be waived,[31] it had little impact on the Supreme Court's Sixth Amendment jurisprudence. The Court cited *Reynolds* only seven times in other Sixth Amendment cases involving an individual's waiver of their confrontation rights,[32] and did not mention

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and Breyer. *See* Lilly v. Virginia, 527 U.S. 116, 140, 143 (1999). Almost without exception, the statements admitted under the misconduct exception are gathered by the police for testimonial purposes and would be subject to the Confrontation Clause under the analysis proposed above.

22. Reynolds v. United States, 98 U.S. 145 (1878).
23. *Id.* at 146.
24. *Id.* at 157-58.
25. *Id.*
26. *Id.* at 158 (citing Lord Morley's Case, 6 State Trials, 770 (1666) (Eng.)).
27. *Id.*
28. *Id.* at 159.
29. *Id.* at 160.
30. *Id.*
31. *See id.* at 158; *see also* Diaz v. United States, 223 U.S. 442, 452-53 (1912) (applying *Reynolds* to hold that a voluntary act of the accused, placing out of court testimony into evidence, constitutes a waiver of that individual's right of confrontation).
32. The seven cases are: White v. Illinois, 502 U.S. 346, 366 n.2 (1992) (citing *Reynolds* for the proposition that the right of confrontation as applies only to formalized testimonial evidence); California v. Green, 399 U.S. 149, 180 (1970) (Harlan, J., concurring) (stating "early

Reynolds in *Snyder v. Massachusetts*,[33] when Justice Cardozo stated that there is "[n]o doubt the privilege [of personally confronting the witness] may be lost by consent or at times even by misconduct."[34] Nor was *Reynolds* cited in *Illinois v. Allen*,[35] which upheld the forcible removal of a disruptive defendant from the courtroom as constitutional.[36]

B. *The Response to Witness Intimidation: The Modern Cases*

Witness intimidation and the loss of testimony became a serious concern in the 1960s and 1970s as the war on organized crime and illegal drugs intensified. The problem was attacked on several fronts. Congress created the Federal Witness Protection Program when it passed the Organized Crime Act of 1970.[37] The Federal Rules of Evidence provided a partial solution to the intimidated, reluctant, or forgetful witness. Changes made to the Federal Rules of Evidence admitted hearsay evidence that otherwise would be lost through intimidation. Under Federal Rule of Evidence 804(b)(1), prior statements of an uncooperative, "forgetful," or an absent witness are admissible if the declarant had testified at a prior hearing or proceeding.[38] Rule 801(d)(1) altered the common law and permitted the introduction of the prior sworn testimony of the witness as substantive evidence when the witness is present in court and has testified

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decisions that consider the confrontation right at any length all involved ex parte testimony submitted by deposition and affidavit"); Diaz v. United States, 223 U.S. 442, 452-53 (1912) (citing *Reynolds* in support of the view that the Sixth Amendment right to confrontation may be waived); West v. Louisiana, 194 U.S. 258, 265 (1904) (finding that *Reynolds* is consistent with upholding a defendant's convictions based upon absent witness's testimony at prior hearing at which defendant was present); Motes v. United States, 178 U.S. 458, 472-74 (1900) (using the deposition of witness whose absence was not procured by defendant, unlike *Reynolds*, is unconstitutional); Mattox v. United States, 156 U.S. 237, 242 (1895) (citing *Reynolds* for the proposition "that, if the witness is absent by the procurement or connivance of the defendant himself, he is in no condition to assert his constitutional immunity"); Eureka Lake & Yuba Canal Co. v. Superior Court of Yuba Co., 116 U.S. 410, 418 (1886) (citing *Reynolds* to support proposition that when corporate agent conceals himself to avoid service the court may proceed with the action).

33. Snyder v. Massachusetts, 291 U.S. 97 (1934).

34. *Id.* at 106.

35. Illinois v. Allen, 397 U.S. 337 (1970).

36. *Id.* at 342-47.

37. 18 U.S.C. § 1961 (2000). *See generally* GRAHAM, WITNESS INTIMIDATION, *supra* note 1 (discussing the various legislative, judicial, prosecutorial, and societal responses to witness intimidation).

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

inconsistently with the prior sworn testimony or now feigns memory loss.[39] Certain hearsay statements of identification also became admissible.[40] Finally, the federal rules included the residual exception to the hearsay rule, now found in Federal Rule of Evidence 807, which authorizes the use of hearsay statements when the traditional hearsay exceptions do not apply and the statement has comparable guarantees of trustworthiness found in traditional hearsay exceptions.[41]

These changes did not remove all obstacles to the admission of an absent or turncoat witness's statements. The prior testimony exception of Rule 804(b)(1) was limited to the testimony of a witness who had testified in a trial or other proceeding where the defendant had an opportunity to cross-examine the witness.[42] Thus, statements made at a preliminary hearing are admissible, but not those made before the grand jury or outside of court. The prior inconsistent statement provision of Rule 801(d)(1), and the identification exception of Rule 801(d)(3), requires that the witness be available in court and subject to cross-examination.[43] The provisions do not apply to prior consistent statements made by a witness who could not or would not testify at the time the testimony was admitted.[44] The residual clause provided some opportunity to admit hearsay, but required a specific finding of the reliability of the evidence.[45] The residual clause came with the admonition of the Senate Committee Report that the provision was to be used rarely, and was not a "broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b)."[46]

Nevertheless, federal courts began using the residual exception as a means of combating witness intimidation by admitting the prior testimony of the intimidated or dead witness. The federal courts addressed the Sixth Amendment issue by extending *Reynolds*, and holding that intimidating the witness waived

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39. *See* GRAHAM, WITNESS INTIMIDATION, *supra* note 1, at 133-49 (discussing the debate over prior inconsistent statements). The Advisory Committee's note to Rule 801(d)(1) refer to section 1235 of the California Evidence Code that was adopted in part to address the turncoat witness problem. FED. R. EVID. 801(d)(1) advisory committee's note.

40. *See* FED. R. EVID. 801(d)(1)(C).

41. FED. R. EVID. 807. The residual clause originally was placed in Federal Rules of Evidence 803(24) and 804(b)(5) but was moved to Rule 807 in 1997. This Article will refer to the residual clause as Rule 807 although cases before December 1, 1997 refer to the earlier sections.

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

43. FED. R. EVID. 801(d)(1), (3).

44. *Id.*

45. FED. R. EVID. 807.

46. S. REP. NO. 93-1277, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7065-66.

any Sixth Amendment rights to the admission of the witness's statements.[47] The first modern federal circuit court to use the defendant's wrongdoing to resolve a Confrontation Clause argument was *United States v. Carlson*,[48] a typical witness intimidation case.[49] The witness in *Carlson* had purchased drugs from the defendant, but immediately before trial refused to testify despite having been granted immunity and subsequently being held in contempt for his persistent refusal to testify.[50] The witness told DEA agents that he feared reprisals, but only indirectly implicated the defendant in the threats.[51] The trial court found that the witness was unavailable within the meaning of Federal Rule of Evidence 804(a), and that the requirements of the residual clause were met, including proof of the "circumstantial guarantees of the trustworthiness."[52] The statements were found to be reliable because they were made before the grand jury about an event with which the witness was personally involved, and which he never recanted.[53] As to the right of confrontation, the court, citing Wigmore and other authorities, held that a defendant should not be afforded the protection of the Confrontation Clause when he silenced the witness.[54] The court acknowledged that this approach avoided the difficult question of whether the grand jury testimony was sufficiently reliable to meet constitutional standards.[55]

Carlson and other first wave federal cases all involved the residual clause and these courts found that the hearsay statements had "equivalent circumstantial guarantees of trustworthiness" as the traditional exceptions.[56] When the courts thought that the Confrontation Clause also required a showing of particularized indicia of reliability, they further examined the evidence and concluded that the statements met those standards.[57] Rather quickly, however, the courts collapsed

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47. *See* United States v. Carlson, 547 F.2d at 1358.
48. United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976).
49. *Id.* at 1358.
50. *Id.* at 1351-53.
51. *Id.* at 1353.
52. *Id.* at 1354.
53. *Id.*
54. *Id.* at 1359.
55. *Id.* at 1357.
56. *Id.* at 1354-55; *see also* United States v. Rouco, 765 F.2d 983, 993-94 (11th Cir. 1985); Steele v. Taylor, 684 F.2d 1193, 1204 (6th Cir. 1982); United States v. West, 574 F.2d 1131, 1134-36 (4th Cir. 1978); United States v. Mastrangelo, 533 F. Supp. 389, 391-92 (E.D.N.Y. 1982). *But see* United States v. Thevis, 665 F.2d 616, 628-29 (5th Cir. Unit B 1982) (finding grand jury testimony does not satisfy rule's reliability standard, but admitting evidence on wavier theory).
57. *See, e.g.*, Rice v. Marshall, 709 F.2d 1100, 1104 (6th Cir. 1982); Steele v. Taylor, 684 F.2d at 1203-04; United States v. Mastrangelo, 533 F. Supp. at 390-91. *But see* United States

the evidentiary and constitutional questions and asked only if the defendant was responsible for the witness's failure to testify. The Tenth Circuit in *United States v. Balano*[58] stated: "A valid waiver of the constitutional right is *a fortiori* a valid waiver of an objection under the rules of evidence."[59] Other circuits quickly adopted the *Balano* approach, eliminating any specific reliability analysis.[60]

Following the lead of the federal courts, ten states and the District of Columbia adopted the misconduct exception between 1980 and 2002.[61] New York adopted the exception in 1983, relying on *United States v. Mastrangelo*,[62] which was originally tried in the Eastern District of New York, and has developed a substantial body of law on the misconduct exception.[63] New York law differs in two respects from the federal version. First, New York courts have always required that the defendant's complicity be established by clear and convincing evidence,[64] as proposed by the Fifth Circuit in *United States v.*

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v. West, 574 F.2d at 1136-38 (rejecting the "notion that small indications of reliability will suffice").

58. United States v. Balano, 618 F.2d 624 (10th Cir. 1979).

59. *Id.* at 626.

60. *See, e.g.*, United States v. Emery, 186 F.3d 921, 926-27 (8th Cir. 1999); United States v. White, 116 F.3d 903, 911-12 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1279-80 (1st Cir. 1996); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Mastrangelo, 693 F.2d at 273.

61. *See* Steele v. Taylor, 684 F.2d at 1199-200 (noting that an unreported Ohio Court of Appeals opinion admitted evidence because of threats); State v. Valencia, 924 P.2d 497, 502 (Ariz. Ct. App. 1996); Devonshire v. United States, 691 A.2d 165, 168 (D.C. 1997); State v. Hallum, 606 N.W.2d 351, 355 (Iowa 2000); State v. Gettings, 769 P.2d 25, 28 (Kan. 1989); State v. Magouirk, 539 So. 2d 50, 64-66 (La. Ct. App. 1988); State v. Black, 291 N.W.2d 208, 213-14 (Minn. 1980); State v. Sheppard, 484 A.2d 1330, 1342-43 (N.J. Super. Ct. Law Div. 1984) (applying wavier by threats to overcome defendant's objections to use of video by child witness); Holtzman v. Hellenbrand, 460 N.Y.S.2d 591, 597-98 (App. Div. 1983). Pennsylvania promulgated the same language in Pennsylvania Rule of Evidence 804(b)(6), effective October 1, 1998, and Tennessee adopted a version of the Rule in 1997. Tennessee's rule deleted the "or acquiesced" language found in the Federal Rule. *See* TENN. R. EVID. 804(b)(6).

62. United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982).

63. Steven Zeidman, *Who Needs an Evidence Code?: The New York Court of Appeals's Radical Re-Evaluation of Hearsay*, 21 CARDOZO L. REV. 211, 223-32 (1999).

64. *See* Holtzman v. Hellenbrand, 460 N.Y.S.2d at 596-97 (citing United States v. Thevis, 665 F.2d 616 (5th Cir. Unit B 1982)); *see also* People v. Geraci, 625 N.Y.S.2d 469, 473 (N.Y. 1995) (stating that the clear and convincing standard is "more protective of the truth-seeking process" and should be applied in New York); People v. Sweeper, 471 N.Y.S. 486, 488 (Sup. Ct. 1984) (stating that although other circuit's have applied the preponderance of evidence test, the State of New York applies the clear and convincing test).

Thevis.[65] Second, New York courts required an evidentiary hearing before an absent declarant's testimony can be admitted.[66]

New York and other states use the general principles found in the federal cases, and have not articulated a specific formulation of the misconduct exception. New York, for example, initially used the *Mastrangelo* test, asking whether the defendant, through "knowledge, complicity, planning, or in any other way," made the witness afraid to testify.[67] Several other variations were used because the formulation was not important in any of the cases. For example, in one case, the New York Court of Appeals used three variations interchangeably: whether the evidence indicated that the witness's "unavailability was procured by the defendant or someone acting on his behalf"; "that the witness's unavailability was procured by misconduct on the part of the defendant"; and "that the defendant either was responsible for or had acquiesced in the conduct that rendered [the witness] unavailable for trial."[68] More recently, the New York courts, following the language of the Federal Rule, have referred to the defendant's acquiescence in the intimidation.[69]

Waiver by misconduct has two advantages: it disposed of the evidentiary and constitutional questions at one time and it avoided a difficult Confrontation Clause issue at a time when the Sixth Amendment jurisprudence was unformed.[70]

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65. United States v. Thevis, 665 F.2d 616 (5th Cir. Unit B 1982).

66. *See, e.g.*, People v. Johnson, 711 N.E.2d 967, 968-69 (N.Y. 1999) (holding that an evidentiary hearing is necessary unless it is waived by defendant or the evidence is so overwhelming that a hearing is superfluous); People v. Geraci, 649 N.E.2d at 820-21 (discussing the use of an evidentiary hearing where it has been shown that the defendant procured a witness's unavailability); Holtzman v. Hellenbrand, 460 N.Y.S.2d at 597 (determining that "the People shall be given the opportunity to prove . . . misconduct at an evidentiary hearing when facts are alleged which indicate a 'distinct possibility' that misconduct by a criminal defendant has induced a witness' unlawful refusal to testify at trial or has caused the witness' disappearance or demise").

67. People v. Colon, 473 N.Y.S.2d 301, 305 (Sup. Ct. 1984) (citing United States v. Mastrangelo, 693 F.2d at 273); *see also* Holtzman v. Hellenbrand, 591 N.Y.S.2d at 597 (applying the *Mastrangelo* test in determining that the defendant's misconduct caused the witness to refuse to testify); People v. Sweeper, 471 N.Y.S.2d at 487 (applying the *Mastrangelo* test in determining whether defendant was involved in murdering a witness).

68. People v. Geraci, 649 N.E.2d at 817, 820-21, 824.

69. *See, e.g.*, *id.* at 823; People v. Johnson, 711 N.E.2d at 968-69; People v. Delarosa, 630 N.Y.S.2d 357, 359 (App. Div. 1995).

70. One respected work stated:

> About the only consistent pattern one can discern in the Supreme Court's confrontation jurisprudence for the balance of the [twentieth] century was that in almost every decision the Court was obliged to reverse or retreat from something it had said in a previous opinion. The result was to create a smorgasbord of authority

Only the most basic examination of the reliability of the hearsay was necessary,[71] even though the declarant was often highly impeachable and had strong motives to minimize his role and expand the responsibility of others. A very high percentage of declarants were accomplices in the crimes for which the defendant was charged,[72] and many others were so sufficiently involved that there was some risk of criminal prosecution.[73] Relatively few cases in federal courts, and

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> from which state and lower federal courts could pick and choose cases to reach almost any decision they desired.

CHARLES ALLEN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6363, at 788 (2000).

71. Valdez & Nieto Dahlberg, *supra* note 1, at 123 (arguing that by focusing on the defendant's waiver, the court is "less encumbered by the task of assessing the trustworthiness of the statement").

72. *See, e.g.*, United States v. Scott, 284 F.3d 758, 760 (7th Cir. 2002) (declarant was coconspirator in drug conspiracy); United States v. Zlatogur, 271 F.3d 1025, 1027 (11th Cir. 2001) (declarant was an unindicted coconspirator); United States v. Houlihan, 92 F.3d 1271, 1278 (1st Cir. 1996) (declarant was selling drugs and cooperated after arrest); United States v. Aguiar, 975 F.2d 45, 46-47 (2d Cir. 1992) (declarant delivering drugs to defendant); Rice v. Marshall, 709 F.2d 1100, 1101 (6th Cir. 1983) (declarant was a participant in the murder charged); Steele v. Taylor, 684 F.2d 1193, 1197-99 (6th Cir. 1982) (noting in habeas corpus review of Ohio conviction that declarant was girlfriend of defendant and privy to planning of murder); United States v. Thevis, 665 F.2d 616, 621 (5th Cir. Unit B 1982) (declarant was an unindicted coconspirator who was given immunity); United States v. Mastrangelo, 662 F.2d 946, 948-49 (2d Cir. 1981) (declarant knowingly sold trucks to defendant importing drugs); United States v. Balano, 618 F.2d 624, 625-26 (10th Cir. 1979) (declarant was convicted of robbery, which defendant aided and abetted); United States v. Carlson, 547 F.2d 1346, 1352 (8th Cir. 1976) (declarant purchased cocaine for distribution from defendant); La Torres v. Walker, 216 F. Supp. 2d 157, 162 (S.D.N.Y. 2000) (declarant Murillo was the driver of a car involved in defendant's shootout, and declarant Rainford, while in jail and facing twenty year sentence, volunteered to provide information and received immunity for testimony); United States v. Melendez, No. CRIM 96-0023(PG), 1998 WL 737994, at *4 (D.P.R. 1998) (declarant was coconspirator who cooperated with the government after arrest for drug importation); State v. Hallum, 606 N.W.2d 351, 353 (Iowa 2000) (declarant, defendant's brother, sexually assaulted and assisted in murder of victim); State v. Pierce, 364 N.W.2d 801, 807-08 (Minn. 1985) (declarants were codefendants who refused to testify); State v. Black, 291 N.W.2d 208, 213 (Minn. 1980) (declarant a participant in the murder); State v. Keeton, 573 N.W.2d 378, 380 (Minn. Ct. App. 1997) (declarants were codefendants); People v. Small, 576 N.Y.S.2d 595, 595 (App. Div. 1991) (declarant had prior knowledge of robbery and drove wounded perpetrator to hospital).

73. Other declarants were minor participants, knowledgeable about the criminal activity, or incarcerated on other charges. *See, e.g.*, Morgan v. Bennett, 204 F.3d 360, 362 (2d Cir. 2000) (declarant was witness to murder and former girlfriend purchased drugs from defendant); United States v. Papadakis, 572 F. Supp. 1518, 1523 (S.D.N.Y. 1983) (declarant stored in trunk cash from robbery); State v. Magouirk, 539 So. 2d 50, 54 (La. Ct. App. 1988) (declarant was a cellmate who reported defendant's confession); People v. Cotto, 699 N.E.2d 394, 403 (N.Y. 1998) (declarant jailed on unrelated charge when he identified defendant) (Smith, J., dissenting); People v.

somewhat more in state courts, involved innocent bystanders.[74] The Supreme Court has questioned the reliability of statements made by accomplices that incriminate others.[75] Admission under the waiver doctrine was relatively easy. Once intimidation was established, only objections of relevancy and prejudicial impact remained. Focusing on the defendant's often egregious conduct and the government's loss of evidence also created powerful incentives to admit the evidence without serious examination of whether it was reliable. Typical comments from the courts reflected the strong inclination toward admissibility. For example, the First Circuit noted that the Confrontation Clause and the hearsay rule balanced the need for the evidence and the defendant's interest in testing the government's evidence through cross-examination.[76] Having waived this right by his own action, only the government's need remains in the hearsay balance.[77] In *United States v. White*,[78] the court noted that a requirement for determining reliability would provide the defendant with greater protection than he would have had if the witness had testified,[79] presumably because no reliability test is applied before a witness testifies before the jury.

Pappalardo, 576 N.Y.S.2d 1001, 1004-05 (Sup. Ct. 1991) (declarant as sole witness who resumed relationship with defendant and planned to assert Fifth Amendment privilege); People v. Colon, 473 N.Y.S.2d 301, 305-06 (Sup. Ct. 1984) (declarants were crime victims who were formerly associated with organized crime).

74. *See, e.g.*, United States v. Thai, 29 F.3d 785, 798, 814 (2d Cir. 1994) (declarant was victim of robbery by defendant); United States v. White, 116 F.3d 903, 909-10 (D.C. Cir. 1997) (declarant was a friend of defendants, and volunteered to cooperate with authorities); United States v. Rouco, 765 F.2d 983, 993-95 (11th Cir. 1985) (declarant was a federal agent murdered by defendant); People v. Johnson, 711 N.E.2d at 968 (declarant was victim of sexual assault); People v. Geraci, 649 N.E.2d 817, 819 (N.Y. 1995) (declarant was witness to murder); People v. Delarosa, 630 N.Y.S.2d 357, 358 (App. Div. 1995) (declarants were crime victims); Holtzman v. Hellenbrand, 460 N.Y.S.2d 591, 592 (App. Div. 1983) (declarant was estranged wife of defendant); People v. Sweeper, 471 N.Y.S.2d 486, 488-89 (Sup. Ct. 1984) (declarant was a crime victim); Commonwealth v. Paddy, 800 A.2d 294, 300 (Pa. 2002) (declarant was a bystander to murder).

75. *See* Lilly v. Virginia, 527 U.S. 116, 137 (1999) (recognizing "[i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted . . . when the government is involved in the statements' production"); Williamson v. United States, 512 U.S. 594, 603-04 (1994) (statements of codefendant implicating others are not admissible as against the declarant's penal interest because of motivation to implicate others).

76. United States v. Houlihan, 92 F.3d at 1279, 1281.

77. *Id.* at 1281-82.

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

79. *Id.* at 913.

C. *The Change in Rationale from Waiver to Forfeiture*

The Rule's rationale is as important as its elements because the rationale provides guidance to the courts in close cases, and determines its reach. The misconduct exception's source is *United States v. Reynolds*, where the defendant waived his confrontation right when he refused to reveal the location of the witness.[80] The Supreme Court used a waiver analysis in subsequent cases when a defendant's conduct led to the loss of Sixth Amendment rights.[81] Similarly, the federal appellate courts initially viewed and interpreted the defendant's misconduct against witnesses as a waiver of the right of confrontation.[82]

A waiver, as defined by *Johnson v. Zerbst*,[83] was "an intentional relinquishment or abandonment of a known right or privilege."[84] When the defendant was clearly responsible for the conduct that led to the loss of rights, such as voluntary absence from trial, the requirements of a knowing, voluntary,

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80. United States v. Reynolds, 98 U.S. 145, 158-60 (1878). The Court's most cited rational is the principle of estoppel. *See id.* "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong . . . ." *Id.* at 159. The Court also cites the defendant's deliberate choice to withhold the witness's location to justify the loss of the right to confront the witness against him. *Id.* at 158.

> [B]ut 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.

Id.

> Clearly, enough had been proven to cast the burden upon [the defendant] of showing that he had not been instrumental in concealing or keeping the witness away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own.

Id. at 160.

81. *See* Valdez & Nieto Dahlberg, *supra* note 1, at 99 (discussing forfeiture by misconduct, and describing Supreme Court and other federal precedents involving the waiver of Sixth Amendment rights).

82. *See, e.g.*, United States v. Thevis, 665 F.2d 616, 630-32 (5th Cir. Unit B 1982) (concluding that the defendant waived his Confrontation Clause right when he murdered an adverse witness); United States v. Carlson, 547 F.2d 1346, 1357-59 (8th Cir. 1976) (holding that where the defendant intimidated a witness into not testifying against him, he waived his right to confront that witness).

83. Johnson v. Zerbst, 304 U.S. 458 (1938).

84. *Id.* at 464.

personal waiver of a constitutional right are easily satisfied.[85] Witness intimidation is often disconnected from the trial process because the acts are committed before indictments are obtained, and performed for mixed motives, only one of which was related to trial. Thus, it is unrealistic to say the defendant knowingly relinquished his rights to object to evidence, or the right to confrontation by committing wrongdoing some months or years before the trial. In *Steele v. Taylor*,[86] the Sixth Circuit stated:

> It is a legal fiction to say that a person who interferes with a witness thereby knowingly, intelligently and deliberately relinquishes his right to exclude hearsay. He simply does a wrongful act that has legal consequences that he may or may not foresee. The connection between the defendant's conduct and its legal consequence under the confrontation clause is supplied by the law and not by a purposeful decision by the defendant to forego a known constitutional right.[87]

In contrast to a waiver, a forfeiture occurs by operation of law, regardless of the state of mind of the defendant.[88] Forfeiture is a consequence of another action performed by the defendant which may have unforeseen and unintended consequences for the affected individual.[89] A forfeiture of constitutional rights is justified only by the adverse consequences to the State that flow from the triggering event.[90] Witness intimidation triggers forfeiture because of the severe consequences to the State.[91] Threats, violence, and murder against witnesses are already criminal acts. The guilty may go unpunished through another crime, and prosecutions in general become more difficult. At a minimum, the government's case may be hobbled, so there is a strong need for other evidence, even if it is less reliable. By shifting the emphasis from the defendant's mental state, which

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85. *See* United States v. Carlson, 547 F.2d at 1358 (citing Taylor v. United States, 414 U.S. 17, 20 (1973); Diaz v. United States, 223 U.S. 442, 455 (1912)) ("If a defendant voluntarily absences himself from his trial, he has waived his confrontation rights.").

86. Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982).

87. *Id.* at 1201 n.8.

88. Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214 (1977).

89. *See id.* at 1214-15 (distinguishing between constitutional rights that may be unknowingly forfeited by a guilty plea, from constitutional rights that can only be deliberately waived based upon the interest of the state in being able to retry the defendant); *see also* Tess, *supra* note 1, at 898-901 (discussing Westen's theory in the context of waiver by misconduct).

90. Westen, *supra* note 88, at 1235-39 (arguing that some defenses are forfeited by a guilty plea because the government has relied upon the plea, and subsequent assertion of the defenses may deprive the government of the ability to obtain a conviction).

91. People v. Geraci, 649 N.E.2d 817, 821 n.2 (N.Y. 1995).

is relevant in determining waiver, to the obvious damage to the State, it becomes easier to justify the loss of significant rights because there are no countervailing considerations.

III. THE MISCONDUCT EXCEPTION: ELEMENTS, PRACTICE, AND PROCEDURE

A. *The Codification of the Misconduct Exception As Federal Rule of Evidence 804(b)(6)*

1. *Introduction*

The misconduct exception had largely coalesced by the mid-1990s. There was general agreement on its requirements and its evidentiary consequences. Most courts used the preponderance of the evidence standard, and the pretrial and trial procedures were being established. The major unresolved questions related to whether there was a specific examination of the reliability of the evidence,[92] and the proof necessary to link a defendant to those who actually intimidated the witness, but few cases presented the latter issue directly.[93] The case-by-case evolution of the law appeared to be working well, and it could be argued that there was no need to codify it as a rule of evidence.[94]

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92. Kroger, *supra* note 1, at 859-64 (discussing the case law on the misconduct exception prior to codification including the different approaches of the federal circuits to the reliability of the hearsay statement).

93. United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982) (discussing test linking defendant with another's murder of witness); People v. Cotto, 699 N.E.2d 394, 398 n.1 (N.Y. 1998) (rejecting a requirement that defendant be identified as responsible for the witness's intimidation).

94. *See* Birdsong, *supra* note 1, at 918-19 (describing the deliberations of the Advisory Committee on Rule 804(b)(6)). Professor Birdsong also suggested that codification was unnecessary because the principle of forfeiture by misconduct had been well established by *Reynolds* and its progeny. *Id.* at 918. I agree with the general point that codification was unnecessary, and add that another reason was that twenty-five years of federal case law had sufficiently defined it. Another argument against codification may be that the exception is relatively unused. Professor Michael H. Graham argued in 1985 that the difficulties in obtaining proof would limit the use of this exception. GRAHAM, WITNESS INTIMIDATION, *supra* note 1, at 174. Research for this Article included reviewing all the pertinent federal and state cases, and the misconduct exception has been a significant issue in about seventy-five state and federal cases in twenty-five years.

2. *The Advisory Committee on Evidence Rules*

A misconduct exception was first mentioned in the committee in 1992, and significant efforts to adopt the exception had begun by 1995.[95] The chief advocate appears to have been Judge Ralph K. Winter of the Second Circuit, who had recently been appointed chair of the Advisory Committee on Evidence, and strongly believed that the rule should be codified.[96] The committee also agreed that "codifying the waiver doctrine was desirable as a matter of policy in light of the large number of witnesses who are intimidated or incapacitated so that they do not testify."[97] As will be seen, the facts of *United States v. Mastrangelo* strongly influenced the Federal Rule. Judge Winter, the chair of the Advisory Committee, had been on the panel that affirmed Mastrangelo's conviction.[98]

One of the first issues discussed by the committee was who, beyond the actual perpetrators of the violence toward the witness, would be subject to the hearsay exception—an issue first raised by *Mastrangelo*.[99] There, the witness, James Bennett, had been murdered on his way to testify against Mastrangelo.[100] Mastrangelo was not a direct participant because he was in court at the time of Bennett's death,[101] yet it was hard to believe that he was innocent because Bennett's testimony affected only Mastrangelo.[102] When the murder was announced, the trial judge, Judge Weinstein, described Mastrangelo as having acquiesced in the murder.[103] The Second Circuit stated a different but equally

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95. Birdsong, *supra* note 1, at 903.

96. *Id.* at 905-06.

97. Minutes of the Advisory Committee on Federal Rules of Evidence (May 4-5, 1995).

98. United States v. Mastrangelo, 722 F.2d 13 (2d Cir. 1983) (affirming conviction after remand and retrial). Judge Winter also wrote the opinion in another forfeiture by misconduct case. *See* United States v. Aguiar, 975 F.2d 45 (2d Cir. 1992) (holding that the defendant waived hearsay objection and right to confront prosecution witness).

99. United States v. Mastrangelo, 662 F.2d 946, 949-50 (2d Cir. 1981) (denying interlocutory appeal that argued double jeopardy prevented prosecution of Mastrangelo), *on remand*, 533 F. Supp. 389 (E.D.N.Y. 1982) (ruling before trial that statements were admissible), *rev'd on other grounds*, 693 F.2d 269 (2d Cir. 1982) (remanding for hearing on knowledge and failure to warn standard), *on remand*, 561 F. Supp. 1114 (E.D.N.Y. 1983) (ruling that evidence supported waiver of hearsay and constitutional rights), *aff'd*, 722 F.2d 13 (2d Cir. 1983) (affirming after remand).

100. United States v. Mastrangelo, 662 F.2d at 949.

101. *Id.* at 950.

102. *Id.* at 950-51.

103. *See* United States v. Mastrangelo, 693 F.2d at 271 (stating that Mastrangelo "either directly arranged for the killing of the witness or was advised of the possible killing of the witness and acquiesced"). Judge Weinstein made this statement during the argument denying Mastranglo's motion on double jeopardy. *See* United States v. Mastrangelo, 662 F.2d at 950. The word

broad rule of accomplice liability when it held, "Bare knowledge of a plot to kill Bennett and a failure to give warning to appropriate authorities is sufficient to constitute a waiver."[104] The drafters adopted Judge Weinstein's version and explained why they used an expansive standard: "[T]he Committee chose a version of the rule that would not require having to show that the defendant actively participated in procuring the declarant's unavailability. Acquiescence will suffice."[105]

The committee also addressed the burden of proof and the consequences of finding a waiver.[106] Following the majority of courts the committee concluded that the proponent's burden of proof was the preponderance of the evidence[107] rather than "clear and convincing" evidence as held by the Fifth Circuit in *United States v. Thevis*.[108] The committee also agreed with the case law that the hearsay statement of the absent witness was admissible only to the extent that it would have been if the witness were present and testifying.[109] Thus, objections to lack of personal knowledge, double hearsay, prejudicial, misleading, or other objections under Rule 403 remained available to the defendant.[110]

The text of the Rule built on *Thevis*, which identified two elements: "(1) the defendant caused the witness' unavailability (2) for the purpose of preventing that witness from testifying at trial."[111] The adoption of a specific intent requirement limited the Rule to witness tampering cases.[112] The initial draft was as follows: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (6) Waiver by misconduct. A statement offered

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"acquiesced" also appears in the Advisory Committee's note to Rule 801(d)(2), in the context of adoptive admissions by silence. *See* FED. R. EVID. 801 advisory committee's note (determining that an "admission may be made by adopting or acquiescing in the statement of another"). Judge Weinstein declared a mistrial after the murder because the government's remaining evidence was a tape implicating Mastrangelo and his codefendant, creating problems under *Bruton v. United States*. *See* United States v. Mastrengelo, 693 F.2d at 271 (requiring an evidentiary hearing to determine whether the defendant was involved in the murder of the witness); Bruton v. United States, 391 U.S. 123, 126 (1968) (affirming that the right to cross examination is "'included in the right of an accused in a criminal case to confront the witnesses against him,'" and that "'a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross examine the witnesses against him'") (citations omitted).

104. United States v. Mastrangelo, 693 F.2d at 273-74.
105. Minutes of the Advisory Committee on Federal Rules of Evidence (May 4-5, 1995).
106. *Id.*
107. *Id.*
108. United States v. Thevis, 665 F.2d 616, 631 (5th Cir. Unit B 1982).
109. Minutes of the Advisory Committee on Federal Rules of Evidence (May 4-5, 1995).
110. *Id.*
111. United States v. Thevis, 665 F.2d at 633 n.17.
112. Valdez & Nieto Dahlberg, *supra* note 1, at 130.

against a party who has engaged or acquiesced in wrongdoing that was intended to, and did procure the unavailability of the witness."[113]

The Rule was approved for publication in July 1995.[114] Comments were received from several sources, and all would have limited the Rule. The commentators favored the proposal but were concerned about the term "acquiesced."[115] Suggestions were made to replace "acquiesced" with "engaged directly or indirectly in wrongdoing" or "engaged in or directed" wrongdoing.[116] The most significant proposal for change would have required the defendant to know that the victim is likely to be a witness, and that the conduct be intended to obstruct justice in a pending proceeding.[117] Several law professors proposed that the Advisory Committee's note indicate that the Rule would not apply unless there was a plausible possibility that, had the defendant opposed the intimidatory conduct, it would not have occurred.[118] This qualification would have limited the Rule to those who had the power to prevent the violence against the witness.[119]

After considering the comments on the proposed Rule, the drafters made two changes.[120] First, the title was changed from "waiver by misconduct," to "forfeiture by misconduct" because forfeiture better reflected the rationale of the Rule.[121] The courts had previously made a similar adjustment in the rationale.[122]

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113. Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure, and Evidence, *reprinted in* 163 F.R.D. 156 (1995) (Letter from Hon. Ralph K. Winer, Chair Advisory Committee on Evidence, to Hon. Alicemarie H. Stotler Chair and members of the Standing Committee on Rule of Practice and Procedure on Proposed Amendments to the Rules of Evidence).

114. Minutes of the Committee on the Rules of Practice and Procedure (July 6, 1995).

115. Comments were received from Robert F. Wise, Jr., Esq., on behalf of the Commercial and Federal Litigation Section of the New York Bar, Will B. Poff, Esq., on behalf of the National Association of Railroad Trial Counsel, Professor Myrna S. Raeder, on behalf of ten law professors of evidence and individuals interested in evidentiary policy, William J. Genego and Peter Goldberger, Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Procedure, and Professor Richard D. Friedman of the University of Michigan. 2 MCCORMICK, TREATISE ON EVIDENCE app. A, at 664-66 (5th ed. 1999). The pubic comments state that acquiescence was "nebulous," "too broad," and "too vague." *Id.* at 665.

116. *Id.*

117. *Id.*

118. *Id.* at 665-66.

119. The requirement of power to prevent intimidation would also have restricted the holding of the Second Circuit's formulation in *Mastrangelo*, that bare knowledge and failure to report the intimidation was sufficient for a waiver. United States v. Mastrangelo, 693 F.2d 269, 273-74 (2d Cir. 1982).

120. Minutes of the Advisory Committee on Federal Rules of Evidence (Apr. 5, 1996).

121. *Id.*

122. Minutes of the Advisory Committee on Federal Rules of Evidence (May 4-5, 1995).

Second, the committee changed the language from "a party *who* has engaged or acquiesced in wrongdoing," to "a party *that* has engaged or acquiesced in wrongdoing" to make clear that the rule applied to the government.[123]

In response to claims that the term was too vague, the committee revisited the "acquiesce" standard, but ultimately rejected all of the proposals for limiting language in the text or the Advisory Committee's note.[124] The members considered alternates such as "aiding and abetting" and "acceptance of the benefits," but retained the original language.[125] The committee also chose not to specifically refer to witness tampering, as suggested by one comment, because it believed that the text made clear that the exception applied only when the object was to procure the witness's absence.[126] The committee also discussed whether to substitute "wrongdoing" for "misconduct."[127] Since "wrongdoing" already appeared in Rule 804 in connection with the definition of unavailability, "wrongdoing" was chosen.[128] Finally, the committee rejected a notice provision because case law had not required such a provision.[129]

The proposed Rule was approved by the Committee on Practice and Procedure and forwarded to the Judicial Conference, which approved it in September and transmitted it to the Supreme Court, which approved the Rule in April 1997, with an effective date of December 1, 1997.[130] The Rule as promulgated reads: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."[131]

B. *The Elements of the Misconduct Exception*

Rule 804(b)(6) is the standard statement of the misconduct exception. Its language generally incorporates the preexisting federal case law, and it serves as a model for other jurisdictions. The Military Rules of Evidence, the Uniform Rules of Evidence, and Pennsylvania Rules of Evidence adopted the federal

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123. Minutes of the Advisory Committee on Federal Rules of Evidence (Apr. 22, 1996) (emphasis added).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. FED. R. EVID. 804(b)(6) advisory committee's note.
131. FED. R. EVID. 804(b)(6).

language.[132] Tennessee followed the Federal Rule, but deleted the "or acquiesced" language.[133] The proposed evidence code for New York was drafted before Rule 804(b)(6), and is consistent with New York case law and the general language of the Federal Rule.[134] For the purposes of this Article, the language of the Federal Rule provides the framework for discussing the misconduct exception.

1. *An Unavailable Declarant*

The federal courts defined the scope of the misconduct exception in several cases decided between 1976 and the promulgation of Rule 804(b)(6) in 1997.

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132. *See* MIL. R. EVID. 804(b)(6); UNIF. R. EVID. 804(b)(5); PA. R. EVID. 804(b)(6).

133. *See* TENN. R. EVID. 804(b)(6). The Tennessee rule provides: "Forfeiture by Wrongdoing.—A statement offered against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness." *Id.* The Advisory Commission on Rules of Practice and Procedure in Tennessee recommended that "acquiesced" be deleted because of the difficulties in determining the scope of that term. Telephone Interview with Professor Neil P. Cohen, Professor, University of Tennessee Law School, and member of the Advisory Commission (Dec. 5, 2002).

134. *See* THE N.Y. STATE LAW REVISION COMM'N, A CODE OF EVIDENCE FOR THE STATE OF N.Y. § 807 (1991).

> § 807. Rendering hearsay admissible by causing the unavailability of a witness
>
> (a) Misconduct causing unavailability. Reliable statements by a potential witness which would otherwise be inadmissible hearsay are admissible as direct evidence against a party whose criminal misconduct has caused that witness to be unavailable within the meaning of subdivision (a) of section 804 of this article.
>
> (b) Misconduct causing a change in testimony. When the criminal misconduct of a party has caused a witness in a criminal case to give testimony upon a material issue of the case which tends to disprove the position of the party who called the witness, prior contradictory reliable statements of that witness are admissible as evidence in chief, without regard to the limitations contained in subdivision (c) of section 613 of this chapter.
>
> (c) Procedure. Whenever a party alleges specific facts based upon reliable sources of information which demonstrate reasonable cause to believe that another party's misconduct has caused a witness to be unavailable or to change his or her testimony under the circumstances outlined in subdivisions (a) and (b) of this section, the court shall hold a hearing pursuant to subdivision (b) of section 104 of this chapter. The determination of whether a defendant has engaged in criminal misconduct shall be based upon clear and convincing evidence.
>
> (d) Evidence of misconduct. Nothing in this section precludes the admission of evidence of misconduct when it is otherwise relevant.

Id. For differing views of the codification movement in New York, see Barbara C. Salken, *To Codify or Not to Codify—That is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992), and Zeidman, *supra* note 63.

The first and most obvious requirement is the unavailability of the declarant to testify either because of death,[135] refusal to testify,[136] "forgetfulness,"[137] or inability of a party to locate the witness.[138] The unavailability requirement is now clearly established by placing the exception in Federal Rule 804.[139] The various forms of unavailability recognized by Rule 804 and the case law may require different predicate facts or procedures.[140] When the declarant's location is unknown, the government must demonstrate a good faith effort to locate the witness.[141] Likewise, when the witness is present in court, but refuses to testify, some courts require that other measures such as immunity or contempt be exhausted before admitting the hearsay.[142] Unavailability can have a counterintuitive meaning when the witness is available to testify but is expected to recant the prior testimony implicating the defendant. In such instances, New York courts have held that the declarant was "practically unavailable," authorizing the admission of the prior testimony and excusing the government from calling the declarant.[143]

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135. United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982) (allowing out of court testimony from a murdered witness).

136. Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982) (permitting out of court testimony from witness who asserted marital privilege and refused to testify); United States v. Carlson, 547 F.2d 1346, 1353-54 (8th Cir. 1976) (permitting hearsay testimony when witness refused to testify).

137. *See* United States v. Amaya, 533 F.2d 188, 190-91 (5th Cir. 1976) (allowing prior testimony when witness suffered a memory loss due to a car accident).

138. *See, e.g.*, United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir. 1984) (allowing hearsay testimony when party was unable to locate witnesses in Greece).

139. *See* FED. R. EVID. 804(a). *But see* Geraci v. Senkowski, 23 F. Supp. 2d 246, 261-65 (E.D.N.Y. 1998), *aff'd*, 211 F.3d 6, 9-10 (2d Cir. 2000) (holding that there was no constitutional requirement that the declarant be actually unavailable, to justify the admission of the hearsay).

140. *See* Kroger, *supra* note 1, at 846 (identifying six legal issues a court must resolve before applying the confrontation forfeiture doctrine).

141. Ohio v. Roberts, 448 U.S. 56, 74 (1980); Mancusi v. Stubbs, 408 U.S. 204, 221-22 (1972); Barber v. Page, 390 U.S. 719, 724-25 (1968).

142. Kroger, *supra* note 1, at 847.

143. *See, e.g.*, Geraci v. Senkowski, 23 F. Supp. 2d at 261 (noting that the witness said he wanted to testify); People v. Cotto, 699 N.E.2d 394, 396-97 (N.Y. 1998) (noting that the declarant was present but not recalled to testify); People v. Geraci, 649 N.E.2d 817, 820 (N.Y. 1995) (noting the witness was unwilling to testify at trial and therefore permitted the witness's grand jury statements). The jury did not know that the witness had recanted his testimony in *Geraci*, but the jury in *Cotto* did hear the witness decline to identify the defendant. *See* Garaci v. Senkowski, 23 F. Supp. 2d at 263; People v. Cotto, 699 N.E.2d at 397-98; *see also infra* notes 224-35.

2. *Misconduct with the Intent of Preventing the Declarant from Testifying*

The scope of the term "misconduct" or "wrongdoing" has not been an issue because the misconduct has also been a serious criminal act such as assault, threats, or murder. The Advisory Committee's note to Rule 804(b)(6) state that "[t]he wrongdoing need not consist of a criminal act."[144] Otherwise, legal acts intended to prevent testimony, such as purchasing a ticket for the witness to leave town before the trial or paying the witness's attorney's fees, fall within it.[145] One federal court has held that wrongdoing is a separate act from the declarant's unavailability at the trial.[146] In another case, the Seventh Circuit ruled that allowing the declarant, a former long-term tenant, to make telephone calls from the defendant's home was not wrongdoing on his part.[147] One important and unresolved question is whether there is any legal conduct resulting in the witness's unavailability that is not within the Rule.[148] The Proposed New York Code of Evidence specifically required that the defendant engage in criminal misconduct.[149]

The misconduct exception has only been used when the defendant specifically intended to prevent the witness from testifying at trial. The intimidated witnesses all were expected to testify, the courts consistently referred to their status as witnesses, and the evidence indicated that the defendants wanted to prevent the witnesses from testifying.[150] The Fifth Circuit in *Thevis*, decided

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144. FED. R. EVID. 804(b)(6) advisory committee's note.

145. *Cf.* United States v. Williamson, 792 F. Supp. 805, 810-11 (M.D. Ga. 1992), *aff'd*, 981 F.2d 1262 (11th Cir. 1992), *rev'd*, 512 U.S. 594 (1994) (considering whether defendant waived confrontation rights by paying for witness's attorney and holding that the government failed to prove that the defendant waived his confrontation rights).

146. United States v. Scott, 284 F.3d 758, 763 (7th Cir. 2002).

147. United States v. Ochoa, 229 F.3d 631, 639 & n.3 (7th Cir. 2000) (holding that granting permission for telephone calls was not wrongdoing and declining to reach question of whether assisting a witness to leave town is misconduct).

148. *See* discussion *infra* Part V.A (concluding that a defendant's non-threatening and successful advice to another witness to assert an available privilege or refuse to cooperate is not misconduct under the Rule).

149. *See supra* note 134.

150. *See, e.g.*, United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (stating that the test is whether the defendant procures a witness's absence); United States v. Potamitis, 739 F.2d 784, 788 (2d Cir. 1984) (stating that a defendant waives his confrontation right "when his own misconduct is responsible for a witness's unavailability at trial"); Rice v. Marshall, 709 F.2d 1100, 1101 (6th Cir. 1983) (stating that the declarant was an expected witness against the defendant); United States v. Mastrangelo, 693 F.2d 269, 271 (2d Cir. 1982) (stating that the declarant was murdered on his way to testify); Steele v. Taylor, 684 F.2d 1193, 1198-99 (6th Cir. 1982) (stating that the defendant's wife was called to testify); United States v. Balano, 618 F.2d 624, 629 (10th

in 1982, set forth a two-part test requiring proof that: (a) the defendant caused the unavailability of the witness; and (b) for the purpose of preventing the witness from testifying.[151] The Federal Rule adopted a specific intent requirement based upon the language in *Thevis*. Finally, preventing the testimony did not have to be the defendant's sole or even major motivation. So long as the desire to prevent the testimony was one reason for the defendant's act against the victim, the intent element was satisfied.[152]

Nothing in these opinions suggests that either the federal or state courts were establishing the broader principle that responsibility for the witness's absence, regardless of intent, would be a waiver of constitutional and evidentiary rights. Extending the misconduct exception to that extent would swallow the hearsay rule whenever the defendant was the cause of the witness's unavailability at the trial, such as in a manslaughter or negligent homicide case.[153] The extension of the misconduct exception would present significant if not insurmountable Sixth Amendment objections because it would admit hearsay in an entire class of cases where it was previously prohibited by both evidence and constitutional law. The breadth of the exception would be beyond anything heretofore accepted under the Confrontation Clause. Nevertheless, there are

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Cir. 1979) (stating "[t]he law [should not] permit an accused to subvert a criminal prosecution by causing *witnesses* not to testify at trial") (citation omitted) (emphasis added); United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1976) (noting that the defendant acted only when he learned that the declarant was going to testify at his trial).

151. United States v. Thevis, 665 F.2d 616, 633 n.17 (5th Cir. Unit B 1982).

152. United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001) (citing United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)).

153. Olson v. Green, 668 F.2d 421, 430 (8th Cir. 1982) (stating no case holds that participation in a crime waives the right to confront an adverse witness, and that such a holding would destroy the right of confrontation); United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) (holding that an accessory who did not threaten defendant did not waive confrontation rights); Wyatt v. State, 981 P.2d 109, 115 n.11 (Alaska 1999) (recognizing that forfeiture by misconduct does not apply to domestic homicide); State v. Jarzbek, 529 A.2d 1245, 1253 (Conn. 1987) ("The constitutional right of confrontation would have little force, however, if we were to find an implied waiver of that right in every instance where the accused, in order to silence his victim uttered threats during the commission of the crime for which he is on trial."); State v. Hansen, 312 N.W.2d 96, 105 (Minn. 1981) (finding waiver based only on declarant's refusal to testify without proof of threats would destroy confrontation clause in crimes against the person); People v. Maher, 677 N.E.2d 728, 731 (N.Y. 1997) (holding that the misconduct exception does not apply to murder unrelated to testimony); People v. Flowers, 667 N.Y.S.2d 546, 547 (App. Div. 1997) (same); Commonwealth v. Laich, 777 A.2d 1057, 1062 n.4 (Pa. 2001) (rejecting the misconduct exception in manslaughter prosecution). *But see* Kroger, *supra* note 1, at 854-57 (stating that none of the federal courts have explicitly rejected a requirement that the defendant must have intended to prevent the witness from testifying).

numerous dissenting opinions reported, which urge broader use of the misconduct exception.[154]

3. *The Declarant Is Expected to Be a Witness*

The term "witness" is interpreted broadly. The defendant does not have to be under indictment or awaiting trial,[155] and there is no requirement that the declarant be a scheduled witness[156] or even cooperating with the government at the time of the intimidation.[157] The condition is satisfied as long as the defendant acted against the declarant because of the witness's potential to testify against the defendant.[158] In one case, forfeiture was based on a murder nearly three years before the trial.[159] In another case, proof that the declarant's murder was to prevent testimony was based on the declarant's statement, "I'm not going to tell," apparently made to fend off the murder.[160]

4. *The Defendant's Acts Caused the Unavailability of the Witness*

The language of Rule 804(b)(6) requires that the defendant engage in misconduct that was "intended to and did, procure the witness's absence."[161] Requiring the government to establish that the defendant's actions procured the

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154. People v. Johnson, 673 N.Y.S.2d 755, 761-62 (App. Div. 1998) (Peters, J., dissenting) (arguing that the defendant-pastor's use of position of authority in acting as a religious advisor providing counseling services to child was responsible for the child's refusal to testify against him in sexual misconduct case); People v. Okafor, 495 N.Y.S.2d 895, 899 (Sup. Ct. 1985) (using the misconduct exception to admit prior statements of decedent in rebuttal); Commonwealth v. Laich, 777 A.2d at 1069 (Castille, J., dissenting) (arguing that the misconduct exception should apply to domestic homicide); *see also* Friedman, *Chutzpa*, *supra* note 1, at 521-35 (arguing that absent declarant-victim's statements should be admissible any time the defendant is responsible for the unavailability of the witness); Sykora, *supra* note 1, at 879-80 (stating that intent to cause witness unavailability should be eliminated from Rule 804(b)(6)).

155. *See* United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997) (holding that an ongoing criminal proceeding in which declarant was to testify is not required).

156. *See id.*

157. *See* Cruchfield v. United States, 779 A.2d 307, 332 (D.C. 2001).

158. *See id.* (determining that witnesses qualifying under the obstruction statute also qualify as potential witnesses under the waiver rule); *see also* United States v. Houlihan, 92 F.3d 1271, 1279-80 (1st Cir. 1996) (holding that waiver by misconduct applies equally to potential witnesses).

159. *See* United States v. Houlihan, 887 F. Supp. 352, 356-57 (D. Mass. 1995), *aff'd in part*, 92 F.3d 1271, 1278-80 (1st Cir. 1996).

160. United States v. Celestine, No. 97-4219, 2002 WL 1821971, at *7 (4th Cir. 2002) (per curiam).

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

witness's unavailability presents the typical problems of proof in many cases. In nearly all the reported opinions, there is some direct evidence of the defendant's participation either by orders, threats, or actual violence against the witness.[162] Some cases have held that the evidence was insufficient to connect the defendant to the unavailability of a witness.[163] When the declarant is present at trial,

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162. *See, e.g.*, United States v. Scott, 284 F.3d 758, 763-65 (7th Cir. 2001) (finding repeated conversations between defendant and witness caused the witness not to testify); United States v. Dhinsa, 243 F.3d 635, 657 (2d Cir. 2001) ("The record amply demonstrates that Dhinsa murdered Manmohan and Satinderjit to 'depriv[e] the government of . . . potential witness[es].'") (citation omitted); United States v. Johnson, 219 F.3d 349, 355 (4th Cir. 2000) (noting that three witnesses observed the defendant murder the informant before trial); United States v. Cherry, 217 F.3d 811, 814 (10th Cir. 2000) (finding direct and circumstantial evidence that declarant was murdered by the defendant, therefore declarant's statements were admissible against the defendant under the *Pinkerton* doctrine); United States v. Emery, 186 F.3d 921, 925 (8th Cir. 1999) (finding substantial proof that defendant participated in killing the federal informant); United States v. White, 116 F.3d 903, 913-14 (D.C. Cir. 1997) (holding eyewitness testimony of defendant murdering potential witnesses admissible); United States v. Thai, 29 F.3d 785, 815 (2d Cir. 1994) (finding "by clear and convincing evidence" that defendants caused the unavailability of a potential witness); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (noting the presence of the defendant's fingerprints on a threatening letter); United States v. Rouco, 765 F.2d 983, 985 (11th Cir. 1985) (finding defendant murdered ATF agent-witness during arrest); United States v. Potamitis, 739 F.2d 784, 788 (2d Cir. 1984) (holding there was ample evidence that defendant threatened absent witnesses, causing them not to appear at trial); Rice v. Marshall, 709 F.2d 1100, 1101-02 (6th Cir. 1983) (witness refused to testify after visit from defendant's "investigators"); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) (noting testimony of defendant's threat to witness); United States v. Carlson, 547 F.2d 1346, 1353 (8th Cir. 1976) (finding witness refused to testify because he had been threatened by defendant); United States v. Melendez, No. CRIM 96-0023(PG), 1998 WL 737994, at *2-3 (D.P.R. Oct. 15, 1998) (noting statements made by defendants to others about their murder of a potential witnesses); United States v. Houlihan, 887 F. Supp. 352, 362-65 (D. Mass. 1995) (relying on testimony of other coconspirators about the murder of the informant, as well as statements made by defendant); United States v. Thevis, 84 F.R.D. 57, 72-73 (N.D. Ga. 1979) (describing evidence of defendants' participation in, and presence at, murder scene); State v. Valencia, 924 P.2d 497, 502-03 (Ariz. Ct. App. 1996) (reviewing declarant's repeated identification of defendant before dying); Cruchfield v. United States, 779 A.2d 307, 315-16 (D.C. 2001) (noting weapon used in murder of witness was found in defendant's possession); Sweet v. United States, 756 A.2d 366, 368-69 (D.C. 2000) (noting that the defendant was seen murdering the declarant); State v. Gettings, 769 P.2d 25, 29 (Kan. 1989) (finding state proved by a preponderance of the evidence that defendant was involved in procuring absence of witness); State v. Magouirk, 561 So. 2d 801, 804 (La. Ct. App. 1990) (stating that the declarant's refusal to testify was the result of defendant's threats); People v. Geraci, 649 N.E.2d 817, 823-24 (N.Y. 1995) (relying on declarant's testimony, bribe by defendant's uncle, and defendant's meeting with declarant); People v. Straker, 662 N.Y.S.2d 166, 167-68 (Sup. Ct. 1997) (relying on direct evidence of defendant's threats); People v. Perkins, 691 N.Y.S.2d 273, 276 (Sup. Ct. 1992) (relying on declarant's testimony of defendant's threats).

163. *See, e.g.*, United States v. Ochoa, 229 F.3d 631, 639 & n.3 (7th Cir. 2000) (finding no evidence that the defendant knew the witness was intending to flee); Olson v. Green, 668 F.2d

however, but refuses to testify or asserts a privilege, those actions may be motivated by reasons independent of the defendant's intimidation, and this refusal to testify severs the link between the defendant's misconduct and the loss of the evidence. For example, the witness's decision not to testify may have been made before the defendant's pressure.[164] In another case, the government asserted that the defendant had purchased his codefendant's silence by paying his attorney's fees.[165] The trial court rejected this claim in part because it found that the declarant's assertion of his Fifth Amendment privilege was due to his pending appeal to suppress evidence on Fourth Amendment grounds.[166] The benefits of a successful appeal would be nullified by testimony that might incriminate him.[167] However, the courts are skeptical of witnesses' statements of independent reasons for refusing to testify.[168] The courts have not addressed whether the defendant's acts must be the sole cause or just one of many reasons for the declarant's decision not to testify. Symmetry argues for the same standard used for the defendant's motivation. As long as the defendant's threats

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421, 429 & n.15 (8th Cir. 1982) (finding no evidence that defendant made threats and rejecting state court's ruling that the defendant was responsible because of conspiracy); State v. Lomax, 608 P.2d 959, 967 (Kan. 1980) (finding no evidence that defendant was responsible for witness's refusal to testify); State v. Washington, 521 N.W.2d 21, 42 (Minn. 1994) (finding no proof that declarant heard threats); State v. Hansen, 312 N.W.2d 96, 105 (Minn. 1981) (finding no proof that the defendant threatened the witnesses); People v. Brown, 632 N.Y.S.2d 938, 944-45 (Sup. Ct. 1995) (holding that witness who was testifying that defendant was responsible for absence of declarant was not credible).

164. *See, e.g.*, People v. Johnson, 711 N.E.2d 967, 969 (N.Y. 1999) (considering whether the twelve-year-old victim of improper sexual advances had reason not to testify independent of the defendant's pleas not to send him to jail).

165. United States v. Williamson, 792 F. Supp. 805 (M.D. Ga. 1992), *aff'd*, 981 F.2d 1262 (11th Cir. 1992), *rev'd*, 512 U.S. 594 (1994).

166. *Id.* at 810.

167. *Id.* There were alternate grounds. The court also found that there was conflicting evidence on whether there was an agreement to keep silent and whether the declarant knew the defendant paid his fees. *Id.* at 810-11. Applying the clear and convincing standard then required in the Fifth Circuit, the court found that the government had not met its burden of proof. *Id.* at 810.

168. United States v. Scott, 284 F.3d 758, 765 (7th Cir. 2001) (rejecting declarant's statements about religious and moral reasons for refusing to testify); Steele v. Taylor, 684 F.2d 1193, 1208 (6th Cir. 1982) (Taylor, J., dissenting) (noting that rejection of declarant's marital privilege claim was based on the same evidence used to support the claim that she was under the control of the defendant); State v. Pierce, 364 N.W.2d 801, 807-08 (Minn. 1985) (rejecting declarant's statements that motive for not testifying was not defendant's threats, but that declarant did not want to be known as a snitch); People v. Serrano, 644 N.Y.S.2d 162, 162 (App. Div. 1996) (finding witness's disclaimers of intimidation by defendant not credible); People v. Pappalardo, 576 N.Y.S.2d 1001, 1002-03 (Sup. Ct. 1991) (rejecting declarant's claim of amnesia when she was involved with defendant).

were one cause of the declarant's decision not to testify, the requirement is satisfied.

C. *The Proponent's Burden of Proof*

The majority of courts have adopted the preponderance of the evidence standard, as did the Federal Rule when it was promulgated in 1997.[169] This follows the general rule that the admissibility of evidence is judged by the preponderance standard.[170] Prior to the adoption of the Federal Rule, at least three federal courts considered a higher standard. The Fifth Circuit, in *United States v. Thevis*, adopted the clear and convincing evidence standard in 1982 because it noted that the Supreme Court had used the "clear and convincing" standard in admitting in-court identifications following a tainted identification.[171] The trial judge in *United States v. Houlihan*[172] followed that reasoning, although it was not clear whether that higher standard made any appreciable difference.[173] The court of appeals ultimately adopted the preponderance standard.[174] The Fourth Circuit used the higher standard without comment.[175] New York state courts, and New York's proposed code of evidence, however, require proof of waiver by misconduct by clear and convincing evidence.[176] New York's rationale for the higher standard rests on three grounds. First, the importance of the constitutional and evidentiary interests involved, principally the loss of the right to cross-examine about the substance of the testimony, argues for a higher standard.[177] Second, the misconduct exception was justified by public policy considerations of deterrence and the maxim that no person should benefit from his wrong, rather than the inherent reliability of the hearsay.[178] Finally, the New York cases initially involved grand jury testimony, and the legislature had

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169. *See, e.g.*, United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996); United States v. Aguiar, 975 F.2d 45, 48 (2d Cir. 1992); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979); State v. Gettings, 769 P.2d 25, 29 (Kan. 1989); State v. Magouirk, 539 So. 2d 50, 64-66 (La. Ct. App. 1989).

170. Bourjaily v. United States, 483 U.S. 171, 175 (1987).

171. United States v. Thevis, 665 F.2d 616, 616 (5th Cir. Unit B 1982).

172. United States v. Houlihan, 887 F. Supp. 352 (D. Mass. 1995).

173. *See id.* at 360, *aff'd*, 92 F.3d 1271, 1280 n.6 (1st Cir. 1996).

174. *See* United States v. Houlihan, 92 F.3d 1271, 1280 n.6 (1st Cir. 1996).

175. *See* United States v. Smith, 792 F.2d 441, 442 (4th Cir. 1986).

176. *See, e.g.*, People v. Geraci, 649 N.E.2d 817, 822 (N.Y. 1995).

177. *Id.*

178. *Id.* at 821.

statutorily limited the circumstances in which the exception could be used.[179] These limitations led the New York state courts to use caution in crafting the misconduct exception.[180]

D. *Practice and Procedure*

1. *The Motion In Liminie*

Federal judges consistently decide the admissibility of hearsay statements, often implicitly holding that it is a decision for the judge under Federal Rule of Evidence 104(a), rather than a question of conditional relevance under Federal Rule of Evidence 104(b). Although the proponent of the unavailable witness's statement is not required to give notice of the intent to introduce the statements,[181] the admissibility of absent witness hearsay is often raised before trial because of its importance to both parties, particularly the government, whose case may depend on the admissibility of the hearsay. Courts often schedule an evidentiary hearing to establish the factual predicates for admitting the evidence.[182] The hearings can be lengthy,[183] and often involve otherwise inadmissible evidence about activities and uncharged crimes that may not be directly relevant to the indicted offenses, and are additional reasons for a pretrial determination, outside the presence of the jury, of the issue. The Second Circuit requires an evidentiary hearing, as do New York state courts, before the hearsay evidence may be admitted.[184]

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179. *Id.* at 822.

180. *Id.* In adopting the clear and convincing standard, the New York Court of Appeals rejected an additional burden when the evidence of intimidation was circumstantial. *Id.* at 823. The court of appeals rejected the defendant's argument that the circumstantial evidence "must exclude to 'a moral certainty' every reasonable hypothesis other than the accused's culpability." *Id.* at 824.

181. Minutes of the Advisory Committee on Federal Rules of Evidence (Apr. 22, 1996).

182. United States v. Price, 265 F.3d 1097, 1100 (10th Cir. 2001); United States v. Cherry, 217 F.3d 811, 813 (10th Cir. 2000); United States v. Thai, 29 F.3d 785, 814-15 (2d Cir. 1994); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Smith, 792 F.2d 441, 442 (4th Cir. 1986); United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346, 1353 (8th Cir. 1976); United States v. Houlihan, 887 F. Supp. 352, 356 (D. Mass. 1995); United States v. White, 838 F. Supp. 618, 621 (D.D.C. 1993); United States v. Papadakis, 572 F. Supp. 1518, 1523 (S.D.N.Y. 1983); United States v. Mastrangelo, 533 F. Supp. 389, 389 (E.D.N.Y. 1982); United States v. Thevis, 84 F.R.D. 57, 61 (N.D. Ga. 1979).

183. United States v. Thevis, 84 F.R.D. at 61 (three-day hearing); United States v. Mastrangelo, 561 F. Supp. 1114, 1115 (E.D.N.Y. 1982) (four-day hearing).

184. *See* United States v. Dhinsa, 243 F.3d 635, 656 (2d Cir. 2001) (requiring that the district court hold a *Mastrangelo* hearing prior to the admission of the challenged statements);

The evidentiary hearing may not be necessary when the defendant is charged with the crime regarding which the witness was to have testified, or when charged with a crime against the absent witness—such as murder or witness tampering. Then the government's case-in-chief will contemporaneously lay the foundation for admitting the absent witness's hearsay statements.[185] The federal courts may rely on a proffer of expected testimony or conferences with the attorneys as the evidence develops to resolve the issue.[186] The court may delay the final ruling until the evidence of the crime against the witness has been presented.[187] In one state case, the court adopted an unusual procedure and held an *in camera* hearing without the presence of any counsel when it determined that the defendant was responsible for the witness's absence.[188] The court analogized this to protecting the identity of a confidential witness.[189]

The declarant's own statements repeated by officers often provide the foundation establishing the defendant's responsibility for the witness's absence, and particularly that it was motivated by a desire to prevent testimony.[190] Rule

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United States v. Miller, 116 F.3d 641, 668-69 (2d Cir. 1997) (finding error in admission of hearsay evidence without evidentiary hearing, but harmless under the facts of the case); People v. Johnson, 711 N.E.2d 967, 968-69 (N.Y. 1999) (holding that a hearing is required unless overwhelming evidence supports a clear and convincing link between the defendant and the witness's unavailability).

185. *See* United States v. Johnson, 219 F.3d at 356 (charging defendant with drug conspiracy and murder of witnesses); *see also* United States v. Emery, 186 F.3d 921, 925 (8th Cir. 1999) (charging the defendant with the murder of a federal informant was sufficient foundation for admission). *But see* United States v. White, 116 F.3d 903, 913-16 (D.C. Cir. 1997) (holding that witnesses testifying about informant's murder gave the defendant an opportunity to challenge the evidence supporting the defendant's forfeiture of confrontation and evidence rights).

186. United States v. Johnson, 219 F.3d at 356 (using meeting with counsel to discuss proof); Crutchfield v. United States, 779 A.2d 307, 329-32 (D.C. 2001) (approving proffer of expected testimony).

187. *See, e.g.*, Crutchfield v. United States, 779 A.2d 307, 324 (D.C. 2001) (stating that the court will monitor the evidence at trial to ensure that it meets pretrial proffer supporting forfeiture); United States v. White, 838 F. Supp. 618, 625 (D.D.C. 1993) (holding that admissibility of hearsay statements subject to objections at trial).

188. State v. Keeton, 573 N.W.2d 378, 380 (Minn. Ct. App. 1997).

189. *Id.* at 381-82; *see also* Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The Waiver Doctrine After* Alvardo, 39 SAN DIEGO L. REV. 1165, 1223-24 (2002) (arguing that principles of the misconduct exception support concealing the names of threatened witnesses).

190. *See, e.g.*, United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001) (INS agent stated declarant fled to Moscow because of defendant's threats); United States v. Aguiar, 975 F.2d 45, 46-47 (2d Cir. 1992) (narcotics agent and Assistant United States Attorney relayed declarant's concern for the safety of his family); United States v. Balano, 618 F.2d 624, 628-29 (10th Cir. 1979) (FBI agent stated declarant would not testify because of defendant's threats and

104(a) authorizes courts to consider otherwise inadmissible evidence in deciding whether to admit evidence, and judges routinely consider hearsay, including the statements sought to be admitted.[191] The state courts likewise authorize the use of hearsay to lay the foundation for the declarant's statements.[192] It is unclear whether the witnesses' hearsay statements can be the sole foundation for their admissibility[193] and whether the determination can rely exclusively on hearsay.[194] The rationale for requiring independent evidence is that hearsay is presumptively unreliable and should not be bootstrapped onto admissible evidence.[195] That argument remains true today, even if the hearsay is part of the evidence considered in determining its admissibility under Rule 104. It is particularly true for the misconduct exception because that exception is not founded on any argument that the circumstances in which the hearsay was made make it reliable. These arguments led to a 1997 amendment to Rule 801(d)(2), which states that a hearsay declarant's statements are not sufficient evidence to establish a conspiracy.[196] The same result should follow when establishing the predicate facts for the misconduct exception.[197] Occasionally the declarant testifies at the hearing, although he does not testify at the trial.[198]

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declarant's desire to continue living in the same city rather than flee); United States v. Carlson, 547 F.2d 1346, 1353 (8th Cir. 1976) (DEA agents testified about threats and intimidating overtures directed toward the declarant by the defendant).

191. FED. R. EVID. 104(a).

192. *See, e.g.*, State v. Valencia, 924 P.2d 497, 503 (Ariz. Ct. App. 1996); People v. Cotto, 699 N.E.2d 394, 398 (N.Y. 1998); People v. Geraci, 649 N.E.2d 817, 823 n.4 (N.Y. 1995).

193. *See* United States v. Emery, 186 F.3d at 927 (expressing doubt that foundation requires evidence independent of the hearsay and finding sufficient independent evidence).

194. *See* United States v. White, 116 F.3d 903, 914 (D.C. Cir. 1997) (leaving undecided whether foundation can rest exclusively on hearsay). The testimony sometimes includes double hearsay. *See* Steele v. Taylor, 684 F.2d 1193, 1207 (6th Cir. 1982) (Taylor, J., dissenting) (noting that declarant's statements were what she had heard other defendants say); People v. Cotto, 699 N.E.2d at 396-97 (officers testified to the defendant's statements that he had heard that his family was threatened, and to the statements of the defendant's mother and sister about threats they received).

195. Glasser v. United States, 315 U.S. 60, 75 (1942).

196. FED. R. EVID. 801(d)(2).

197. The Advisory Committee on the Federal Rules recommended adopting the amendment to Rule 801(d)(2) and the adoption of Rule 804(b)(6) at the same meeting, but in separate discussions without any mention or indication in the minutes that the members saw the topics as related. *See* Minutes of the Advisory Committee on Federal Rules of Evidence (May 4-5, 1995). Certainly there is no indication that the committee rejected a requirement in Rule 804(b)(6) that there be some independent evidence of the predicate facts that support admitting the hearsay statements. *See id.*

198. United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) (noting that witness testified that his prior statements were true, but refused to state reasons for not testifying at trial).

Sometimes extra precautions are appropriate because of previous threats against a witness. In one case where the defendant was charged with murdering a witness, other substantial and verified threats by the defendant led the district judge to allow the government to establish its foundation for the wrongdoing entirely through the hearsay testimony of a police officer.[199] The police officer relayed the expected testimony of the witnesses identified only by numbers.[200] The court tentatively admitted the statements and confirmed the ruling when the witnesses testified at the trial.[201] In two state cases, the courts have extended the forfeiture to include the defendant's presence while the court examined the declarant about the threats and his willingness to testify at an *in camera* hearing.[202] Another court ordered defense counsel to refrain from informing his client that the witness reversed an earlier refusal to testify and could take the stand the next morning.[203] A New York court informed the defendant before releasing him on bail that if the witness was not available at trial due to the defendant's efforts, the court would admit the grand jury testimony.[204]

The opposing party may present evidence and cross-examine the proponent's witnesses.[205] Defendants often object to the introduction of hearsay evidence on the ground that it is inherently unreliable, but they are rarely successful.[206] At a minimum, the hearsay must meet the standard for due process as well as Rule 403.[207] However, these standards are quite low. One federal circuit has held the Due Process standard to be whether statements are "totally lacking in reliability."[208] Rule 403 bars the admission of relevant testimony

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199. United States v. White, 116 F.3d at 913.

200. *Id.*

201. *Id.* at 913-14.

202. *See* State v. Keeton, 573 N.W.2d 378, 381-82 (Minn. Ct. App. 1997) (finding that even if it was error to exclude the defendant and defendant's attorney from *in camera* hearing, it was harmless error because where the defendant procures the witness's absence by threats, the defendant impliedly waives his right to confrontation), *rev'd*, 589 N.W.2d 85 (Minn. 1998); People v. Perkins, 691 N.Y.S.2d 273, 275-76 (Sup. Ct. 1999) (emphasizing that the declarant refused to testify in the defendant's presence and allowing defense counsel to submit questions in writing).

203. People v. Perkins, 691 N.Y.S.2d 273 (Sup. Ct. 1992); *see also* Morgan v. Bennett, 204 F.3d 360, 368 (2d Cir. 2000) (noting that the defendant had initiated conversations with the witness to encourage her to refuse to testify).

204. United States v. Gallo, 653 F. Supp. 320, 331-33, 345 (E.D.N.Y. 1986).

205. United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (submitting letter from the witness retracting accusations against the defendant); United States v. Balano, 618 F.2d 614, 630 (10th Cir. 1979) (submitting letter retracting part of testimony).

206. United States v. White, 116 F.3d at 912-14; United States v. Houlihan, 92 F.3d 1271, 1282 (1st Cir. 1996).

207. United States v. Thevis, 665 F.2d 616, 633 (5th Cir. Unit B 1982).

208. *Id.*

unless its probative value is substantially outweighed by its prejudicial impact.[209] While the Second Circuit requires a trial court to balance the probative value and prejudicial effect stated in Rule 403,[210] other courts have held that a forfeiture of confrontation and hearsay objections makes a special examination of the reliability of hearsay unnecessary.[211]

The form and content of the hearsay must also be determined. When the statement has been recorded as grand jury testimony, a recorded statement, a sworn affidavit, or a signed written statement, the task is simple because those methods establish the content with some precision. Oral statements recorded in agents' notes present more difficulties in determining precisely what was said. The most problematic is the testifying witness's uncorroborated recollection of the victim's statement.

Then there may be some doubt of the exact wording, and correspondingly greater doubt of the accuracy and intent of the declarant and perhaps some concern about the motivation for selective memory.[212] Additionally, the court may exclude any portion of the statement that was not based on personal knowledge.[213] Multi-defendant trials may present issues under *Bruton v. United States*,[214] because some defendants may not be involved in the witness's intimidation, thereby retaining their right to object to the declarant's out-of-court statements implicating them.[215] Redaction or editing of the hearsay statements, or severance of the uninvolved defendants, is necessary in these situations.[216]

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209. FED. R. EVID. 403.

210. United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997); United States v. Thai, 29 F.3d 785, 814 (2d Cir. 1994).

211. *See* United States v. Houlihan, 92 F.3d at 1281.

212. United States v. Pineda, 208 F. Supp. 2d 619, 623 (W.D. Va. 2001) (refusing to find indicia of reliability for hearsay statement in part because it was only recorded in officer's notes, which may not have recorded the statement directly); United States v. Houlihan, 887 F. Supp. 352, 357 n.8 (D. Mass. 1995) (explaining that agents were instructed by the prosecutor not to take notes of interview); *see also* John C. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1836 nn.169 & 172 [hereinafter Douglass, *Reluctant Accomplice*] (stating that agents are adept at not creating records and thereby limiting discovery under Jencks Act and *Brady v. Maryland*, 373 U.S. 83 (1963)).

213. United States v. Houlihan, 887 F. Supp. at 365.

214. Bruton v. United States, 391 U.S. 123 (1968).

215. *See id.* at 133 (holding that limiting instructions cannot erase the prejudice resulting from a statement made by a codefendant possibly involuntarily).

216. United States v. White, 116 F.3d 903, 917 (D.C. Cir. 1997) (redacting statement); United States v. Smith, 792 F.2d 441, 444 (4th Cir. 1986) (redacting codefendant's name who did not procure witness's absence); United States v. Houlihan, 887 F. Supp. at 365-66 (redacting testimony to avoid *Bruton* issues); People v. Colon, 473 N.Y.S.2d 301, 307 (Sup. Ct. 1984) (granting severance to codefendant uninvolved in the intimidation of the witnesses).

2. *The Effect of a Finding of Forfeiture by Misconduct*

Once the defendant's responsibility for the witness's absence is established, the defendant's hearsay and right of confrontation objections are deemed waived or forfeited.[217] The hearsay statements are admissible as substantive evidence on any relevant issue not only for the truth of what is asserted, but also as circumstantial evidence on other issues such as motive or intent.[218] There is no subject matter limitation on the uses of the hearsay testimony. The statements of a witness murdered because he was an informant on a drug scheme may be used to prove the drug offense for which he was expected to testify, and for which he was made unavailable, as well as evidence establishing his murder.[219] As with most rules of evidence, hearsay testimony can be used even if there is more probative evidence available.[220] Only the hearsay and constitutional objections are lost. Other objections, such as lack of personal knowledge of the declarant,[221] or prejudicial and misleading statements under

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217. *See infra* note 426 and accompanying text.

218. *Cf. id.* at 443 (stating that testimony regarding defendant's role in witness's absence was permissible to impeach defendant's claim that codefendant committed arson).

219. *See* United States v. Thai, 29 F.3d 785, 814-15 (2d Cir. 1994) (allowing decedent's posthumous statements as evidence for both the extortion and murder claims); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (admitting witness's statements for both the conspiracy to import heroin and witness tampering); United States v. Houlihan, 887 F. Supp. at 355-56 (allowing witness's statements concerning drug conspiracy and murder in furtherance of racketeering); United States v. White, 838 F. Supp. 618, 625 (D.D.C. 1993) (finding the declarant's statement admissible as if declarant was testifying in court).

220. La Torres v. Walker, 216 F. Supp. 2d 157, 160 (S.D.N.Y. 2000) (holding that hearsay testimony was admissible although other witnesses were called and could have testified in person about the events described in the testimony). Although the loss of live testimony is usually viewed as a detriment, in some cases it is advantageous because the testimony is fixed by the hearsay statement and cannot be modified or weakened by cross-examination. The availability of other testimony was a subplot in *Mastrangelo*. The government introduced the grand jury testimony of James Bennett under the residual exception, which requires that the hearsay be more probative than other evidence. United States v. Mastrangelo, 561 F. Supp. 1114, 1115 (E.D.N.Y. 1983). At the time, however, the government knew that James's nephew, Joseph Bennett, also knew about Mastrangelo's involvement in the drug conspiracy. *Id.* at 1121. The government did not advise the court of this fact because Joseph Bennett, despite a plea agreement that required his testimony against the defendant, had refused to take the stand and promised to disavow his testimony in other cases. *Id.* The defense argued that this failure to disclose Joseph Bennett, and the failure to have a judicial determination of his unavailability to testify, nullified the admission of James's grand jury testimony. *Id.* The trial court ultimately concluded that it would have preferred to know of Joseph's testimony before ruling, but under the facts of the case it was not error for the government to withhold the information from the court. *Id.* at 1120-24.

221. United States v. Houlihan, 887 F. Supp. at 364-65 (excluding testimony because prosecution had not proven it was based on personal knowledge).

Rule 403,[222] remain available. The waiver or forfeiture applies only to the intimidator who made the hearsay necessary. The prosecution may object to hearsay statements made by the declarant that are offered by the defendant.[223]

Two New York cases suggest that the forfeiture extends beyond the hearsay and constitutional objections and affects the defendant's ability to challenge the hearsay evidence. In *People v. Geraci*,[224] the court held that the defendant forfeits "the right to cross-examine about the substance of those statements."[225] That case involved an intimidated declarant who was prepared to testify at trial that he had misidentified the defendant before the grand jury.[226] The court held that the government did not have to call the declarant in their case-in-chief, and that the grand jury testimony was sufficient proof linking the defendant to the crime.[227] The jury never learned that the declarant had recanted his prior testimony.[228] The New York appellate opinions do not address either issue, and the federal courts reviewing the decision via habeas corpus concluded that there was no constitutional violation because the defendant could have called the declarant to solicit the testimony had he desired.[229] The trial court in *People*

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222. United States v. Houlihan, 92 F.3d 1271, 1282 n.6 (1st Cir. 1996) (recognizing that courts should continue to exclude unfairly prejudicial evidence under Rule 403); People v. Joyner, 726 N.Y.S.2d 434, 435-36 (App. Div. 2001) (holding that when a defendant causes a witness to be unavailable, evidence of impermissibly suggestive lineup is not admissible because defendant made witness unavailable); *see also* Minutes of the Advisory Committee on Federal Rules of Evidence (May 4-5, 1995) (stating that upon waiver, the hearsay statement is admissible to the extent it would have been admissible if the declarant was present and testifying).

223. *See* FED. R. EVID. 804(a) (stating that the witness is not unavailable if the absence is procured by the proponent of the evidence); United States v. White, 838 F. Supp. at 625 n.10 (finding that by procuring the witness's absence, "only the defendants waived their confrontation rights and hearsay objections in this case"); Sweet v. United States, 756 A.2d 366, 379 (D.C. 2000) (holding that a defendant responsible for witness's absence may not offer absent witness's exculpatory statement); Wisconsin v. Frambs, 460 N.W.2d 811, 813-14 (Wis. 1990) (same).

224. People v. Geraci, 649 N.E.2d 817 (N.Y. 1995).

225. *Id.* at 822.

226. *Id.* at 819-20.

227. These rulings appear in the subsequent federal habeas corpus petition. *See* Geraci v. Senkowski, 23 F. Supp. 2d 246, 250-57 (E.D.N.Y. 1998), *aff'd*, 211 F.3d 6, 9-10 (2d Cir. 2000).

228. Geraci v. Senkowski, 23 F. Supp. 2d at 263.

229. *Id.* at 261-65. The issue before the federal courts was whether there were constitutional violations in finding the declarant "unavailable" although present and ready to testify—albeit recanting his prior testimony—and whether the defendant's trial and appellate counsel were constitutionally ineffective for not calling the declarant at trial. *Id.* The federal courts found that there was no constitutional requirement that the declarant be actually unavailable to justify the admission of the hearsay, and that the trial counsel made a strategic decision not to call the declarant who then would be subject to examination about the defendant's threats. *Id.*

v. Cotto[230] went further when the intimidated declarant was prepared to testify favorably for the defendant. There the court precluded any cross-examination of the declarant for any purpose.[231] The declarant was called and testified about events immediately before the murder, but refused to identify the perpetrator.[232] The jury was removed, and after an evidentiary hearing, the court admitted the witness's pretrial statements identifying the defendant as the murderer.[233] The witness did not return to the stand, and the defendant was barred from cross-examining and possibly impeaching the declarant on his motives for implicating the defendant before the grand jury.[234] The New York Court of Appeals held that the scope of cross-examination was not preserved for appeal and thus did not reach it on the merits, but implied in a footnote that it was not endorsing the general principal, but only that special circumstances in the case justified the limitation of cross-examination.[235]

These cases are troubling, to the extent that they support restricting the defendant's right to challenge the hearsay by impeachment or contradiction, because they go beyond resolving the Confrontation Clause issues to limit another Sixth Amendment protection, the right to present a defense.[236] However, neither case is explicit authority for the proposition that forfeiture reaches this far. Allowing the witness to testify gives the defendant some benefit from his threats and deprives the government of some value in the uncontaminated prior statements. These cases, along with those that limit the defendant's participation in the hearings to determine the admissibility of the evidence,[237] suggest that the declarant's presence at trial creates some issues that remain to be resolved.

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230. People v. Cotto, 699 N.E.2d 394 (N.Y. 1998).

231. *Id.* at 399.

232. People v. Cotto, 642 N.Y.S.2d 790, 792 (Sup. Ct. 1996).

233. People v. Cotto, 699 N.E.2d at 396-97.

234. *Id.* at 402-03 (Smith, J., dissenting).

235. *See id.* at 399 n.2.

236. *Cf.* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense" and that hearsay and other procedural rules cannot combine to prevent the introduction of otherwise reliable evidence "where constitutional rights directly affecting the ascertainment of guilt are implicated"); United States v. Houlihan, 887 F. Supp. 352, 366 (D. Mass. 1995) (rejecting argument that defendant waived right to introduce other portions of the declarant's testimony that are admissible and competent).

237. *See supra* notes 202-03 and accompanying text.

3. *Trial Issues—Presentation and Defense at Trial*

After deciding to admit the absent witness's hearsay, the court faces several trial issues. For example, what explanation should be given for using hearsay rather than calling the witness?[238] When the defendant is charged with a crime directed against the witness as well as other crimes on which the declarant would have testified, the jury will hear about the indictment and evidence of the crime during the government's case-in-chief so no special precautions are necessary. When the defendant is charged only with the crime the declarant witnessed, however, details about the intimidation are likely to be based, in part, on inadmissible evidence and raise concerns about the prejudicial impact of the other evidence under Rule 403. The better practice is to avoid the evidence or comment on the reason for the declarant's absence.[239] A second issue is the order of proof, and whether the government should first establish the link between the defendant and the witness's absence before admitting the hearsay statements.[240] The better approach would be for the government to admit the evidence of the murder or witness tampering and then seek a ruling on the admissibility of the hearsay.[241] However, the courts have not required this approach. Relying on a similar problem in introducing the hearsay statements of coconspirators, the courts have admitted the absent witness's hearsay statements subject to the introduction of sufficient evidence that the defendant was responsible for the witness's unavailability.[242]

The hearsay statements implicating the defendant generally are introduced through the officers who took the statements from the declarant, or by reading the grand jury testimony.[243] The prosecution's direct examination is subject to

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238. RICHARD O. LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE 661 (3d ed. 2000).

239. *Id.*

240. *See, e.g.*, United States v. White, 116 F.3d 903, 914 (D.C. Cir. 1997) (noting that defendants objected to the sequence of events at trial, and argued that the murdered witness's statements should only have been admitted after a full exploration of the witness's murder).

241. *Id.* at 915.

242. *See, e.g.*, United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (holding that hearsay evidence can be admitted contingent upon proof of the underlying murder by a preponderance of the evidence); *see also* United States v. Perholtz, 842 F.2d 343, 356 (D.C. Cir. 1988) ("In order to admit co-conspirator statements, the trial judge must determine that a conspiracy existed, that the co-conspirator and the defendant against whom the statement is offered were members of the conspiracy and that the statements were made in furtherance of the conspiracy.").

243. *See, e.g.*, United States v. Price, 265 F.3d 1097, 1100 (10th Cir. 2001) (affirming trial judge's decision to admit agent's testimony from absent declarant); United States v. Houlihan, 92 F.2d 1271, 1278 (1st Cir. 1996) (same); United States v. Thevis, 665 F.2d 616, 627 (5th Cir.

reasonable control by the court.[244] Some have allowed the government to present portions of the declarant's testimony and leave it for the defendant to bring out that the witness subsequently recanted that testimony.[245] The defendant can impeach the declarant under Rule 806 as he can any other witness.[246] The impeachment can be for bias, prior criminal convictions, or prior inconsistent statements.[247] Often the impeachment is through the officers presenting the hearsay.[248] The defendant's right to exculpatory material under *Brady v. Maryland*,[249] or other impeaching evidence, is implicated by the hearsay statements as if the witness had been called by the government.[250] The defense may also attack the reliability of the methods used to record the testimony.[251]

Unit B 1982) (affirming admission of declarant's statements and grand jury testimony); United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1980) (affirming admission of grand jury testimony); *see also* John C. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2123-25 (2000) [hereinafter Douglass, *Balancing Hearsay*] (recognizing the receptiveness of federal courts to allow grand jury testimony and statements procured by the police to be admitted as hearsay evidence against defendants).

244. FED. R. EVID. 611(a).

245. *See, e.g.*, United States v. Smith, 792 F.2d 441, 442-43 (4th Cir. 1986) (holding that when the government declined to introduce a witness's recanted testimony, it was up to the defense counsel to elicit the fact that the witness had recanted).

246. *See* Fred Warren Bennett, *How to Administer the "Big Hurt" in a Criminal Case: The Life and Times of Federal Rule of Evidence 806*, 44 CATH. U. L. REV. 1135, 1143-63 (1995) (describing impeachment of unavailable declarant); Anthony M. Brannon, *Successful Shadowboxing: The Art of Impeaching Hearsay Declarants*, 13 CAMPBELL L. REV. 157, 160-78 (1991) (discussing the use of Rule 806 to impeach absent declarants); Douglass, *Beyond Admissibility*, *supra* note 21, at 250-60 (discussing methods of impeaching absent declarants).

247. *See, e.g.*, United States v. Smith, 792 F.2d 441, 442-43 (4th Cir. 1986) (defendant introduced declarant's testimony at his trial retracting the declarant's confession); State v. Valencia, 924 P.2d 497, 505 (Ariz. Ct. App. 1996) (impeaching declarant's hearsay statement of identification with prior inconsistent statement).

248. *See, e.g.*, United States v. Houlihan, 92 F.3d 1271, 1284 n.10 (1st Cir. 1996) (cross-examination of detective who taped and testified concerning defendant's prior statement revealed criminal record; statements made while facing fifteen year mandatory minimum sentence and after promise of low bail); Steele v. Taylor, 684 F.2d 1193, 1197, 1199 (8th Cir. 1982) (stating that FBI agent interviewed witness and testified to the contents of her statement when she refused to testify).

249. Brady v. Maryland, 373 U.S. 83 (1963).

250. Giglio v. United States, 405 U.S. 150, 152-53 (1972) (holding government must disclose agreements with witness and other impeaching evidence); Brady v. Maryland, 373 U.S. at 87 (holding government must disclose exculpatory information upon request); United States v. Williams-Davis, 90 F.3d 490, 512-14 (D.C. Cir. 1996) (holding that a hearsay declarant is a government witness); *see also* Douglass, *Beyond Admissibility*, *supra* note 21, at 264-70 (discussing discovery of information about absent declarants).

251. *See* United States v. White, 838 F. Supp. 618, 625 (D.D.C. 1993).

The court may also give a limiting instruction as to the problems with hearsay testimony.[252]

Rule 106 allows the defendant to offer other portions of a written or recorded hearsay statement that are necessary to place the previously offered testimony in context.[253] This is apparently so even if the latter statements are otherwise inadmissible.[254] Rule 106 is only concerned that the original submission is not misleading because of selective editing and presentation.[255] The Rule does not authorize the admission of other parts of the statements that are neither explanatory nor relevant to the previously admitted portions of the testimony.[256]

IV. PROBLEMS IN THE APPLICATION OF THE MISCONDUCT EXCEPTION

A. *Introduction*

The promulgation of Rule 804(b)(6) was an opportunity to reevaluate the misconduct exception to the rule against hearsay. The Advisory Committee adopted the proposal without serious opposition, and rejected comments that the proposed language was too broad.[257] The Rule established for federal courts the elements of the exception, its rationale, the burden of proof, and that it applied to all parties, including the government. As envisioned by the Advisory Committee, Rule 804(b)(6) was now a strong policy statement about the consequences of witness intimidation.[258] The negative consequences of

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252. *See, e.g.*, United States v. Zlatogur, 271 F.3d 1025, 1030-31 (11th Cir. 2001) (noting that cautionary instruction on reliability of hearsay not requested); United States v. Peoples, 250 F.3d 630, 635 (8th Cir. 2001) (finding no error in argument by prosecutor that defendant murdered witness when that was government's theory, and there was instruction that the admission of hearsay of absent witness did not mean that court believed that the defendants murdered the witness); United States v. Papadakis, 572 F. Supp. 1518, 1527 (S.D.N.Y. 1983) (noting cautionary instruction that evidence applies to only one defendant); State v. Gettings, 769 P.2d 25, 30 (Kan. 1989) (noting that court gave instruction on accomplice testimony).

253. *See* FED. R. EVID. 106.

254. *See* United States v. Houlihan, 92 F.3d 1271, 1283 (1st Cir. 1996) (stating that the trial court is in the best position to determine whether statements are misleading under Rule 106); United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (examining the admissibility of portions of recorded conversations under Rule 106); *see also* Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 TEX. L. REV. 51 (1996).

255. *See* FED. R. EVID. 106.

256. United States v. Marin, 669 F.2d 73, 84-85 (2d Cir. 1982); United States v. Houlihan, 887 F. Supp. 352, 366 (D. Mass. 1995).

257. *See supra* notes 116-26 and accompanying text.

258. Minutes of the Advisory Committee on Federal Rules of Evidence (May 4-5, 1995).

codification are more subtle, but equally important. Codification ties the operation of the Rule to its language, and restricts its application and the resolution of issues to the terms selected by the drafters.

The key issue in the misconduct exception is who, beyond the actual participants in the violence against the witness, is bound by those acts? In terms of Rule 804(b)(6), the question is what acts support a finding that the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness"?[259] The term "engaged" certainly includes all direct participants. There can be no objection to the use of the exception when there is sufficient evidence of the defendant's responsibility for the declarant's absence. Then the loss of evidentiary and constitutional rights follows as the logical consequence of the defendant's deliberate conduct.

The more difficult problem arises when there is a more tenuous relationship between the defendant and the perpetrators of the violence against the witness. Witness intimidation is a surreptitious activity and often is accomplished by proxy. The defendant may remain behind the scenes, be incarcerated, or have an ironclad alibi. Professor Michael H. Graham has suggested that the difficulty of obtaining proof of complicity would limit the misconduct exception.[260] The Advisory Committee chose "acquiesced" to address this situation so that direct participation was not a required element of the rule.[261] The term almost certainly came from the *Mastrangelo* case, which presented the problem of linking a defendant to the witness's murder.[262]

Regardless of the source of "acquiesced," that term did little to define what conduct was sufficient under the Rule, or what evidence should link the defendant to the crime. More importantly, acquiesce is sufficiently ambiguous such that it is capable of broad interpretation, potential misapplication, and unjustified loss of constitutional and evidentiary rights.[263] Acquiesce is defined as follows: "to accept or comply tacitly or passively, without implying assent or agreement; to accept as inevitable or indisputable."[264] A tacit or passive agreement suggests that it can be inferred from silence or perhaps from the

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

260. MICHAEL H. GRAHAM, EVIDENCE, AN INTRODUCTORY PROBLEM APPROACH 196 (2002) [hereinafter GRAHAM, EVIDENCE]; GRAHAM, WITNESS INTIMIDATION, *supra* note 1, at 174.

261. Minutes of the Advisory Committee on Federal Rules of Evidence (May 4-5, 1995).

262. United States v. Mastrangelo, 533 F. Supp. 389, 389 (E.D.N.Y. 1982).

263. The potential problems in defining the scope of "acquiesced" led the drafters of the Tennessee rule to drop the term when it adopted its version of Rule 804(b)(6). Telephone Interview with Professor Neil P. Cohen, University of Tennessee Law School and member of the Advisory Committee (Dec. 5, 2002).

264. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 23 (2d ed. 1936).

gestalt of the surrounding circumstances. Acquiescence has the advantage of not excluding any evidence that might show agreement.[265] A definition that permits the agreement to be inferred from silence or from some unspecified gestalt of the situation implies that a weak probative link between predicate facts and ultimate conclusion is sufficient. Furthermore, acquiesce also has the connotation of submission to another's wishes. *Ballentine's Law Dictionary*, for example, has defined "acquiescence" as "[a] tacit approval or at least an indication of lack of disapproval. Acceptance, perhaps without approval, as acquiescence in a decision."[266] This connotation and reliance on a "lack of disapproval" further weaken the required probative link between a defendant and the violence directed at the witness.

The forfeiture rationale also erodes the constraints on the use of the Rule. Waiver, under *Johnson v. Zerbst*, examines the defendant's deliberate actions.[267] Forfeiture looks to the consequences and interests of the State. Witness intimidation is reprehensible and, once established, courts may be less willing to carefully examine the proof that a particular defendant is responsible for the crime. Consequently, there is a greater likelihood that the exception will be misapplied when the proof is inadequate. The following section addresses the scope of the Rule when direct evidence of the defendant's involvement is not available. This is the situation most susceptible to error in the application of the Rule. The language of Rule 804(b)(6) inevitably will affect the states as they develop their own versions of the Rule.[268] Although the exception has been

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265. *See* Minutes of the Advisory Committee on Federal Rules of Evidence (May 4-5, 1995) (noting that "acquiescence" was chosen because it did not require active participation); Judicial Conference of the United States, Minutes of the Advisory Committee on Rules of Practice and Procedure (June 19-20, 1996), *available at* http://www.uscourts.gov/rules/Minutes/june1996.pdf (Judge Winter reporting that the Evidence Advisory Committee deliberately chose broad terms to avoid overinclusion and underinclusion, and to leave room for common sense interpretation by the courts).

266. BALLENTINE'S LAW DICTIONARY 15 (3d ed. 1969).

267. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

268. The influence of federal case law and rules of evidence is pervasive. Forty-one states have adopted rules of evidence primarily based upon the Federal Rules of Evidence. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, tbl.T-1 (2d ed. 2000) (listing states that have adopted rules of evidence). Pennsylvania adopted the language of Rule 804(b)(6), as has Tennessee, except for deleting "or acquiesced." *See supra* note 61 and accompanying text. Federal precedent is also influential in states without an evidence code. For example, New York has followed the *Mastrangelo* case, and its courts have tended to refer to the language in federal cases. Following Rule 804(b)(6), the courts have used "acquiescence" to describe the defendant's relationship to the intimidation. *See, e.g.*, People v. Geraci, 649 N.E.2d 817, 824 (N.Y. 1995); People v. Johnson, 673 N.Y.S.2d 755, 761 (App. Div. 1998) (Peters, J., dissenting); People v. Delarosa, 630 N.Y.S.2d 357, 359 (App. Div. 1995).

promulgated as a rule of evidence, it will affect Confrontation Clause claims because the Supreme Court has linked hearsay rules and the Confrontation Clause, and has generally found that exceptions to the rule against hearsay also satisfy the Confrontation Clause.[269] Now that Rule 804(b)(6) defines the conditions for the forfeiture of the hearsay objection, those same conditions will inevitably apply to the constitutional objections as well.

B. *Connecting the Defendant to the Intimidation*

1. *Tests of "Acquiescence"*

The term "acquiescence" is particularly flexible. At its core acquiescence means agreement. However, in this context, the type of agreement can range from reluctant submission to endorsement and wholehearted support. The tests suggested in the cases for acquiescence have all been similarly vague. The members of the Advisory Committee properly rejected a standard that attributed the waiver to any defendant who accepted the benefits of the witness's absence.[270] This standard was rejected by the courts because it fails to articulate any link between the defendant and the intimidation of the witness.[271] In many

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269. The Supreme Court began linking the Confrontation Clause and the hearsay rule in *Ohio v. Roberts*, when it held that a hearsay statement is presumptively reliable and admissible when it "falls within a firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. 56, 66 (1980). The Supreme Court has held, or strongly implied, that excited utterances, dying declarations, former testimony, business records, coconspirator statements, and some statements against penal interest are firmly rooted. Douglass, *Beyond Admissibility*, *supra* note 21, at 209. What exactly is "firmly rooted" is flexible. The Court found the coconspirator exception firmly rooted although it rejected an important safeguard in prior case law requiring that the conspiracy be established by evidence independent of the coconspirators' statements. *See* Bourjaily v. United States, 483 U.S. 171, 183-84 (1987). Courts disagreed about whether the exception for statements made for purposes of medical diagnosis was firmly rooted because very few states recognized that exception prior to its codification in the Federal Rules of Evidence. WRIGHT & GRAHAM, *supra* note 70, § 6367, at 830 ("[N]o one had heard of this exception prior to the Federal Rules of Evidence.") (citing United States v. George, 960 F.2d 97, 99 (9th Cir. 1992) (finding exception firmly rooted); Dana v. Dep't of Corr., 958 F.2d 237, 239 (8th Cir. 1992) (same); Gregory v. North Carolina, 900 F.2d 705 (4th Cir. 1990) (assuming exception not firmly rooted)). In only two cases did the Supreme Court find hearsay falling within Rules 801-807 to be not firmly rooted. *See* Lilly v. Virginia, 527 U.S. 116, 139-40 (1999) (ruling that statements against penal interest that implicate accomplices are not firmly rooted); Idaho v. Wright, 497 U.S. 805, 817 (1990) (ruling that statements admitted under Idaho's residual clause are not firmly rooted).

270. Minutes of the Advisory Committee on Federal Rules of Evidence (Apr. 22, 1996).

271. *See* People v. Delarossa, 630 N.Y.S.2d 357, 359 (App. Div. 1995) (pointing out that because a defendant has a motive to procure the witness's absence does not necessarily mean the defendant was involved in the witness's absence); United States v. Houlihan, 871 F. Supp. 1495,

multi-defendant cases, particularly conspiracies, all defendants gain an advantage from a witness's absence when it complicates the government's case.[272] Moving to exclude inadmissible hearsay (thereby accepting the benefits of the intimidation) says nothing about whether the movant was responsible for the intimidation. Moreover, the test becomes a Catch-22. Anyone who objects waives the objection by seeking its benefit, and one who does not seek to benefit does not object, and the hearsay evidence is admitted.

A second test is found in *United States v. Mastrangelo*.[273] That decision apparently was the source for the term "acquiescence," and it is reasonable to assume that the committee had its facts in mind when they chose that term.[274] Mastrangelo was charged in a drug conspiracy with a codefendant.[275] Only one witness, James Bennett, could connect Mastrangelo to the conspiracy, and he was expected to testify that he sold Mastrangelo several trucks used to deliver the drugs.[276] Bennett was murdered on his way to court to testify on the third day of trial.[277] Only Mastrangelo benefited by Bennett's death, and although he had made some statements that could be construed as a threat to Bennett some time before, he was in court at the time of the murder, and could not have physically participated in it.[278] A mistrial was declared as to Mastrangelo, and after an unsuccessful appeal on double jeopardy grounds, the case was retried.[279] A new judge admitted Bennett's hearsay statements, finding that they met the residual

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1497 n.1 (D. Mass. 1994) (holding that a prior statement made by a witness rendered unavailable by the "wrongful conduct" of a defendant is admissible against that defendant as long as the statement would have been admissible had the witness been able to testify at trial); *cf.* United States v. Thevis, 665 F.2d 616, 633 n.17 (5th Cir. Unit B 1982) (emphasizing that defendant must be responsible for the witness's unavailability and have the intent to prevent the witness from testifying).

272. *See* People v. Delarosa, 630 N.Y.S.2d at 359 (stating that the defendant's accomplices stood to benefit from the misconduct) (Altman, J., dissenting).

273. United States v. Mastrangelo, 693 F.2d 269, 273-74 (2d Cir. 1982).

274. *See supra* notes 98-104 and accompanying text. The Advisory Committee's note to Rule 804(b)(6) cites the district court's opinion in *United States v. Mastrangelo* only because of the need for a rule to deal with the abhorrent behavior of witness intimidation. FED. R. EVID. 804(b)(6) advisory committee's note.

275. United States v. Mastrangelo, 693 F.2d at 271.

276. *Id.*

277. *See id.* (noting the trial began on April 27, and Bennett was shot dead two days later).

278. The government never claimed that Mastrangelo murdered Bennett. At the hearing to determine his involvement in that crime, the court only found that he had prior knowledge of Bennett's murder. United States v. Mastrangelo, 561 F. Supp. 1114, 1120 (E.D.N.Y. 1983).

279. United States v. Mastrangelo, 662 F.2d 946, 948-49 (2d Cir. 1981) (rejecting double jeopardy argument).

exception's indicia of reliability, and also noting that the trial judge in the first trial believed that Mastrangelo was involved in Bennett's murder based upon his behavior in the courtroom when the murder was announced.[280]

On appeal again, the Second Circuit faced a case where common sense argued for Mastrangelo's involvement in Bennett's murder, but the evidence in the record was little more than his stoic acceptance or unshocked demeanor when the murder was announced.[281] The Second Circuit found that the defendant's demeanor and the judge's opinion of his complicity were not dispositive of the constitutional and evidentiary issues, and therefore remanded the case for determination as to whether there had been a waiver by misconduct to avoid the difficult issues of the reliability of the testimony and the Confrontation Clause issues.[282] The opinion remanding the case enunciated the broad standard, which seemed to fit the available evidence. The court stated:

> If the District Court finds that Mastrangelo was in fact involved in the death of Bennett through knowledge, complicity, planning or any other way, it must hold his objection to the use of Bennett's testimony waived. Bare knowledge of a plot to kill Bennett and a failure to give warning to appropriate authorities constitute a waiver.[283]

The court's second sentence states the minimal level of proof necessary to connect the defendant to the murder—prior knowledge and failure to warn.[284] The logic is barely plausible. A defendant who is aware of efforts to attack a witness and who does nothing to prevent it can be said, in a general sense, to have agreed with those efforts and, therefore, can be bound by them. The problem with the *Mastrangelo* test is that the probative value of knowledge, plus silence or inaction, is very low. Mere knowledge of impending events does not establish agreement, consent, responsibility, control, or encouragement of those events. Many may be aware that organized crime figures are likely to intimidate witnesses in a particular case, but it is extreme to hold that all have waived their constitutional rights by merely having this knowledge. Several commentators on

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280. *See* United States v. Mastrangelo, 533 F. Supp. 389, 390-91 (E.D.N.Y. 1982) (ruling before trial that Bennett's grand jury testimony was admissible).

281. *See* United States v. Mastrangelo, 693 F.2d at 271 (discussing chief judge Weinstein's statements on Mastrangelo's involvement).

282. *Id.* at 273-74.

283. *Id.*

284. *See id.*

the draft rule opposed applying the exception to those who only had knowledge of the intimidation.[285]

The test also creates an affirmative duty to report the impending crime.[286] As a practical matter, the notice requirement will rarely, if ever, be satisfied. One who is aware of the impending witness intimidation, but is not a participant, has little or no reason to take affirmative steps to preserve constitutional rights, particularly if the intimidation occurs some time before the arrest, indictment, or before a trial is scheduled. Agreement is not normally inferred from silence or inaction alone. Including inaction as an element makes the Rule applicable to many individuals who have little contact with, or responsibility for, actual threats against the witness. The commentators on the draft rule recognized this, and, as a result, proposed that the Rule could only be applied to individuals whose objection might have prevented the intimidation.[287] One who could prevent the act, but chose not to do so, does indeed agree with it.

However, this notice requirement is not a good indicator of who is uninvolved in the witness intimidation. This requirement does not separate those with knowledge of the intimidation, from the smaller group that should be chargeable with the evidentiary consequences of the witness intimidation. The *Mastrangelo* test is also underinclusive because it does not reach those without prior knowledge of the intimidation, but who nevertheless approve, ratify, or reward the perpetrators after the violence occurs.

The rule on adoptive admissions by silence under Rule 801(d)(2)(B) does not provide any support for the *Mastrangelo* test. Rule 801(d)(2)(B) requires a person to disavow a statement made in one's presence when a denial is necessary to protect one's interests or avoid the implication that silence means consent.[288] Careful examination of this Rule, however, shows there are significant and substantial differences that make it inappropriate to apply it in the Rule 804(b)(6) context. First, the fundamental premise of adoption by silence is that human nature leads a person to affirmatively deny or correct the statements made in his presence when those statements may adversely affect him or his interests. The

285. *See supra* notes 111-18 and accompanying text.

286. PAUL RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 479 (4th ed. 2000); *see also* Friedman, *Chutzpa*, *supra* note 1, at 520 (supporting the judgment made by the drafters of the prospective Federal Rule of Evidence 804(b)(6) in allowing forfeiture when the defendant "knows about illicit efforts about to be made on his behalf, and does nothing to stop them"); Sykora, *supra* note 1, at 876-77 (reinforcing the notion that a suspect's knowledge of a plot to kill a declarant and subsequent failure to notify the authorities provides a sufficient basis for forfeiture of confrontation rights).

287. 2 MCCORMICK, TREATISE ON EVIDENCE app. A, at 665-66 (5th ed. 1999).

288. FED. R. EVID. 801(d)(2)(B).

psychology of an individual hearing another individual threaten violence against a potential witness might call for agreement or perhaps silence. However, it would not prompt opposition or efforts to frustrate the threats because the person hearing threats would want to avoid coming to the attention of the person threatening violence against others.

The probative value of adoptive admissions manifested by silence is low in criminal cases, as the Advisory Committee's note to Rule 801(d)(2) recognize by stating that a lack of response may be motivated by many reasons.[289] Moreover, in criminal cases, admissions by silence are an opportunity for the declarant to create evidence, and "encroachment upon the privilege against self-incrimination seems inescapably to be involved."[290] Similar observations can be made about inferring responsibility for witness intimidation from the failure to report it.

The concern about adoptive admissions, particularly adoptions by silence, has led courts to apply a multi-factored analysis before permitting such alleged admissions to be heard by the jury. Conditions that indicate a party's adoption by silence include: (1) the party heard the statement; (2) the subject matter was within his knowledge; and (3) "the occasion and nature of the statement were such that he would likely have replied if he did not mean to accept what was said."[291] However, even if these conditions are satisfied, the statement should be excluded if it appears the party did not understand it; if some psychological or physical factor explains why the party did not reply, or if the speaker was someone whom the party would be likely to ignore.[292] Thus, adoptive admissions are presented to the jury only when there is sufficient context in which to evaluate and substantiate the link between silence and approval of the statement.[293] The *Mastrangelo* test lacks any additional factors that might further define the adoptive admissions rule and limit it to those who are truly complicit in the intimidation of, or violence against, the witness.

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289. *See* FED. R. EVID. 801(d)(2)(B) advisory committee's note (providing that silence may be motivated by advice of counsel or the realization that what you say could be used against you). Interestingly, the note also uses the word "acquiescing" to describe the party's adoption of a statement. *See id.* (stating that an admission may be made by adopting or acquiescing in the statement of another).

290. *Id.*

291. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.29, at 876 (2d ed. 1999).

292. *Id.*

293. *See id.* ("[T]he question whether inaction and silence indicate adoption depends on the situation.").

A final reason for rejecting the *Mastrangelo* test is that the appellate court prematurely formulated the test when it remanded the case.[294] The evidence subsequently developed in a four-day hearing, and the evidence from prior proceedings in the case showed that the case involved substantially more than mere knowledge and failure to report.[295] The hearing testimony from Bennett's nephew showed that Mastrangelo expressed that Bennett did not appreciate how serious Mastrangelo was about Bennett not testifying against him.[296] His testimony further established Mastrangelo's confidence that Bennett would not be allowed to testify against him.[297] Nicholas Berardi, who was incarcerated with Mastrangelo at the time of the murder, also testified that he said "it had to be done" and a "phone call was made," suggesting at least that Mastrangelo had some prior knowledge of a plan to kill Bennett, and at most that Mastrangelo arranged the murder.[298] In addition, Bennett's grand jury testimony identified a tape on which Mastrangelo had established that Mastrangelo had talked to Bennett on several occasions and had tried to bribe him and made statements that could be construed as threats against Bennett.[299] Most importantly, Bennett's testimony threatened only Mastrangelo.[300] Finally, the timing of Bennett's murder, which occurred when Bennett was on his way to the courthouse to testify against Mastrangelo, further suggests Mastrangelo's involvement in the murder.[301] In sum, the murder was a logical extension of, and consistent with, Mastrangelo's prior goal and intention and served only his purpose of preventing Bennett from testifying.[302]

Prior to adoption of the Rule, courts generally required evidence of the defendant's direct and substantial participation in intimidating or murdering the potential witnesses,[303] or those clearly acting on the defendant's behalf.[304]

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294. *See* United States v. Mastrangelo, 693 F.2d 269, 273-74 (2d Cir. 1982) (enunciating test and then remanding case to district court).

295. *See* United States v. Mastrangelo, 561 F. Supp. 1114, 1115-19 (E.D.N.Y. 1983) (detailing the evidentiary hearing and summarizing the facts of the case).

296. *Id.* at 1116.

297. *See id.* (outlining the hearing testimony of Joseph Bennett, in which he stated that he understood Mastrangelo to say in substance there was no way James Bennett would testify against him).

298. *See id.* at 1116-17.

299. *Id.* at 1121.

300. *See id.* (outlining James Bennett's grand jury testimony).

301. *See* United States v. Mastrangelo, 693 F.2d 269, 271 (2d Cir. 1982).

302. *See id.*

303. *See, e.g.*, United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (relying on defendant's fingerprint on threatening note); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) (citing threats by defendant); United States v. Melendez, No. CRIM. 96-0023(PG), 1998 WL

Likewise, the courts have refused to apply the Rule when there is no evidence that the particular defendant was responsible for the loss of the witness, or did not have the requisite intent to prevent the witness from testifying.[305] Courts have specifically rejected the *Mastrangelo* test. The federal district court in *United States v. White* rejected that standard and required individualized proof that each defendant participated in the murder of the witness.[306] Likewise, in *United States v. Houlihan*, the court rejected the agency argument and required proof that "each member of the conspiracy at least *knew* that one of the motives for the killing was the silencing of a potential witness."[307]

Another approach was suggested by several law professors commenting on the draft rule. They proposed that the Advisory Committee's note should state that the exception would not apply "unless a plausible possibility existed that had the accused opposed the conduct it would not have occurred."[308] Professor

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737994, at *2-3 (D.P.R. 1998) (relying on defendant's statements to others about the murder of informant); United States v. Houlihan, 887 F. Supp. 352, 364-65 (D. Mass. 1995) (noting coconspirator testimony of defendant's motive and participation in murder).

304. *See, e.g.*, Rice v. Marshall, 709 F.2d 1100, 1101-02 (6th Cir. 1983) (finding witness refused further cooperation with police after being visited by "investigators" for the defendant); United States v. Mayes, 512 F.2d 637, 649-50 (6th Cir. 1975) (holding that defendant's attorney, who procured a witness's silence by convincing him not to answer questions on the basis of his constitutional right to remain silent, was acting with the defendant's consent); People v. Sweeper, 471 N.Y.S.2d 486, 490-91 (Sup. Ct. 1984) (describing criminal organization known as Vigilantes, which have a policy of murdering witnesses for the defendant, and to which perpetrators of witness's murder belonged); People v. Colon, 473 N.Y.S.2d 301, 305-06 (Sup. Ct. 1984) (finding defendant was a member of the Gambino crime family and that members of his family made threats against the witness).

305. *See, e.g.*, United States v. Gomez-Lemos, 939 F.2d 326, 331-34 (6th Cir. 1991) (finding no conclusive evidence that defendant threatened witnesses); Olson v. Green, 668 F.2d 421, 429 & n.15 (8th Cir. 1982) (finding no evidence that defendant threatened witness even though he participated in another murder); United States v. Pineda, 208 F. Supp. 2d 619, 624 n.2 (W.D. Va. 2001) (refusing to believe witness who said his fear of the defendant had nothing to do with his decision not to testify, but could not consider the admissibility of the witness's statements without additional evidence); United States v. Houlihan, 887 F. Supp. at 364 (holding that codefendant Fitzgerald participated in murder as a favor for another gang, but did not intend to prevent victim from testifying); State v. Lomax, 608 P.2d 959, 967 (Kan. 1980) (determining witness was recalcitrant, and finding no evidence that defendant threatened witness); State v. Washington, 521 N.W.2d 35, 42 (Minn. 1994) (citing evidence defendant had threatened other witnesses but not the witness in question, and noting the witness did not cite defendant's threats as cause for refusal to testify); People v. Brown, 632 N.Y.S.2d 938, 944-45 (Sup. Ct. 1995) (denying admission of hearsay statement because the only evidence of defendant's participation in declarant's murder was from an unreliable and uncorroborated source).

306. United States v. White, 838 F. Supp. 618, 622-23 (D.D.C. 1993).

307. United States v. Houlihan, 887 F. Supp. at 364-65.

308. 2 McCormick, Treatise on Evidence app. A, at 665 (5th ed. 1999).

Friedman made a similar proposal for the Advisory Committee's note, suggesting they state that "knowledge of the conduct, and even satisfaction concerning it does not suffice unless there was at least a plausible possibility that if the accused had opposed the conduct the person engaged in it would not have done so."[309] Although these proposals were not adopted, and would have been placed in the Advisory Committee's note rather than the text of the Rule, they attempted to identify a predicate fact that would link the defendant and the violence perpetrated by others against the witness. These proposals had two advantages. First, the logic was sounder than the *Mastrangelo* test. An individual with knowledge and power to prevent the crime, but who fails to do so, does have greater responsibility for the resulting violence and loss of testimony. Second, the power requirement would narrow the class of individuals subject to the exception, thereby causing fewer errors in applying the Rule. These advantages are undone by the burden of proof. The government only has to show there was "at least a plausible possibility" that the crime against the witness would not have occurred if the defendant had opposed it.[310] "Plausible" means superficially reasonable, and often implies disbelief.[311] Thus, barely credible, but unconvincing proof of the power to stop the intimidation, would authorize the exception. Another issue is how to prove—or disprove—this plausible element. Expert testimony on criminal organizations and behavior by the prosecutor and the defense seems inevitable and unlikely to be illuminating on whether a defendant could have prevented violence by other criminals.

A review of the various tests for acquiescence suggests that no simple formulation describes a workable test for complicity in intimidation. Prior knowledge of the intimidation, inaction in the face of that knowledge, plausible power to prevent the crime, or benefiting from the loss of evidence are circumstances that are not sufficient links between the defendant and the intimidation to support the loss of evidentiary and constitutional rights. These circumstances do not show who have associated themselves with the violence. At most, they establish that the individual could have been associated with the violence. Consequently, additional proof is necessary to justify the loss of a substantial trial and constitutional right.

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309. *Id.* at 666.

310. *Id.* at 665-66.

311. *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1484 (2d ed. unabridged 1987) (labeling "specious" as a synonym of "plausible," and defining it as "that which has the appearance of truth but might be deceptive").

2. *Connecting a Defendant to Intimidation Performed by Others*

The cases that have faced the problem aid in determining what evidence may connect the defendant and the agents who actually harmed the witness.[312] The task is easier when a single defendant is tried; not because proof of the connection is easier, but because a prosecution aimed at one defendant generally eliminates all other plausible instigators, and increases the probative value of the other circumstantial evidence. Mastrangelo is the classic single defendant case. Although Mastrangelo could not have been a direct participant in Bennett's murder, the court reached the right result when it held him responsible for that crime.[313] The key fact is that Bennett's testimony threatened only Mastrangelo, and along with his prior efforts to convince Bennett not to testify by bribery or other means, the evidence sufficiently supports the finding that he agreed with or consented to others murdering Bennett so he would not testify against Mastrangelo.[314]

Another single defendant case is *People v. Cotto*.[315] The defendant was indicted for murdering Steven Davilla.[316] The sole living eyewitness was Anthony Echevarria,[317] who knew the defendant and the victim.[318] Echevarria did not give his correct name to the police and did not identify the defendant as the perpetrator at the scene in 1992.[319] Four years later, shortly before the trial, and while Echevarria was in jail on an unrelated matter, he named Cotto as the murderer and described what he saw that night.[320] Echevarria was named as a government witness in opening statements.[321] The morning before the trial, he refused to testify because his wife had reported to him that his mother and sister, who lived in the defendant's neighborhood, had been approached by men inquiring to the witness's whereabouts.[322] The officers testified to statements by

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312. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982); People v. Cotto, 642 N.Y.S.2d 790 (Sup. Ct. 1998).
313. United States v. Mastrangelo, 693 F.2d at 273-74.
314. *See supra* notes 295-302 and accompanying text.
315. People v. Cotto, 642 N.Y.S.2d 790 (Sup. Ct. 1996), *aff'd*, 699 N.E.2d 394 (N.Y. 1998).
316. *Id.* at 791.
317. *Id.* at 792.
318. People v. Cotto, 699 N.E.2d at 396.
319. *Id.*
320. *Id.* at 400.
321. *Id.* at 396.
322. People v. Cotto, 642 N.Y.S.2d at 794-95.

the sister and mother describing the contacts and that word on the street was that her brother was "talking."[323] The sister subsequently denied the conversations, and the mother testified that the sister said she was approached on the street and asked if the witness was in jail.[324]

Notably absent from the testimony was any evidence about the defendant because he did not participate in the intimidation, nor were the perpetrators ever identified other than as people from the neighborhood.[325] The court pointed to several factors that supported the defendant's responsibility for the intimidation. Cotto was out on bail and lived in the neighborhood with Echevarria's relatives, and one of the contacts was on the street where Cotto lived.[326] Cotto had the opportunity and motive to intimidate Echevarria.[327] The threats followed immediately upon the revelation that Echevarria would testify in the trial.[328] Cotto was the only person charged with the murder and the only one who benefited by the threats.[329] Echevarria said that on the night of the murder Cotto had pointed the gun at him before leaving the scene, which the court found to be a threat against Echevarria.[330]

The decision seems intuitively correct. Any other explanation is less plausible than the defendant's instigation of the threats. Particularly important to the conclusion is that Echevarria was the key witness against only one defendant and the physical proximity of the defendant's family to the relatives of the witness.[331] These facts are probative of the defendant's motive and opportunity, and support an inference of his involvement. Nevertheless, the proof of association with the threats was less than overwhelming, and there was certainly a reasonable question as to whether this proof met the "clear and convincing" evidence standard in New York.[332]

The *Mastrangelo* and *Cotto* courts looked at several factors to generate the defendant's circumstantial involvement in the intimidation. Without direct proof of the defendant's involvement, the courts relied upon evidence of the

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323. People v. Cotto, 699 N.E.2d at 397.
324. *Id.* at 396-97.
325. People v. Cotto, 642 N.Y.S.2d at 794.
326. *Id.* at 795-96.
327. *See id.* at 795 (stating defendant was the only person who would benefit if Echevarria was unable to testify against him at trial).
328. People v. Cotto, 699 N.E.2d at 398.
329. *Id.*
330. *Id.*
331. *See id.*; People v. Cotto, 642 N.Y.S.2d at 795-96.
332. *Cf.* Zeidman, *supra* note 63, at 226-29 (arguing that the standard in practice is less than clear and convincing).

defendant's knowledge of the witness, the timing of the intimidation in proximity to the trial,[333] the defendant's prior acts including threats against the witness,[334] the defendant's reputation for intimidation,[335] perhaps his connection with the actual intimidators,[336] and most importantly, the lack of other plausible perpetrators to establish the link between the intimidation and the defendant.[337]

Nonetheless, there is a certain unease about the *Cotto* case. Proof of Cotto's involvement was indirect and weak.[338] All of the evidence connecting Cotto to the threats was hearsay by the officers reporting their conversations with Echevarria's sister and mother, or double hearsay about Echevarria's statements repeating what others had told him.[339] The hearsay testimony was more beneficial to the government than live testimony. Echevarria was impeachable because he first identified Cotto four years after the crime, although he had been interviewed at the scene.[340] He named Cotto as the murderer the weekend before trial and while he was in jail when testimony favorable to the state could benefit

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333. In *Mastrangelo*, the witness was murdered on his way to trial. *Id.* at 1120. In *Cotto*, the threats began when the witness's name was announced during pretrial. United States v. Cotto, 699 N.E.2d at 398.

334. United States v. Cotto, 699 N.E.2d at 396.

335. United States v. Cotto, 642 N.Y.S.2d at 795. *But see* State v. Washington, 521 N.W.2d 35, 42 (Minn. 1994) (holding that the declarant must hear threats directed against others); State v. Hansen, 312 N.W.2d 96, 105 n.7 (Minn. 1981) (holding that a general reputation for violence is insufficient to support threats against witnesses).

336. The courts attribute witness intimidation to the defendant when his associates are the intimidators. *See, e.g.*, Rice v. Marshall, 709 F.2d 1100, 1101-02 (6th Cir. 1983) (attributing the witness's refusal to testify to the defendant after the defendant's "investigators" visited the witness); Geraci v. Senkowski, 23 F. Supp. 2d 246, 258 (E.D.N.Y. 1998) (finding that the defendant's uncle bribed the declarant and that unnamed persons intimidated declarant with transcript of testimony received from the defendant's attorney); People v. Colon, 473 N.Y.S.2d 301, 306 (Sup. Ct. 1984) (finding defendant a member of Gambino crime family, whose members made threats against the witness); People v. Sweeper, 471 N.Y.S.2d 486, 490 (Sup. Ct. 1984) (describing a criminal organization known as the Vigilantes with a policy of murdering witnesses, to which the defendant and the perpetrators of the witness's murder belonged).

337. United States v. Mastrangelo, 561 F. Supp. at 1119; United States v. Cotto, 699 N.E.2d at 398 n.1.

338. *See* United States v. Cotto, 699 N.E.2d at 398 n.1. The majority declined to require specific identification of the defendant as the one responsible for the intimidation. *See id.* The court relied on expediency and the deterrence rationale—perhaps at the expense of adequate proof. *See id.* at 398-99. "Requiring specific identification in situations invariably involving surreptitious conduct permits easy evasion of the principle, and sound public policy, that defendants should neither interfere with witnesses nor benefit from such wrongful conduct." *Id.* at 398 n.1.

339. *See id.* at 399, 401.

340. *See id.* at 404 (noting that the alleged incident took place four years before Echevarria first identified Cotto).

him.[341] Although Echevarria testified at trial that he could not identify the defendant, the trial court refused to permit cross examination by the defendant, holding that it had been waived by the intimidation.[342] The prosecution rejected the court's offer of a continuance when Echevarria refused to testify, and moved the next day to admit his statements.[343] The decision can be seen as a prudent decision in light of the circumstances, or as an opportunity to strengthen a weak and impeachable case by using hearsay rather than actual evidence.[344] Finally, all of the significant evidence of identification was hearsay because the victim's dying declaration was the only other evidence of identification.[345] The right of confrontation to an available witness seemed to be evaded in the hearing and during the trial.[346] On the other hand, it can be viewed as a case where a murderer was successfully prosecuted despite intimidation of the witness, producing a victory for the criminal justice system. Regardless of the perspective, the case is unsettling.

3. *Multiple Defendant Cases*

The problem of connecting each defendant to the threats is greater when there are codefendants. Several defendants substantially reduce the probative weight of the most important factor in the Mastrangelo and Cotto cases—the

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341. *Id.* at 396.

342. *Id.* at 397. The trial judge ruled that cross-examination would not serve any purpose under these facts. *Id.* Presumably, the judge thought that denial of the identification by Echevarria was the maximum benefit the defendant could have obtained from that witness. The defendant, however, may have been able to further explore Echevarria's motives for changing his mind about the identification. However, to do so would be risky for the defendant. *See* Geraci v. Senkowski, 23 F. Supp. 246, 256 (E.D.N.Y. 1998) (finding that counsel's decision not to call a recanting declarant avoided the possibility that the jury would disbelieve the recantation, and it prevented rebuttal testimony of threats against declarant to explain recantation and avoided adverse inferences from declarant's demeanor).

343. United States v. Cotto, 699 N.E.2d at 397.

344. Commentators have noted the increasing reliance on hearsay even when the declarant can testify. *See* Douglass, *Reluctant Accomplice*, *supra* note 212, at 1847 (arguing that in many Sixth Amendment cases neither the prosecutor nor the defendant try to bring the declarant into court to testify); *see generally* Richard D. Friedman & Bridget McCormick, *Dial-In Testimony*, 150 U. PA. L. REV. 1171 (2002) (describing prosecutions for domestic violence using the excited utterance exception although declarant-victim is available to testify).

345. *See* People v. Cotto, 699 N.E.2d at 399-401 (upholding admission as excited utterance rather than dying declaration).

346. For another example of hearsay leading to trial without direct confrontation, see Friedman & McCormick, *supra* note 344 (discussing the prosecution of domestic violence cases through excited utterance and other hearsay exceptions without calling available declarants).

individual who obviously has the most to gain from the witness's unavailability.[347] The courts generally have required individual proof of complicity in the witness intimidation.[348] At least two multi-defendant cases, however, lack any substantial probative evidence of individual responsibility even when the trial judge admitted the evidence. Steele v. Taylor, an early misconduct case, is one example.[349] In Steele, Judge Robert Steele hired Owen Kilbane and his brother, Martin, to procure a hit man to murder Steele's wife, Marlene.[350] Carole Braun, a prostitute for Owen Kilbane, overheard the principals planning the murder.[351] Seven years later she left Kilbane and reported the conversations to the FBI.[352] Her testimony led officers to the hit man, who agreed to testify about the Steele murder.[353] In the meantime, Braun reconciled with Kilbane, had his child, and allegedly married him.[354]

At the trial of the Kilbane brothers and Robert Steele, Braun was represented by an attorney paid by Owen Kilbane, and she refused to testify on Fifth Amendment and marital privilege grounds.[355] The trial court overruled both objections, and upon her continued refusal to testify, held her in contempt.[356] The trial court admitted her prior statements to the police against all three defendants by finding that she was under the control of the defendants who persuaded her not to testify.[357] There was evidence of control by her husband, Owen Kilbane, because she depended on him for support and he hired the attorney who asserted the privileges at trial.[358] However, there was no evidence as to the other defendants.[359] The court concluded that all three defendants were

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347. United States v. Mastrangelo, 693 F.2d 269, 271 (2d Cir. 1982); People v. Cotto, 699 N.E.2d 394, 398 (N.Y. 1998).

348. *See, e.g.*, Olson v. Green, 668 F.2d 421, 428 (8th Cir. 1982) (finding that one defendant was not responsible for death of declarant because of coconspirator status); United States v. Carlson, 547 F.2d 1346, 1354-55 (8th Cir. 1976) (providing discussion of admissibility of absent witness hearsay only as to one of three defendants in joint trial); United States v. Houlihan, 887 F. Supp. 352, 363-66 (D. Mass. 1995) (finding one defendant did not kill declarant because he was a witness).

349. *See* Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982).

350. *Id.* at 1197-98.

351. *Id.* at 1197.

352. *Id.*

353. *Id.* at 1197-98.

354. *Id.* at 1198.

355. *Id.* at 1198-99.

356. *Id.* at 1199.

357. *Id.*

358. *Id.* at 1203.

359. *Id.* at 1207-08 (Taylor, J., dissenting).

"united in interest and effort" even though they had sought to subpoena Braun at trial.[360] The "united in interest" test was not explained in the opinion.[361] The trial court did not devote much time to the question of joint responsibility.[362] There was no evidentiary hearing on the issue, and it was not raised by the defendants on appeal.[363]

The case of *People v. Delarosa*[364] is similar. The defendant was on trial for a burglary committed in Nassau County, in which the perpetrators gained entrance by posing as flower deliverymen.[365] To prove Delarosa's identity in the Nassau crime, the state offered the testimony of victims of an earlier burglary in Queens where the defendant and three or four others had gained entrance by posing as cable television repairmen and then as flower deliverymen.[366] The government sought to prove the prior burglary using the grand jury testimony of the witness who identified Delarosa and others in the Queens burglary because the witness had fled the county in fear of testifying.[367] There was evidence that one of Delarosa's confederates in that burglary had beat the witness's husband, and another unidentified individual had threatened him about testifying, but there was no evidence that Delarosa had been involved in the intimidation.[368] Nevertheless, the court concluded, without discussing the evidence relevant to Delarosa, that the proof met the clear and convincing standard that the "'defendant either was responsible for or had acquiesced in the conduct that rendered [the witness] unavailable' to testify."[369] Two dissenting justices pointed out the lack of evidence and the fact that at least three other persons had similar motives to benefit from the misconduct.[370]

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360. *Id.* at 1208.
361. *See id.* at 1193.
362. *See id.* at 1193-1208.
363. *See id.* at 1193.
364. People v. Delarosa, 630 N.Y.S.2d 357 (App. Div. 1995).
365. *Id.* at 358.
366. *Id.*
367. *Id.*
368. *Id.* at 359 (Altman, J., dissenting).
369. *Id.* (quoting People v. Geraci, 649 N.E.2d 817, 824 (N.Y. 1995)).
370. *Id.*

4. *The Attribution of the Witness Intimidation and Forfeiture of Constitutional and Evidentiary Rights by One Coconspirator to Other Coconspirators*

Conspiracy law has been used to address the attribution problem in forfeiture by wrongdoing cases. The issue was first addressed in *United States v. Cherry*,[371] three years after Rule 804(b)(6) was adopted. Five defendants were charged with participating in a drug conspiracy.[372] There was strong circumstantial evidence that Joshua Price murdered Ebon Lurks, who was cooperating with the government in its investigation of illegal drug dealing.[373] The evidence also suggested that another coconspirator, Teresa Price, had been involved in the murder.[374] There was no evidence of knowledge or participation in Lurks's murder by the three other members of the drug conspiracy—Michelle Cherry, LaDonna Gibbs, and Sonya Parker.[375] The government argued that the principles of coconspirator liability expressed in *Pinkerton v. United States*[376] were applicable to forfeiture by misconduct.[377] *Pinkerton* held that a member of a conspiracy did not have to participate in a crime to be held criminally responsible for it if the crime was in furtherance of the conspiracy.[378] By analogy, all the conspirators did not have to act with Josuha Price in murdering Lurks to forfeit their rights, so long as the murder was in furtherance of the conspiracy.

The trial judge excluded the statements as to all the defendants except Joshua Price.[379] After an interlocutory appeal, the Tenth Circuit adopted the *Pinkerton* rationale.[380] The circuit court agreed with the trial judge, that membership in a conspiracy alone was insufficient to support the forfeiture.[381] The evidence also must establish that the intimidation was in furtherance of, and within the scope of, the drug conspiracy, and was reasonably foreseeable as a

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371. United States v. Cherry, 217 F.3d 811 (10th Cir. 2000). *But see* Olson v. Green, 668 F.2d 421, 428-29 (8th Cir. 1982) (rejecting state court's theory that defendant was bound by threats of coconspirators).
372. United States v. Cherry, 217 F.3d at 813.
373. *Id.* at 814.
374. *Id.*
375. *Id.*
376. Pinkerton v. United States, 328 U.S. 640 (1946).
377. United States v. Cherry, 217 F.3d at 815.
378. Pinkerton v. United States, 328 U.S. at 647-48.
379. United States v. Cherry, 217 F.3d at 814.
380. *Id.* at 813.
381. *Id.* at 820.

necessary or natural consequence of the conspiracy.[382] Thus, the other coconspirators would not be bound by one conspirator's unilateral act unrelated to the conspiracy. The coconspirators must reasonably foresee the witness intimidation.[383] The court remanded the case for a determination of whether the other defendants who had not participated in the murder could be held to have forfeited their evidentiary and constitutional objections to the hearsay.[384] The Seventh Circuit also adopted *Pinkerton*, but found that the three other conspirators could not have reasonably foreseen the informant's murder because there had been no similar witness intimidation or murder before, and the random violence experienced during the conspiracy was insufficient to put them on notice.[385] Despite the improper introduction of the hearsay, the court sustained all convictions, finding harmless error due to other overwhelming evidence of their participation in the drug conspiracy, which made the hearsay unimportant and cumulative to other testimony.[386]

The *Pinkerton* rationale sweeps quite broadly. Coconspirators may be liable for crimes in which they did not directly participate or were unaware were being planned and had no ability to influence,[387] provided there is evidence that the murder was an object of the conspiracy.[388] They can also be responsible for crimes that were not contemplated when the conspiracy was formed, and were in fact inconsistent with the original goal of the conspiracy.[389] *Pinkerton* leads to the loss of evidentiary and constitutional rights in similar circumstances. Proof that the witness intimidation or murder was an object of the conspiracy, or that it was reasonably foreseeable, can be satisfied easily in many cases. Conspiracies often have explicit or implicit enforcement policies which satisfy this element.[390]

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382. *Id.* at 816-18.

383. *Id.* at 817 (citations omitted).

384. *Id.* at 822. The conviction of Joshua Price, the murderer, was affirmed in a subsequent opinion without mentioning the other defendants. *See* United States v. Price, 265 F.3d 1097 (10th Cir. 2001).

385. United States v. Thompson, 286 F.3d 950, 964-65 (7th Cir. 2002).

386. *Id.* at 962-63.

387. United States v. Cherry, 217 F.3d at 821.

388. *See* United States v. Etheridge, 424 F.2d 951, 963-65 (6th Cir. 1970) (finding that the murder of an informant could be an overt act of burglary conspiracy that reaches two conspirators who had no knowledge of the intended murder of the informant).

389. United States v. Feola, 420 U.S. 671, 696 (1975) (holding defendants guilty of conspiracy for assaulting federal agents, at the time the defendants were unaware they were federal officers).

390. United States v. Celestine, No. 97-4219, 2002 WL 1821971, at *4, 8-9 (4th Cir. 2002) (noting a series of murders, the purpose of which was retaliation to enhance their reputation for violence, and to strengthen bonds of loyalty); United States v. Miller, 116 F.3d 641, 669 (2d

Thus, members of a criminal organization, with a reputation for violent discipline, are responsible for those murders and the consequent loss of constitutional and evidentiary rights. Such evidence would support applying hearsay forfeiture to all coconspirators for acts intending to conceal the conspiracy after the main purpose of the conspiracy has been accomplished.[391]

The *Pinkerton* doctrine has been criticized when used in large sprawling conspiracies to reach lower-level members. Those lower-level members are unaware of the activities of other conspirators and have no ability to influence them, nor are they directly responsible for the acts.[392] The Model Penal Code rejected *Pinkerton* in favor of individual responsibility for one's acts.[393] The Code requires proof that the defendant affirmatively commanded, encouraged, aided, or agreed to aid a crime.[394] The rationale for the requirement is to maintain a sense of proportionality, so that minor figures in conspiracies cannot be held responsible for other major crimes of which they were unaware, or had no ability to influence.[395] The proposed provision of the federal criminal code also rejected *Pinkerton*,[396] as have several states.[397]

The most appealing argument for applying *Pinkerton* to the misconduct exception lies in the fact that the doctrine can be used to impose the greater sanction of imprisonment for a crime, and therefore it may also be used to impose the lesser sanction of admitting some evidence. "It would make little sense to limit forfeiture of a defendant's trial rights to a narrower set of facts than would be sufficient to sustain a conviction and corresponding loss of liberty."[398]

Cir. 1997) (finding that it was the gang's practice to murder individuals suspected of cooperating with authorities); United States v. Houlihan, 92 F.3d 1271, 1277 (1st Cir. 1996) (noting that defendants "imposed a strict code of silence" and "dealt severely with [those] who . . . talk[ed] too freely"); People v. Sweeper, 471 N.Y.S.2d 486, 491 (Sup. Ct. 1984) (same).

391. Grunewald v. United States, 353 U.S. 391, 404-06 (1957) (holding acts of concealment in furtherance of the main objects of the conspiracy are punishable after the object of the conspiracy has been accomplished).

392. MODEL PENAL CODE § 2.04(3), at 20, 26 (Tentative Draft No. 1, 1956).

393. *Id.* at 20.

394. *Id.*

395. *See id.* at 21 ("Law would lose all sense of just proportion if in virtue of that crime, each were held accountable for thousands of offenses that he did not influence at all.").

396. Final Report of The National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code § 401 (1971).

397. *See, e.g.*, State *ex rel.* Woods v. Cohen, 844 P.2d 1147, 1151 (Ariz. 1992); Commonwealth v. Stasiun, 206 N.E.2d 672, 680-82 (Mass. 1965); People v. McGee, 399 N.E.2d 1177, 1182 (N.Y. 1979); State v. Lind, 322 N.W.2d 826, 841-42 (N.D. 1982); State v. Stein, 27 P.3d 184, 187-89 (Wash. 2001).

398. United States v. Cherry, 217 F.3d 811, 818 (10th Cir. 2000).

This argument is not as compelling as it seems. First, the *Pinkerton* principle is not universally accepted because it is capable of being applied too broadly.[399] More importantly, criminal liability can be imposed because the procedural protections increase the truth-finding values of the trial. When applied to evidence, however, *Pinkerton* permits the jury to hear suspect evidence without constitutional protections, thereby reducing the reliability of the verdict as to some defendants. Moreover, the most exposed are the least important members of the conspiracy, and often the hearsay may be the only evidence linking the defendant to other crimes.

5. *Summary*

The misconduct exception's most difficult issue is reaching the defendant who acts by proxy and is not directly involved in the crimes against the witness that caused his unavailability at trial. The Advisory Committee chose "acquiescence" as the mental state necessary to bring those defendants within the Rule, but that term is ill-suited to the task. Its connotations as tacit or silent, often reluctant acceptance, inferred perhaps from the general circumstances, imply that a very weak probative link between the perpetrators and the defendant supports the use of the exception. The consequences are that the Rule can be applied to those with little or no responsibility for the acts, and can lead to significant loss of trial and constitutional rights, most commonly in multi-defendant cases. All of the attempts to define predicate facts that will support the link, such as the *Mastrangelo* test,[400] have likewise failed because they are overinclusive. Some connection between the defendant and the crime is necessary to correctly apply the Rule. Filling the gap by conspiracy theories likewise has the potential for error. The Model Penal Code's criticism of *Pinkerton* is equally applicable to its extension of the misconduct exception. There is a need for some proportion between the individual's act and its consequences, so there must be some proof of individual knowledge, approval, or participation in the intimidation to avoid an unfair result.[401] It is impossible to

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399. *See supra* notes 393-97 and accompanying text.

400. *See* discussion *infra* Part IV.B.

401. There is some suggestion that *Pinkerton* liability is generally applied only to the leadership of the conspiracy and there are hints that the courts are sensitive to the issue. *See, e.g.*, United States v. Alverez, 755 F.2d 830, 851 (11th Cir. 1985) (limiting *Pinkerton* to those who played more than a minor role in the conspiracy). However, there are exceptions, and *Pinkerton* provides no clear demarcation line in applying the Rule. In *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002), the court held that *Pinkerton* did not apply because the violence was not

define that connection precisely. The general phrases "engaged directly or indirectly," or "engaged in or directed" wrongdoing, or consented to the witness intimidation by others on his behalf are more appropriate choices. These phrases state a requirement of clear proof of connection, and leave it to the available circumstantial evidence to establish that link.

C. *Concerns About the Reliability of the Hearsay Admitted Under the Misconduct Exception*

There are three principal reasons for concern about the quality or reliability of the evidence that may be admitted under the misconduct exception. First, there is no claim that the hearsay statement is made in situations that provide circumstantial guarantees of their reliability.[402] Second, the hearsay statements are often made in circumstances where their reliability can be questioned. Many of the declarants are deeply involved with the defendant in the criminal activity or otherwise exposed to criminal liability in circumstances where courts have had concerns about the reliability of the statements.[403] Finally, the courts have increasingly admitted less reliable forms of hearsay statements.[404]

The waiver or forfeiture of constitutional and evidentiary rights under the misconduct exception has always been justified by the principle of estoppel and the public policy that "no one shall be permitted to take advantage of his own wrong,"[405] and bolstered by the government's need for the evidence as the logical consequence of the defendant's actions and the desire to deter this conduct.[406]

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foreseeable, but it was a Pyrrhic victory because the court then ruled that admitting the hearsay was harmless error.

402. *See* Sykora, *supra* note 1, at 862-69 (listing categories of prior statements and discussing their relative reliability or unreliability based on the contexts in which they were made).

403. *See infra* notes 412-16 and accompanying text.

404. *See, e.g.*, United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (affirming the admission of an unsworn statement made by a coconspirator after his arrest for possession of heroin); Steele v. Taylor, 684 F.2d 1193, 1204 (6th Cir. 1982) (upholding the admission of a witness's signed but unsworn statement after she invoked the privilege against self-incrimination).

405. *See* United States v. Reynolds, 98 U.S. 145, 159 (1878).

406. *See* United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997) (stating that admitting prior statements partially offsets defendant's advantage in removing witness); United States v. Houlihan, 92 F.3d 1271, 1279-80 (1st Cir. 1996) (stating that murdering a witness deprives government of its testimony); Steele v. Taylor, 684 F.2d at 1202 (finding a strong interest in deterring litigants from acting on incentives to prevent an adverse witness from testifying); United States v. Thevis, 665 F.2d 616, 632-33 (5th Cir. Unit B 1982) (stating that once confrontation rights are waived the balance "fall[s] in favor of the need for evidence"); United States v. White, 838 F. Supp. 618, 625 (D.D.C. 1993) (stating that the underlying policy of the misconduct waiver was to deter defendants from making witnesses unavailable). The deterrence

No one asserts that there are circumstantial guarantees of reliability when the declarants make statements to the police.[407] Nor have the courts argued that silencing the witness is an implicit recognition of the truthfulness of the hearsay.[408] This argument is a variation of the one that has been used to support the admissibility of threats to establish the defendant's guilty knowledge,[409] which also involves an inference about the reliability of the declarant's testimony. At best, these arguments provide an inference, but are certainly not highly probative evidence that the declarant's statements are reliable, and are not the circumstantial guarantees of trustworthiness found in most other hearsay exceptions.[410]

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rationale is questionable. The intimidator has not been deterred by the well-known criminal sanctions for murder, threats, or assault, and is not likely to be deterred or even aware of an additional exception to the rule against hearsay. There may be a deterrent effect when the defendant knows of the Rule and its consequences. *See* United States v. Gallo, 653 F. Supp. 320, 331-33 (E.D.N.Y. 1986) (warning defendant that declarant's statements are admissible if the declarant becomes unavailable before releasing defendant on bail).

407. *See* Sykora, *supra* note 1, at 868 (stating that trustworthiness is not the core of a forfeiture by misconduct rule, it is "an attempt to trump a defendant's successful, wrongful 'defense' by witness intimidation").

408. Some commentators, however, have made the argument. *See* LEMPERT ET AL., *supra* note 238, at 659-60 (stating, without citation, that numerous courts have held that witness absence through violence or bribery is an adoptive admission); Markland, *supra* note 1, at 1014 (opining that a defendant acknowledges reliability of witness statements when the defendant attempts to prevent the witness's testimony); Valdez & Nieto Dahlberg, *supra* note 1, at 123-24 (arguing that if statements were not reliable there would be no need to prevent the testimony).

409. The train of logic is as follows: the defendant knows the witness will testify and that the testimony will be harmful to him. If the defendant threatens the witness it can be inferred that the defendant has something to hide, which "implies a consciousness of guilt of the particular crime charged." United States v. Gonsalves, 668 F.2d 73, 75 (1st Cir. 1982). An intermediate inference is that the defendant threatens the declarant because he knows that the declarant's statements are true. GRAHAM, WITNESS INTIMIDATION, *supra* note 1, at 179.

410. The process of inferring the truth of the declarant's statements from the defendant's acts of intimidation is sometimes referred to as an admission by conduct. GRAHAM, WITNESS INTIMIDATION, *supra* note 1, at 178-81. Viewing the threats as an admission suggests that it shares some of the characteristics of an admission of a party opponent, including the fact that an admission of a party opponent may be offered without any proof of reliability or personal knowledge of the party opponent. *See* FED. R. EVID. 801 advisory committee's note. By extension, characterizing the threats as an admission by conduct suggests that there may be no need to be concerned about the reliability of the declarant's statements. This view confuses the statements of the defendant/party-opponent with the declarant's hearsay statements. The former may be admitted with few limitations, but the latter are subject to all of the ordinary requirements of any other hearsay statement, including the requirements that the declarant have personal knowledge about the topic and that it be reliable.

Professor Michael H. Graham, in the first analysis of the waiver theory found in the early federal cases, argued:

> A defendant has an incentive to intimidate a witness whenever the witness is going to give damaging evidence regardless of the truth of such evidence. Since the declarant's evidence is harmful even if untruthful, the incentive to eliminate the evidence through intimidation, including murder, is substantially if not almost totally identical. Any small reduction in incentive that does arise stems from the assumption that an innocent defendant is more likely to be able to present a strong defense including refutation of the prior out-of-court statement.[411]

Ultimate vindication at trial does not avoid many significant consequences of false testimony, including arrest, the possibility of pre-trial detention, damage to one's reputation, the financial and psychological costs of trial, and the small, but still very real, possibility of conviction and sentencing to jail. In fact, the defendant's motive to silence a witness is arguably more if the witness is lying about the defendant's involvement in a criminal activity because of the frustration at being unfairly and unnecessarily accused of a crime. The inference is also undercut when the defendant has other motives for the threats or violence, as often happens in criminal organizations.

Moreover, the logic looks only at the defendant's acts and not to the witness's motives to falsify.[412] The declarants in almost all of the federal misconduct cases were directly and deeply involved in the criminal activity as principals, and many others were criminally culpable bystanders who knew about the principal's criminal activity, but did not render direct support to the crime.[413] Those declarants have mixed motives in talking to law enforcement. They are in situations where it is to their advantage to minimize their participation and exaggerate the culpability of others. Both are necessary to reduce their exposure to the criminal process by inflating their importance as a means of convicting those higher in the criminal scheme.[414] In some of the early cases, the exception for statements against penal interest was used as an alternate ground for

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411. GRAHAM, WITNESS INTIMIDATION, *supra* note 1, at 177.

412. *See, e.g.*, State v. Ackley, No. 43666-O-I, 2001 WL 210681, at *4-5 (Wash. Ct. App. 2001) (noting that the truth of the victim's accusations against the defendant are irrelevant, the fact that the accusations were made provides the motive for retribution).

413. *See supra* notes 72-73 and accompanying text (identifying declarants' participation in crimes).

414. Douglass, *Reluctant Accomplice*, *supra* note 212, at 1828 (stating that often an accomplice confession is "calculated to benefit the confessor by shifting the primary criminal responsibility to another").

admitting the absent declarant's statements.[415] The Supreme Court has held that such statements cannot be used to implicate others without proof of reliability.[416] Consequently, the defendant's act of intimidating the witness furnishes, at best, a weak inference that the statements are reliable, which is often undercut by other evidence, including the motive of the declarant and the circumstances in which the statements were made.

Finally, evidence of threats is perceived to be so serious that it is likely to be overvalued in any consideration of the evidence.[417] Forfeiture means the loss of known and unknown rights and protections forfeited,[418] and courts may conclude that the ability to object on reliability grounds is one of the protections forfeited, or at least insufficient to raise a significant impediment to admitting the evidence. The purpose of the rule against hearsay and the prerequisites for each exception are to produce reliable evidence so that verdicts reflect the facts.[419] This institutional value is central to the acceptability of verdicts, and important regardless of the acts of the defendant.

There was a reliability check in the early cases.[420] The English and early American cases on waiver by misconduct generally involved the admission of prior written testimony, often subject to cross-examination with the defendant present.[421] Consequently this procedure produced more reliable evidence than the usual hearsay testimony. *United States v. Carlson* and the initial federal

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415. *See, e.g.*, United States v. Ochoa, 229 F.3d 631, 635 (7th Cir. 2000); United States v. Johnson, 219 F.3d 349, 355 n.4 (4th Cir. 2000); United States v. Carlson, 547 F.2d 1346, 1354 n.4 (8th Cir. 1976); United States v. Williamson, 792 F. Supp. 805, 811 (M.D. Ga. 1992); State v. Gettings, 769 P.2d 25, 28-29 (Kan. 1989); State v. Pierce, 364 N.W.2d 801, 806-07 (Minn. 1985); State v. Hansen, 312 N.W.2d 96, 99-100 (Minn. 1981); State v. Black, 291 N.W.2d 208, 213 (Minn. 1980).

416. Lilly v. Virginia, 527 U.S. 116, 131 (1999) (plurality opinion); *see also* Lee v. Illinois, 476 U.S. 530, 541 (1986) (finding that accomplice testimony implicating others is presumptively unreliable); Bruton v. United States, 391 U.S. 123, 135-36 (1968) (finding accomplice testimony "inevitably suspect").

417. GRAHAM, WITNESS INTIMIDATION, *supra* note 1, at 180-81.

418. *See* United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992). The courts will refuse to apply the rule when there is no evidence linking the defendant to the threats. *See supra* note 304 and accompanying text (citing cases where rule not applied). *But see* People v. Brown, 632 N.Y.S.2d 938, 944-45 (Sup. Ct. 1995) (holding that one witness providing evidence that defendant murdered another witness was not credible due to prior convictions involving dishonesty).

419. LEMPERT ET AL., *supra* note 238, at 494-500.

420. *See* discussion *supra* Part II.A.

421. *See* Kroger, *supra* note 1, at 888-93 (arguing that the English and American precedents do not support the admission of uncrossed hearsay statements); *see also supra* notes 11-17 and accompanying text (discussing common law precedents that involved prior recorded testimony).

cases involved hearsay offered under the residual exception in Rule 807, which requires the courts to determine whether the hearsay statements have "equivalent circumstantial guarantees of trustworthiness" to the traditional exceptions.[422] The courts made the appropriate findings in the early cases.[423] When the courts thought that the Confrontation Clause also required a showing of particularized indicia of reliability, the courts also examined the evidence and concluded that the statements met that standard.[424] However, after *United States v. Balano*,[425] the courts adopted the view that forfeiture waived all objections, constitutional and evidentiary, which eliminated any special reliability analysis.[426]

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422. United States v. Carlson, 547 F.2d 1346, 1357 (8th Cir. 1976); FED. R. EVID. 807.

423. *See* United States v. Rouco, 765 F.2d 983, 994 (11th Cir. 1985) (concluding that the evidence being admitted did meet the "circumstantial guarantees of trustworthiness equivalent to those inherent in statements admissible under the specific hearsay exceptions of Rules 803 and 804(b), and that the prerequisites to admissibility were present"); Steele v. Taylor, 684 F.2d 1193, 1199-200 (6th Cir. 1982) (noting that the state court found Rule 804(b)(5) satisfied); United States v. Thevis, 84 F.R.D. 57, 63-66 (N.D. Ga. 1979), *aff'd on other grounds*, 665 F.2d 616, 628-29 (5th Cir. Unit B 1982) (finding grand jury testimony does not satisfy the Rule's reliability standard when admitting evidence on waiver theory); United States v. West, 574 F.2d 1131, 1134-36 (4th Cir. 1978) (holding that the "equivalent guarantee of trustworthiness requirement of § 804(b)(5) is met if there is equivalency of any one of the preceding § 804(b) exceptions"); United States v. Carlson 547 F.2d at 1354 (deciding that "the statement sought to be admitted under Rule 804(b)(5) must have 'circumstantial guarantees of trustworthiness' equivalent to those inherent in the other four exceptions of Rule 804(b)"); United States v. Mastrangelo, 533 F. Supp. 389, 390-91 (E.D.N.Y. 1982) (deciding that the requirements of Rule 804(b)(5) have been met).

424. *See* Rice v. Marshall, 709 F.2d 1100, 1103-04 (6th Cir. 1983) (holding that the indicia of reliability were established and that there was no violation of the Constitution); Steele v. Taylor, 684 F.2d at 1203-04 (deciding that the 804(b)(5) circumstantial guarantees of trustworthiness have been satisfied); United States v. West, 574 F.2d at 1136-38 (holding that there was a high degree of reliability and trustworthiness to the defendant's statements before the grand jury, and the circumstances sufficed to meet the requirements of Rule 804(b)(5) and the Confrontation Clause); United States v. Mastrangelo, 533 F. Supp. at 390-91 (same).

425. United States v. Balano, 618 F.2d 624 (10th Cir. 1979).

426. *See, e.g.*, United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (stating "it is well established that a defendant's misconduct may work a forfeiture of his or her constitutional right of confrontation"); United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997) (finding the defendant may lose constitutional and evidentiary objections through misconduct); United States v. Houlihan, 92 F.3d 1271, 1279-81 (1st Cir. 1996) (finding that the defendant waived his rights under the Confrontation Clause by murdering a potential witness against him, because this right may be waived by intentional misconduct); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) (holding that where a defendant procures the absence of a witness through misconduct such as threats or intimidation, the defendant waives any constitutional and evidentiary objections); United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982) (finding that a witness waives his or her rights under the Confrontation Clause by procuring the silence of a witness, because to allow otherwise "would mock the very system of justice the confrontation clause was designed to protect").

As the case law developed, the courts admitted less reliable forms of hearsay. The first federal cases to address waiver by misconduct generally involved the admission of prior sworn statements of the absent witness, usually grand jury testimony.[427] Grand jury testimony is given under oath, in a formal proceeding, "in the presence of jurors who are free to question the witness."[428] Plea agreements are generally drafted such that if the witness lies the agreement is void.[429] Perhaps more importantly, the grand jury is used to develop evidence and testimony for trial,[430] hence the prosecutors and police are likely to ensure that it can be corroborated by other evidence, or at least other information available to the police. Finally, grand jury testimony is often recorded, and the transcripts of witnesses' testimony are made available to the parties.[431] Witness statements outside the grand jury may or may not be recorded, but are often not formally recorded, creating issues of reconstructing what actually was said, and providing opportunities for selective recollection and possibly fabrication.[432] Later cases, however, held that the waiver principle applied to any hearsay statement made by an absent witness. Commonly, the statements were made to

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427. *See* United States v. Potamitis, 739 F.2d 784, 788 (2d Cir. 1984) (grand jury testimony); Rice v. Marshall, 709 F.2d at 1104 (signed statement); United States v. Thevis, 665 F.2d 616, 627 (5th Cir. Unit B 1982) (grand jury and FBI interviews); United States v. Balano, 618 F.2d 624, 625 (10th Cir. 1979) (grand jury testimony); United States v. Carlson, 547 F.2d at 1353 (grand jury testimony); United States v. Papadakis, 572 F. Supp. 1518, 1523 (S.D.N.Y. 1983) (grand jury testimony); *cf.* United States v. West, 574 F.2d at 1134-36 (grand jury testimony admitted under residual exception, not misconduct exception). *But see* United States v. Rouco, 765 F.2d at 994-95 (statement of undercover officer's supervisor about source of cocaine); Steele v. Taylor, 684 F.2d at 1199 (noting that the trial judge admitted agent's testimony of a witness's prior statement).

428. DAVID F. BINDER, HEARSAY HANDBOOK § 47.1 (4th ed. 2001).

429. *See, e.g.*, Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 S.C. L. REV. 679, 685-86 (1999) (recommending to draft plea agreements with language requiring witness to tell the truth); Neil B. Eisenstadt, Note, *Let's Make a Deal: A Look at* United States v. Daily *and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749, 750 n.6 (1987) (noting that plea agreement requiring truthful cooperation "is characteristic of most prosecutor-witness plea agreement provisions").

430. *See* 14 COLO. PRAC., CRIMINAL PRACTICE & PROCEDURE § 2.50 (1996) (noting the grand jury is needed to develop sufficient evidence).

431. *See* FED. R. CRIM. P. 6(e).

432. *See, e.g.*, United States v. Pineda, 208 F. Supp. 2d 619, 623 (W.D. Va. 2001) (refusing to find indicia of reliability for hearsay statement, in part because it was only found in officer's notes, which may not have been a direct recording of the statement); United States v. Houlihan, 887 F. Supp. 352, 357 n.8 (D. Mass. 1995) (explaining that agents were instructed by the prosecutor not to take notes of interviews with witnesses); Douglass, *Reluctant Accomplice*, *supra* note 212, at 1836 n.170 (noting that agents are told not to create records and thereby limit discovery under Jencks Act).

law enforcement officers and the testimony introduced through the officers' testimony.[433] At the least, introducing unsworn and often unrecorded statements increases the risk of unreliable evidence being presented to the jury.

The arguments against some reliability review have an underlying theme of retribution, asserting that the defendant cannot complain about the reliability of the evidence against him because his own actions have created a need for the government to use this form of evidence.[434] Some courts have held that the waiver of constitutional rights includes the waiver of any objection under the hearsay rules, including any special reliability test required by the residual clause.[435] Other courts suggest that Rule 403 remains available as a sufficient check.[436] Any analysis under Rule 403 is not likely to be a significant filter of unreliable evidence for two reasons. First, the judge, in determining the admissibility of evidence, does not consider the credibility of the witness.[437] Second, the probative value of the evidence has to be substantially outweighed by the prejudicial effect in order for the evidence to be excluded.[438] In summary, the misconduct exception has the potential to admit hearsay statements that are less reliable than those admitted under the standard hearsay exceptions. Courts have shown relatively little interest in the issue, but as argued above, there is a need to address it. While the issue has not been addressed as a matter of evidence law, it has been addressed by the Supreme Court in its Confrontation

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433. *See* United States v. Price, 265 F.3d 1097, 1100-01 (10th Cir. 2001) (statements to FBI); United States v. White, 116 F.3d 903, 910 (D.C. Cir. 1997) (informant's statements to police during debriefing sessions); United States v. Houlihan, 92 F.3d 1271, 1278 (1st Cir. 1996) (statement of state trooper and tape of declarant's other statements); United States v. Thai, 29 F.3d 785, 814 (2d Cir. 1994) (statements by victim of extortion to police); United States v. Aguiar, 975 F.2d 45, 46-47 (2d Cir. 1992) (statements to special agent and Assistant United States Attorney).

434. *See* Markland, *supra* note 1, at 1011-16 (arguing that defendant has essentially removed his own protection against unreliable statements); Sykora, *supra* note 1, at 871-72 (arguing that once forfeiture by misconduct has been established, defendant should have burden of showing a due process violation of the "kangaroo court" level); Valdez & Nieto Dahlberg, *supra* note 1, at 102-03, 123 (arguing that Rule 804(b)(6) is intended to punish wrongdoers).

435. *See, e.g.*, United States v. Houlihan, 92 F.3d at 1281; United States v. Thai, 29 F.3d at 814; United States v. Aguiar, 975 F.2d at 47.

436. *See* United States v. White, 116 F.3d at 913 (stating that defendants can move to exclude statements under Rule 403); United States v. Thai, 29 F.3d at 814 (stating that the court should conduct a balancing test under Rule 403 to avoid facially unreliable testimony); United States v. Thevis, 665 F.2d 616, 633-34 (5th Cir. Unit B 1982) (applying Rule 403 to exclude statements).

437. WRIGHT & GRAHAM, *supra* note 70, § 5214.

438. *Id.*

Clause cases.[439] The application of the Sixth Amendment to hearsay admitted under the misconduct exception may not be straightforward.

D. *The Misconduct Exception and the Confrontation Clause*

The forfeiture rationale for the misconduct exception to the hearsay rule raises a fundamental question about the scope and purpose of the Confrontation Clause. One answer is that hearsay statements that satisfy the misconduct exception simply do not create a Confrontation Clause issue. As stated in *Reynolds v. United States*:

> 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 his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.[440]

It can be argued that the Confrontation Clause does not remedy self-created confrontation problems.[441] Confrontation problems generally arise because a third party, not the defendant, makes confrontation impossible. For example, the declarant refuses to testify or asserts a privilege, could not be located, or the government chose to try the defendants together, thereby precluding the use of a codefendant's confession. When the defendant causes the loss of the witness that makes confrontation impossible, the Sixth Amendment has no role.[442] This theory has the advantage of simplicity and rough justice. It leaves any question of the admission of evidence to the rules of evidence, and any constitutional question of the reliability of the evidence to other parts of the Constitution, including the Due Process Clause, which does bar evidence that is "totally lacking in reliability."[443]

The full forfeiture theory is at best a partial answer for some cases, but the Confrontation Clause cannot be so easily avoided in all cases. Forfeiture of Sixth Amendment rights hinges on strong evidence of the defendant's participation in making the witness unavailable. Only then may the defendant be held responsible for the loss of the right to confront the witness. The major confrontation cases all satisfy the knowing waiver of rights rationale because they all involve direct decisions by the defendant, either by concealing the

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439. *See* discussion *infra* Part IV.D.
440. United States v. Reynolds, 98 U.S. 145, 158 (1878).
441. *See id.*
442. *See id.*
443. United States v. Thevis, 665 F.2d 616, 633 (5th Cir. Unit B 1982).

location of the witness,[444] voluntarily staying away from the trial,[445] or misbehaving so that he was removed from the courtroom.[446] The immediate and inevitable consequence of the knowing waiver of rights theory was the loss of a Sixth Amendment right.

As indicted by the title to Rule 804(b)(6), the misconduct exception reaches beyond waiver to forfeiture, where the loss of the right is tied to activity months or years before a trial is contemplated, when the consequences of the act cannot be foreseen. In addition, the "acquiescence" standard and the *Pinkerton* doctrine ensure that the misconduct exception will be applied to some whose relationship to the violence against the witness is attenuated at best. Under *Pinkerton*, for example, the defendant could lose all confrontation rights because of the conduct of another, even if he had no personal knowledge or had no ability to influence or prevent from acting, provided that the court concludes that the witness intimidation was within the scope of the conspiracy and reasonably foreseeable.[447] Unlike the individual who directly participates in the crime, who can be said to have knowingly and voluntarily waived any Sixth Amendment rights, these individuals forfeit their confrontation right based upon tort-like findings of reasonable foreseeability.[448] In sum, the misconduct exception will present some novel situations for the Confrontation Clause.

In addition, "[t]he central concern of the Confrontation Clause is to ensure the reliability of evidence . . . by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[449] Many of these statements are made by declarants in circumstances that the Court has found constitutionally suspect because of the inherent motivation to lie when exposed to criminal liability.[450] They remain constitutionally suspect even if the trial court relabels the evidentiary basis for admitting the evidence.[451]

Finally, and at a more basic level, all citizens have constitutional rights regardless of the nature of the prosecution or the criminal acts alleged. The fact that some defendants begin the criminal process stripped of a constitutional right

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444. United States v. Reynolds, 98 U.S. at 160 (refusing to disclose witness's location).

445. *See* Diaz v. United States, 223 U.S. 442, 452 (1912) (noting that "if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away").

446. *See* Illinois v. Allen, 397 U.S. 337 (1970) (noting that the defendant engaged in disruptive behavior resulting in his removal from the courtroom).

447. *See* Pinkerton v. United States, 328 U.S. 640, 645-47 (1946).

448. *Id.* at 647.

449. Maryland v. Craig, 497 U.S. 836, 845 (1990).

450. *See* Lilly v. Virginia, 527 U.S. 116, 132 (1999).

451. *Id.* at 135-38.

because of acts done months or years before, perhaps by persons unknown to the defendant, is fundamentally inconsistent with the notion of personal rights and the presumption of innocence. The Court has always addressed the Sixth Amendment problem directly, even when the defendant bears some responsibility for the witness's unavailability. Dying declarations have always been viewed as presenting a Confrontation Clause question, although one easily satisfied because of the longstanding exception for such statements.[452] Likewise, the problems presented by child victim witnesses are analyzed by first assuming that the right attaches, and only then considering the scope of the right when there is a strong policy interest based upon the particular facts to support a restriction.[453] The Sixth Amendment is not viewed as forfeited because the defendant chose an emotionally vulnerable victim. While face-to-face confrontation cannot be attained when the declarant is unavailable, even at the instigation of the defendant, the right still has meaning and effect. The Court must still address the reliability of the hearsay statements that are admitted under the misconduct exception. The defendant's acts do not excuse the obligation to use reliable evidence at trial. Thus, the Court, in reviewing hearsay statements admitted under the misconduct exception, will address the Confrontation Clause issue and apply the framework for evaluating the constitutionality of admitting hearsay established in *Ohio v. Roberts*[454] that it has used for more than twenty years.

Under this framework, the Court has repeatedly said that hearsay statements are admissible without confrontation when they fall within a firmly rooted hearsay exception, or when the statement contains "particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything to the statements' reliability."[455] The misconduct exception

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452. *See* Mattox v. United States, 156 U.S. 237, 242-44 (1895) (recognizing that dying declarations are prohibited by the language of the Sixth Amendment but admissible because of the long standing exception to the hearsay rule).

453. *See* Maryland v. Craig, 497 U.S. 836, 855 (1990) (holding that the Sixth Amendment's right to face-to-face confrontation can be overcome by the important public policy of protecting child witnesses); Coy v. Iowa, 487 U.S. 1012, 1021 (1988) (leaving for another day to decide whether exceptions exist to the literal reading of the Sixth Amendment right to confront witnesses).

454. Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).

455. *Id.* at 66; *see also* Lilly v. Virginia, 527 U.S. 116, 124-25 (1999) (reaffirming *Roberts*). At least three current justices of the Supreme Court are open to a reevaluation of the Confrontation Clause jurisprudence, and in particular, whether it might be aimed at the use of ex parte affidavits and depositions of accomplices or other statements gathered by the government for a prosecution. *Id.* at 140-44 (referring to Justices Breyer, Scalia, and Thomas). Almost all of the statements admitted under the misconduct exception are gathered by the police for testimonial purposes, and would raise Confrontation Clause issues even under this approach.

is not firmly rooted as defined by the plurality opinion in *Lilly v. Virginia*.[456] Justice Stevens defied an exception as "firmly rooted":

> if, in light of "longstanding judicial and legislative experience" it "rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection.'" This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proved over time "to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath" and cross-examination at a trial.[457]

An exception formally promulgated in 1997, adopted by twenty percent of the states, and whose first modern appearance was in 1976, certainly is not firmly rooted in any sense of those words. It also fails the reliability standard. No one asserts that the exception is based upon the inherent reliability of the statements. The exception is often used to admit the statements of coconspirators, and the statements have the same disadvantages as statements against penal interest, which the Court has consistently found to create concerns about reliability.[458] The misconduct exception is prefigured in *Reynolds v. United States*,[459] but that case and the precedents upon which it relied,[460] do not provide a firmly rooted lineage for the rule now being used.[461] *Reynolds* involved the admission of testimony previously given under oath and subject to cross-examination,[462] and

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456. Lilly v. Virginia, 527 U.S. at 125.

457. *Id.* at 126 (citations omitted).

458. *See, e.g., id.* at 137 ("It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted . . . when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing."); Lee v. Illinois, 476 U.S. 530, 541 (1986) (stating that "'the arrest statements of a codefendant have traditionally been viewed with general suspicion'") (quoting Bruten v. United States, 391 U.S. 123, 141 (1968) (White, J., dissenting)).

459. Reynolds v. United States, 98 U.S. 145 (1878).

460. Regina v. Scaife, 117 Eng. Rep. 1271 (1851); Drayton v. Wells, 10 S.C.L. (1 Nott. & McC.) 409 (1819); Harrison's Case, 12 State Trials 857 (1692) (Eng.); Lord Morley's Case, 6 State Trials 770 (1666) (Eng.).

461. *See* Kroger, *supra* note 1, at 888-93 (arguing that English and American precedents do not support the admission of uncrossed hearsay statements); *see also supra* notes 14-17 and accompanying text (discussing common law precedents that involved prior recorded testimony).

462. *See* Reynolds v. United States, 98 U.S. at 150 (noting that the testimony at issue had been given at a prior trial on another indictment).

applied well established waiver principles.[463] The misconduct exception rests on estoppel and forfeiture, and as commonly used, authorizes the admission of hearsay with minimal circumstantial guarantees of trustworthiness. These differences in rationale, scope, and source of hearsay, as well as its reliability, make the misconduct exception promulgated in Rule 804(b)(6) in 1997 fundamentally different from the knowing and deliberate waiver of constitutional rights found in *Reynolds* and its predecessors. Consequently, the Confrontation Clause requires that hearsay statements admissible under the misconduct exception "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."[464]

V. THE MISCONDUCT EXCEPTION: PROSECUTORS AND CIVIL LITIGANTS

A. *The Misconduct Exception and a Word to the Wise*

The Advisory Committee drafted Rule 804(b)(6) to apply to both the prosecution and the criminal defendant.[465] The government does not murder witnesses to prevent their testimony as defendants do. Prosecutors, however, commonly advise potential defense witnesses of their right to avoid self-incrimination, knowing that inevitably the witness will refuse to testify for the defense, typically by asserting the privilege against self-incrimination. This conduct falls within the Rule,[466] and yet it seems incongruous that giving potential witnesses information about their constitutional rights may trigger sanctions against the government or any other party.

This scenario not only raises the question of how the Rule should be applied to the government when it advises potential witnesses of their rights, but also a more general question of whether nonviolent and noncriminal but successful attempts to induce a witness not to testify for the opposing party fall within the Rule.[467] In terms of the language of the Rule, the question is whether

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463. *See id.* at 158 (holding that when a defendant procures the absence of a witness, he or she waives the right to confront that witness).

464. Idaho v. Wright, 497 U.S. 805, 822 (1990) (citing Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986)).

465. *See* FED. R. EVID. 804(b)(6) advisory committee's note ("The rule applies to all parties, including the government."); Minutes of the Advisory Committee on Federal Rules of Evidence (Apr. 22, 1996).

466. *See* FED. R. EVID. 804(b)(6) advisory committee's note (providing that "[t]he wrongdoing need not consist of a criminal act").

467. *See* Sykora, *supra* note 1, at 881-82 (discussing whether cajoling, nagging, or friendship is wrongdoing).

nonviolent persuasion or practical advice to assert available privileges is "wrongdoing" that justifies the admission of the absent witness's hearsay statements.[468] States that adopted the misconduct exception by judicial opinion or rule may avoid the issue by interpretation, but federal prosecutors still face the problem, although no cases have been found applying the Rule to the prosecution.

The intimidation of witnesses is addressed in two other areas of the law: *Webb v. Texas*[469] and its progeny apply to the government's intimidation of witnesses, and the federal witness tampering statute applies to statements made by defendants to potential witnesses.[470] These provide insight into how the Rule should address the problem of constitutional advice.

1. *The Due Process Clause and Governmental Intimidation of Defense Witnesses*

The government and its agents cannot undermine a defendant's right to present a defense by threatening potential witnesses for the defense.[471] *Webb v. Texas*, established that a defendant's constitutional rights to due process and to present a defense are violated when the judge singles out the sole defense witness for a lengthy harangue on the dangers of providing perjured testimony for the defense so that the witness does not testify.[472] Subsequent cases extended the principle to government prosecutors and agents.[473]

At the same time, several cases recognize that the prosecutor and judge may advise a defense witness of the right against self-incrimination, or of the possibility of a perjury prosecution if the testimony is false, even though the

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468. *See id.* (opining that "simply pleading with a witness not to testify may not be egregious enough to constitute wrongdoing worthy of forfeiture of constitutional rights").

469. Webb v. Texas, 409 U.S. 95 (1972) (per curiam).

470. 18 U.S.C. § 1512 (2000).

471. *See, e.g.*, Webb v. Texas, 409 U.S. at 98 (per curiam) (holding that judges remarks effectively drove witness off the stand in violation of the Fourteenth Amendment); United States v. Heller, 830 F.2d 150, 152-54 (11th Cir. 1987) (holding that the governmental deprivation of a defense witness by intimidation entitled the defendant to a new trial).

472. Webb v. Texas, 409 U.S. at 95-98 (per curiam).

473. *See, e.g.*, United States v. Heller, 830 F.2d at 152-54 (applying due process standard to IRS agents' statements to defense witness); United States v. Morrison, 535 F.2d 223, 227-29 (3d Cir. 1976) (applying due process standard to prosecutor's decision not to grant immunity to a defense witness). The federal government is treated as one entity so that the conduct of the various agencies is attributed to the prosecution, and the issue of whether the prosecutor acquiesced in the intimidation of other federal agencies does not arise. *See generally* United States v. Heller, 830 F.2d at 152-54 (referring to the IRS agents' actions as action by the government as a whole).

defense may lose a witness as a result.[474] The cases distinguish between generic advice about rights and the possible legal consequences of false testimony, and advice that explicitly or implicitly threatens prosecutorial retaliation if the witness takes the stand for the defense.[475] The former is permissible.[476] Advice about rights becomes coercive when the statement exceeds what is necessary and appropriate to inform the witness of his rights, such as telling a defense witness that previously dismissed charges would be reinstated if he testifies.[477] Likewise, a statement that the government may challenge the validity of the witness's plea agreement,[478] or that the witness's plea negotiations would terminate and he would be tried on all charges if he testified for a codefendant, is improper.[479] Implicit threats, such as statements including that a witness would have "nothing but trouble" if she testified,[480] or threats of prosecution, also require a reversal of the conviction.[481]

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474. *See, e.g.*, United States v. Smith, 997 F.2d 674, 679-80 (10th Cir. 1993) (determining that a judge is not prohibited from advising a witness of his or her rights); United States v. Davis, 974 F.2d 182, 187 (D.C. Cir. 1992) (noting that advising a witness of rights does not violate defendant's right to witness, but badgering and threats do); United States v. Jackson, 935 F.2d 832, 847 (7th Cir. 1991) (determining that advising a witness in order to help him make an informed decision is not prohibited).

475. *See* United States v. Pierce, 62 F.3d 818, 832 (6th Cir. 1995) (stating that the test is whether the substance of the communication is a threat over and above what is necessary); United States v. Simmons, 670 F.2d 365, 369 (D.C. Cir. 1982) (finding actions of United States Attorney went beyond advice, were unjustified, uncalled for, and as a result, "constituted an improper threat to deprive the defendant of a witness"); United States v. Gloria, 494 F.2d 477, 484-85 (5th Cir. 1974) (finding no misconduct when a witness was advised only of the possibility of prosecution if his testimony differed from the prior plea).

476. *See* United States v. Pierce, 62 F.3d at 832.

477. *See* United States v. Vavages, 151 F.3d 1185, 1189-92 (9th Cir. 1998) (finding the prosecutor's statement that the witness would perjure herself and be reindicted and his threat to withdraw the plea agreement improper); United States v. MacCloskey, 682 F.2d 468, 478-79 (4th Cir. 1982) (advising counsel that the witness could be reindicted if she testified and incriminated herself).

478. *See* United States v. Vavages, 151 F.3d at 1191 (finding the prosecutor's threat of withdrawal of plea agreement was impermissibly intimidating); United States v. Aguilar, 90 F. Supp. 2d 1152, 1167-70 (D. Colo. 2000) (finding that a threat to withdraw plea agreement of witness improper, but holding defendant's constitutional claim procedurally barred).

479. *See* United States v. Henricksen, 564 F.2d 197, 198 (5th Cir. 1977) ("Substantial Government interference with a defense witness' free and unhampered choice to testify violates due process.").

480. United States v. Hammond, 598 F.2d 1008, 1012-13 (5th Cir. 1979) (finding threats made by an FBI agent "deprived the defendant of his due process right to present his witness").

481. United States v. Thomas, 488 F.2d 334, 336 (6th Cir. 1973) (holding that a threat by a secret service agent that the witness would be prosecuted if he testified deprived appellants of their due process rights).

2. *Corrupt Persuasion Under 18 U.S.C. § 1512*

A similar distinction occurs in the federal witness tampering statute—18 U.S.C. § 1512.[482] That statute, and its predecessor, 18 U.S.C. § 1503, prohibits a wide range of violent and criminal activity intended to influence a witness.[483] The statute covers more than violent conduct, however, and reaches some nonviolent communications with witnesses. Subpart (b) of the statute penalizes a person who "corruptly persuades another person, or attempts" to persuade another to prevent testimony or evade legal processes summoning a person to appear as a witness.[484] "Corruptly" has been defined broadly in the context of witness tampering to include acts done with the intent of subverting the integrity or truth-seeking ability of an investigation.[485] An otherwise legal act, such as

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482. *See* 18 U.S.C. § 1512 (2000).

483. Section 1503 requires specific intent to intimidate a witness in a pending proceeding, and does not cover either potential witnesses or those who provide information that cannot be used as testimony because of hearsay or other objections. *See id.* § 1503; Teresa Anne Pesce, *Defining Witness Tampering Under 18 U.S.C. Section 1512*, 86 COLUM. L. REV. 1417, 1418-21 (1986). Section 1512 was enacted in 1982 to close these loopholes, and provides that one who attempts to influence any person by performing specified acts, violates the statute. *See* 18 U.S.C. § 1512; Pesce, *supra*, at 1417.

484. Section 1512(b) provides:

> (b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person with intent to—
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> (1) influence, delay or prevent the testimony of any person in an official proceeding;
>
> (2) cause or induce any person to—
>
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
>
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
>
> (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
>
> (D) be absent from an official proceeding to which such person has been summoned by legal process;
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
>
> shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1512(b).

485. *See* United States v. Schaffner, 715 F.2d 1099, 1103 (6th Cir. 1983) (helping witness avoid subpoena constitutes a violation of § 1503).

paying a witness to go out of town to avoid talking to authorities, is a violation of the statute and meets the "misconduct" standard of the Rule.[486] Likewise, paying a witness for not testifying would also be misconduct.[487]

The legality of advice not to testify may depend upon who provides it. Section 1512(e) provides an affirmative defense when the "conduct consisted solely of lawful conduct and the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully."[488] The witness's attorney, in the performance of his duties, can advise him not to testify.[489] Furthermore, this section provides protection to the judge and perhaps the prosecutor who threaten a witness with perjury or false swearing if the witness testifies falsely.[490] One court in dicta argued that the mother of the witness may advise her son that it was in his own best interests to assert the Fifth Amendment without running afoul of the statute.[491] Likewise, disinterested advice by a doctor, priest, or spouse to assert a relevant privilege may not violate the statute.[492]

Authority exists for the proposition that advice given by one who stands to benefit if the witness asserts a privilege satisfies the "corruptly persuades" language of the statute. In *Cole v. United States*,[493] the court framed the question as follows:

> [Whether] advice to claim the constitutional privilege, which advice does not have and was not designed to have any consequence in the way of influencing the witness to violate any of his duties as a witness or in the way of bringing about an effect on the administration of justice that is

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486. *See id.*

487. *See* United States v. Williamson, 792 F. Supp. 805, 807 (M.D. Ga. 1992), *aff'd*, 981 F.2d 1262 (11th Cir. 1992), *rev'd*, 512 U.S. 594 (1994) (holding that defendant's paying for witness's counsel in return for testimony improper); *see* H.R. REP NO. 100-169, at 12 (1987) (amending 18 U.S.C. § 1512(b) to include "corrupt persuasion" as culpable under the statute).

488. 18 U.S.C. § 1512(e).

489. *See* United States v. Williamson, 792 F. Supp. at 811 (refusing to find that declarant's attorneys advised client to assert the Fifth Amendment at defendant's instigation because they were paid by defendant).

490. *See* 18 U.S.C. § 1512(e) (placing the burden of proof on the defendant to prove that person did not intend to encourage truthful testimony); GRAHAM, WITNESS INTIMIDATION, *supra* note 1, at 110.

491. United States v. Farrell, 126 F.3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting).

492. *See* Cole v. United States, 329 F.2d 437, 440 (9th Cir. 1964) (stating that the attorney's advice to the client "relates to and is an exercise of the client's right; not the attorney's—the advice by the priest relates to and is an exercise of the patient's right, not the priest's").

493. Cole v. United States, 329 F.2d 437 (9th Cir. 1964).

> undue, corrupt or unlawful, can be as a matter of law the crime defined by section 1503 [the predecessor to 1512].[494]

The question was limited to whether an otherwise noncriminal and nonviolent correct statement that the witness may assert a privilege was violative of § 1503.[495] The court answered the question affirmatively.[496] "[O]ne who bribes, coerces, forces or threatens a witness to claim [the Fifth Amendment,] *or advises with corrupt motive* the witness to take it, can and does obstruct or influence the due course of justice."[497] Several other courts have adopted and repeated this language.[498]

Despite this statement, a close reading of the cases does not reveal a single conviction based solely on nonthreatening advice not to testify. All the convictions involve substantially more than a conversation about legal options.[499] *Cole* is typical.[500] The defendant Cole met with the witness over several weeks and insisted that the witness assert his privilege against self-incrimination.[501] Cole also blackmailed the witness with knowledge that the witness had previously submitted a false affidavit to a congressional committee.[502] Cole further suggested a lawyer for the witness, and when the witness selected his own, told the witness to conceal information from his lawyer.[503] When the lawyer advised the witness not to assert the privilege, Cole became very angry.[504]

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494. *Id.* at 438-39 (citation omitted).
495. *Id.*
496. *See id.* at 443.
497. *Id.* (emphasis added).
498. *See, e.g.*, United States v. Cintolo, 818 F.2d 980, 991-93 (1st Cir. 1987); United States v. Baker, 611 F.2d 964, 968 (4th Cir. 1979); United States v. Cortese, 568 F. Supp. 119, 129 (M.D. Pa. 1983).
499. *See* United States v. Davis, 183 F.3d 231, 250 (3d Cir. 1999) (finding that advice to kill suspected informant is corrupt persuasion); United States v. Thompson, 76 F.3d 442, 452-53 (2d Cir. 1996) (finding that advising witness to lie constituted corrupt persuasion); United States v. Cioffi, 493 F.2d 1111, 1118-19 (2d Cir. 1974) (holding evidence of threats of violence to witness's wife constituted corrupt influence); United States v. Osticco, 580 F. Supp. 484, 486-87 (M.D. Pa. 1984) (finding obstruction of justice when witness was told to, and did, lie to the grand jury). The line appears very thin. Almost anything other than a statement of the consequences runs the risk of being illegal. United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975) (finding acts went beyond suggesting that the witness plead the Fifth Amendment, and acted to corruptly persuade the witness to remain silent or conceal the criminal activity).
500. *See* Cole v. United States, 329 F.2d at 443.
501. *Id.* at 444-45.
502. *Id.* at 444.
503. *Id.* at 444-45.
504. *Id.* at 445.

Based on these facts the court concluded there was substantial evidence that the persistent course of conduct insisting the witness assert the privilege constituted intimidation or implicit threats.[505]

The few courts that have faced fact scenarios of nonviolent attempts to persuade a witness not to cooperate with the prosecution have held that such conduct does not violate the witness tampering statute.[506] The most recent case is *United States v. Farrell*,[507] in which Farrell tried to persuade another witness that they should "stick together" on their story.[508] Unfortunately for Farrell, the witness was cooperating with the government, and the witness intimidation charge followed.[509] The judge in a nonjury trial found that Farrell did not knowingly use intimidation, but nonetheless corruptly attempted to persuade the witness from communicating with the government agent.[510] On appeal, the Third Circuit read the statutory language "corruptly persuades" to mean that some persuasion is outside of the statute.[511] To give meaning to "corruptly," the appellate court held that the evidence must establish something more than just nonviolent attempts to urge a coconspirator not to cooperate with the government.[512] The conviction was reversed because the trial court did not find intimidation.[513] The court did remand the case for further findings on whether Farrell attempted to get the witness to testify falsely, which would violate the statute.[514]

The court's rationale in *Farrell* clearly means that nonviolent advice to assert an available privilege is not "corruptly" persuading the witness not to testify under the witness tampering statute.[515] At least one other court instructed the jury that advice that the witness had a right to invoke the Fifth Amendment

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505. *Id.* at 443.

506. *See* United States v. Farrell, 126 F.3d 484, 490 (3d Cir. 1997) (finding an attempt to persuade a coconspirator to conceal information did not constitute corrupt persuasion); United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975) (affirming jury instructions that mere advice to invoke Fifth Amendment did not constitute corrupt intent); United States v. Herron, 28 F.2d 122, 123 (N.D. Cal. 1928) (finding that no matter what motive was involved, advising a witness to exercise a lawful right did not improperly influence witness).

507. United States v. Farrell, 126 F.3d 484 (3d Cir. 1997).

508. *Id.* at 486.

509. *Id.*

510. *Id.* at 487.

511. *Id.* at 488-89.

512. *Id.*

513. *Id.* at 489.

514. *Id.* at 491.

515. *See id.* at 489 (holding an individual can persuade another to invoke the Fifth Amendment without "corruptly" persuading the witness).

did not violate the statute.[516] Similarly, a 1928 case held that the statute was not violated when witnesses on trial advised another witness to assert the Fifth Amendment privilege and to consult a lawyer, who also told him to claim the privilege.[517] As indicated by *Farrell*, however, the line between criminal and noncriminal activity is slight. The lack of intent to intimidate saved Farrell, however, a finding on remand that he attempted to induce the witness to lie before the grand jury would satisfy the "corruptly persuades" language of the statute.[518]

The due process cases on prosecutorial misconduct, as well as those under the federal witness tampering statute, recognize that simple advice about constitutional rights that results in the unavailability of the witness, is not within the prohibitions of the witness tampering statute or the Constitution.[519] The same result must follow under Rule 804(b)(6) and the states' versions of the misconduct exception. The terms "wrongdoing" and "misconduct," although read more broadly than criminal activity must be given meaning.[520] Simple advice by either the government or a defendant to assert a valid privilege such as self-incrimination, is not prohibited conduct under any of the rules discussed. It is untenable to argue that a party should lose evidentiary, and perhaps constitutional rights, merely by informing a witness of what the Constitution, statutes, or case law permit. At the same time, the permissible limits are easily exceeded. Any additional conduct that amounts to threats, coercion, or retribution violates each standard.[521] As suggested by the witness tampering cases, defendants are much more likely to exceed the limits than the prosecution.[522]

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516. *See* United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975).

517. United States v. Herron, 28 F.2d 122, 123 (N.D. Cal. 1928).

518. *See* United States v. Farrell, 126 F.3d at 488.

519. *See supra* notes 489-92, 507-20 and accompanying text.

520. *See, e.g.*, United States v. Scott, 284 F.3d 758, 763-64 (7th Cir. 2002) (recognizing that Rule 804(b)(6) requires more than proof that the witness is made unavailable by the defendant's acts); United States v. Ochoa, 229 F.3d 631, 639 n.3 (7th Cir. 2000) (raising, but not resolving, whether assisting a witness to be unavailable is sufficient to forfeit Constitutional rights).

521. *See, e.g.*, United States v. Scott, 284 F.3d at 764 (holding that using threats of harm and suggesting future retribution are acts of wrongdoing under Rule 804(b)(6)); United States v. Hooks, 848 F.2d 785, 799 (holding a prosecutor violates due process when using his authority to distort the judicial fact-finding process); Cole v. United States, 329 F.2d 437, 439 (3d Cir. 1969) (holding that bribing, coercing, forcing, or threatening a witness to claim Fifth Amendment privilege is an obstruction of justice).

522. *See, e.g.*, United States v. Scott, 284 F.3d at 764 (defendant applied pressure on potential witness); United States v. Houlihan, 92 F.3d 1271, 1278-81 (1st Cir. 1996) (defendant

3. *Prosecutorial Intimidation of Defense Witnesses Under Rule 804(b)(6) and Under the Due Process Clause*

Rule 804(b)(6) and the *Webb v. Texas* line of cases substantially overlap. Some legal advice by prosecutors to defense witnesses does not violate the Due Process Clause, and also is not "wrongdoing" under Rule 804(b)(6). At the other extreme, any prosecutorial intimidation of a defense witness that satisfies the standard of *Webb v. Texas* also satisfies Rule 804(b)(6). As demonstrated below, the overlap is not complete, and the courts will have to analyze each to determine their applicability to the prosecution.

Rule 804(b)(6) may be violated by the government more easily than the *Webb v. Texas* standard. The principal reason is that the Rule's intent standard is satisfied so long as the motive to prevent testimony is one of many motives for the action; it does not have to be the predominant motive.[523] Thus, if the court finds that the government's warnings were delivered in part so that the witness will not testify at trial, the Rule applies. This inference can easily be drawn when the behavior is less than professional, or the acts take place immediately before or during the trial, because the outcome of the trial must have been some consideration in the government's decision to influence the witness not to testify.

In contrast, the principle of *Webb v. Texas* is triggered when the prosecutorial misconduct is the primary, if not the sole, cause of the refusal to testify.[524] The standard is whether the government's conduct amounted to "substantial interference with the defense witness's free and unhampered determination to testify."[525] The courts closely examine whether there are other reasons for the witness's refusal to testify for the defense. For example, the witness may be responding to counsel's advice rather than the threats.[526] Perhaps

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murdered potential witness); Steele v. Taylor, 684 F.2d 1193, 1203 (6th Cir. 1982) (defendant using persuasion and control).

523. United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001) (citing United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)).

524. *See* Webb v. Texas, 409 U.S. 95, 95-96 (1972) (per curiam); Washington v. Texas, 388 U.S. 14, 19 (1967); Muhammad v. State, 782 So. 2d 343, 356-59 (Fla. 2001); State v. Stanley, 720 A.2d 323, 327-29 (Md. 1998).

525. Williams v. Woodford, 306 F.3d 665, 700 (9th Cir. 2002); United States v. Crawford, 707 F.2d 447, 449 (10th Cir. 1983).

526. *See* United States v. Hooks, 848 F.2d 785, 801-02 (7th Cir. 1988) (finding that witness's decision not to testify was made on the advice of counsel); United States v. Hoffman, 832 F.2d 1299, 1305 (1st Cir. 1987) (finding no causal connection between prosecutor's ill-advised comments and refusal of witness to testify); United States v. Simmons, 699 F.2d 1250, 1251 (D.C. Cir. 1983) (stating that the witness asserted his Fifth Amendment right on the advice of counsel who had independently concluded that the witness's expected testimony would be perjury).

for this reason, the cases often consider whether the prosecutor threatened the witness directly, or whether the message was delivered through counsel or the court.[527] The latter route "strips the warnings of their coercive force."[528] Other acceptable motives may be the desire to avoid being a "snitch,"[529] or simply not wanting to become involved. Any of these intervening causes defeat the claim of a due process violation. The projected testimony must be material and favorable to the defense.[530] The loss of cumulative evidence, for example, will not support a remedy. The origin of each standard also argues for a broader application of the misconduct exception. The Rule is a prophylactic measure designed to deter anyone from intimidating witnesses. The remedy is the admission of a lesser class of evidence, but it does not necessarily alter the outcome of the trial. A constitutional violation, on the other hand, is a fundamental defect in the trial process that can be remedied only by requiring the government to retry and reprove its case before a different jury.

Courts have been willing to construe the facts and to find the required elements under Rule 804(b)(6) when faced with the defendant's threats, violence, or murder against witnesses. They may be less so when faced with the relatively tame verbal misconduct of the prosecution.[531] Yet, fundamental fairness demands that the same standards be applied to both the prosecution and the defense so there is no arbitrary distinction in the results reached when the prosecution or defense is found to have engaged in misconduct resulting in the loss of a witness. Perfect symmetry of results will not be achieved because the government generally has greater credibility on contested points which may be reflected in the decisions.

Nevertheless, one consequence of applying the Rule to the government may be to force a reevaluation of the case law on the misconduct exception. The forfeiture rationale places few restraints on the application of the misconduct exception to defendants, and the courts have broadly construed its elements to

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527. *See, e.g.*, United States v. Santiago-Becerril, 130 F.3d 11, 25 (1st Cir. 1997) (admonition made by judge); United States v. Touw, 769 F.2d 571, 573 (9th Cir. 1985) (noting that the prosecutor's questionable statements were made to the judge who advised the witness); State v. Peterson, 833 S.W.2d 395, 397 (Mo. Ct. App. 1992) (remarks made by judge).

528. United States v. Vavages, 151 F.3d 1185, 1191 (9th Cir. 1998).

529. Dowthitt v. State, 931 S.W.2d 244, 267 (Tex. Crim. App. 1996) (stating that defendant's fear of being a snitch was basis for refusal rather than prosecutor's statements).

530. United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982); United States v. Aguilar, 90 F. Supp. 2d 1152, 1166 (D. Colo. 2000).

531. The government's delivery of the threats is comparatively tame to those of criminals. From the witness's point of view, however, potential retaliation by the prosecution is very significant, especially if the likelihood of conviction is high.

enhance its effectiveness.[532] The rationale is less persuasive when applied to the government and its generally nonviolent activity. The courts may become more receptive to two arguments—discussed below—that have been ignored or rejected when advanced by the defense.

Generally, the courts have not undertaken any reliability analysis of the proposed testimony, other than the minimum established by the Due Process Clause[533] and Rule 403,[534] and none has excluded the testimony on that basis. Once governmental misconduct is established, the government's only objections are relevance and Rule 403. The government does not have any right comparable to the defendant's confrontation right, and the hearsay objection has been waived. The hearsay proffered in most cases, whether by the government or the defense, will likely come from those most knowledgeable about the crimes being tried, and hence most often highly impeachable and unreliable. Further exacerbating the problem may be the form of the hearsay. Normally, the prosecution has some record of the absent witness testimony either in a transcript before the court or grand jury, in a signed statement or affidavit, or in the notes of the police. Undoubtedly the defense will use those sources if available. However, the defense may proffer uncorroborated witnesses who overheard the absent declarant make statements that are favorable to the defense. These arguments may generate a reexamination of the reliability issue and its proper role in the matrix of factors considered in the decision to admit hearsay in these cases.

Rule 804(b)(6) cases have also established a minimal causal link between the defendant's motive and the declarant's refusal to testify. So long as the defendant had among his motives for threatening the witness the prevention of testimony, and apparently so long as the declarant had the threats among his

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532. *See, e.g.*, United States v. Scott, 284 F.3d 758, 763 (7th Cir. 2002) (noting that malevolent acts such as physical assault, bribery, and murder, while sufficient to constitute "wrongdoing" under Rule 804(b)(6), need not be found); United States v. Mastrangelo, 693 F.2d 269, 274 (2d Cir. 1982) (holding that involvement in a potential witness's death "through knowledge, complicity, planning or in any other way," results in the party's waiving his or her objections to the use of the witness's testimony).

533. *See, e.g.*, United States v. White, 116 F.3d 903, 913 n.3 (D.C. Cir. 1997) (citing United States v. Thevis, 665 F.2d 616, 633 n.17 (5th Cir. Unit B 1982)) ("observing that even where defendant forfeits confrontation rights, lack of reliability may require exclusion under Fed. R. Evid. 403 or constitutional due process").

534. *See, e.g.*, United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001) (cautioning that a Rule 403 balancing test should be used in conjunction with Rule 804(b)(6) "in order to avoid the admission of facially unreliable hearsay").

reasons for refusing to testify, the Rule applies.[535] The constitutional cases, however, concentrate on whether the government's acts were a "substantial interference" in the decision not to testify.[536] Likewise, the courts often conclude that the witness had independent reasons for asserting a privilege and refusing to appear.[537] It can be expected that the government will argue that similar standards should apply to the evidence rule, thereby making the causal connection somewhat more difficult to establish. The application of Rule 804(b)(6) to the prosecution may potentially benefit the development of the law. A reliability analysis of the hearsay would be particularly helpful because the testimony of partners in crime is subject to fabrication. Likewise, a more nuanced analysis of the causal connection between misconduct and refusal to testify reduces the likelihood that the Rule will be misapplied, particularly in multi-defendant cases.

Rule 804(b)(6) also has significant ramifications for Due Process violations under *Webb v. Texas*. The Rule and the admission of the hearsay may become an alternate remedy to a Due Process violation, and the remedy of a new trial now required by case law.[538] Despite possible prosecutorial intimidation, the trial may continue and pass constitutional muster if the fundamental equivalent of live testimony is admitted through the absent witness's hearsay.[539] This presents interesting tactical choices for both the government and the defendant. For example, the defendant can argue that hearsay is never the equivalent of live testimony when the witness's credibility is so important in evaluating the testimony. If the court rules otherwise, however, a defense decision not to

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535. *See supra* note 152 and the text accompanying note 168.

536. *See, e.g.*, Williams v. Woodford, 306 F.3d 665, 700 (9th Cir. 2002) (citing United States v. Emuegbunam, 268 F.3d 377, 400 (6th Cir. 2001); United States v. Pinto, 850 F.2d 927, 932 (2d Cir. 1988)) ("The prosecution's conduct must amount to a substantial interference with the defense witness's free and unhampered determination to testify before the conduct violates the defendant's right to due process.").

537. *See infra* notes 526-29 and accompanying text.

538. Some courts have found that the action of the prosecutor, although improper, was harmless error. *See generally* Craig Goldblatt, *Disentangling* Webb*: Governmental Intimidation of Defense Witnesses and Harmless Error Analysis*, 59 U. CHI. L. REV. 1239 (1992) (discussing harmless error and arguing for a per se reversal for prosecutorial witness intimidation rather than use of the harmless error analysis).

539. *See, e.g.*, United States v. Capozzi, 883 F.2d 608, 611-14 (8th Cir. 1989) (finding no prosecutorial misconduct in naming potential defense witnesses as unindicted coconspirators shortly before trial in part because the civil depositions of those witnesses were admitted in the defendant's trial). *But see* People v. Warren, 207 Cal. Rptr. 912, 918-20 (Cal. Ct. App. 1984) (noting that a hearsay version of the absent witness's testimony carried far less weight than the direct testimony).

introduce the hearsay will be at the risk of waiving the constitutional argument. At the same time, the government will have to decide whether to accept the hearsay with its uncertain effect on the jury in order to avoid the constitutional issue and its more severe sanction of retrial.

A major problem with the misconduct exception is that the rationale and incentives strongly favor the admission of the hearsay. The case law reflects this tendency, particularly in multi-defendant cases.[540] Applying the Rule to the government has the potential of forcing the courts to reexamine the case law and elements, and perhaps to require stronger proof of each element, thereby limiting the likelihood that it will be misapplied to either the prosecution or the defense.

B. *The Misconduct Exception and Civil Cases*

Rule 804(b)(6) was developed solely in response to problems in criminal cases, with little or no consideration given to its use in civil cases.[541] At best, it will be used sporadically in civil cases because hearsay is much less of a problem in this type of litigation. The civil litigant has the advantage of an extensive pretrial discovery procedure that identifies key witnesses and provides the opportunity to depose them where they are located.[542] Civil discovery often takes months or years, and there is substantial time to identify and locate key witnesses. They are less likely to flee or to assert privileges, and without the Confrontation Clause, hearsay can be admitted more easily.[543] Moreover, the discovery rules already provide the court with substantial authority to sanction the offending party for concealing or preventing a witness from testifying and those sanctions are more severe and more flexible than a rule admitting

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540. *See generally* MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 7078 (2000) (discussing the misconduct exception and citing cases involving application of the Rule).

541. *See* FED. R. EVID. 804(b)(6) advisory committee's note; GRAHAM, EVIDENCE, *supra* note 260, § 7078 (discussing reasons for adoption of Rule 804(b)(6)).

542. *See* FED. R. CIV. P. 26(a) (requiring the disclosure of witnesses with relevant information); FED. R. CIV. P. 30, 45 (providing that witness statements can be requested to be produced and depositions can be scheduled throughout the country); *see also* Douglass, *Balancing Hearsay*, *supra* note 243, at 2141-49 (comparing civil and criminal discovery regarding hearsay); Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Activities, Mar. 18-July 27, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (providing opportunity to depose witness located overseas); *see generally* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION 843-934 (3d ed. 1996).

543. *See* FED. R. CIV. P. 32(a)(3)(A)-(E) (enumerating circumstances under which deposition testimony may be admitted).

hearsay.[544] Comparatively speaking, Rule 804(b)(6) is a "one-trick pony." Nevertheless, Rule 804(b)(6) may be a valuable tactical option for civil litigants when the hearsay statement is important. For example, the declarant's particular words or phrasing may be critical to the party's legal theory, and the hearsay statement is better than a waffling witness. In addition, the misconduct exception clears the way for the hearsay testimony and it may be useful when the trial court will not grant a more expansive sanction.[545]

VI. CONCLUSION

We now have twenty-five years experience with the misconduct exception, including five years with Rule 804(b)(6). This Article describes the application of the exception, including the situations in which it can be applied easily, and those that generate significant problems. The misconduct exception has not been used extensively in the last twenty-five years. Although witness intimidation is a significant problem, the exception has been an important issue in only about seventy-five reported federal and state cases. Apparently, the promulgation of the Federal Rule has not broadly expanded its use. Only ten jurisdictions and the District of Columbia have adopted it in that period.[546] This raises the question of whether it was necessary to promulgate a formal rule of evidence to address this situation when the case law was reasonably well developed by the mid-1990s.

The relatively infrequent use of the exception may represent the growth by accretion of any legal principle, but I believe it is caused by an inherent problem with the misconduct exception, first noted by Professor Michael H. Graham.[547] Witness intimidation occurs in the shadows and is difficult to prove. Almost all of the successful applications of the exception were in cases when the prosecution was able to present direct proof that the defendant actually

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544. Rule 37 authorizes the court to dismiss the case, take certain facts as admitted, or any other sanctions that are appropriate. FED. R. CIV. P. 37(a), (d).

545. Foreign laws often block production of materials in civil litigation that are located in the foreign jurisdiction. Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 210 (1958). Severe sanctions on the foreign national or corporation that dictate the outcome of the case such as dismissal, or taking key facts as admitted, present due process problems. *Id.* Admission of relevant hearsay pursuant to Rule 804(b)(6) may be a preferable alternative. The only public comment on Rule 804(b)(6) regarding civil litigation was whether the Rule would be imposed if a foreign defendant refused to produce employees for deposition in a foreign country. Public Comment of Robert F. Wise, Jr., Esq., on Behalf of the Commercial and Federal Litigation Section of the New York Bar; 2 MCCORMICK, TREATISE ON EVIDENCE app. A, at 664-65 (5th ed. 1999).

546. *See supra* note 61 and accompanying text.

547. *See* GRAHAM, WITNESS INTIMIDATION, *supra* note 1, at 177.

threatened or harmed the witness, or ordered the violence against the witness.[548] Conversely, there are few cases in which the evidence is wholly circumstantial, or in which the exception reached a defendant who used a proxy to intimidate a witness.[549] The infrequent use of the exception in these circumstances confirms that there are significant problems in applying the Rule in those cases.

A third observation reflects the differences in federal and state prosecutions. The declarants in the federal cases are almost always deeply involved in criminal activity with the defendant, or at least knowledgeable about it so that they have some exposure to criminal liability with the defendant.[550] The state cases more often have witnesses who are not involved in criminal activity.[551] This difference between the declarants in federal and state courts reflects differences in prosecutorial priorities. Federal prosecutions are generally aimed at the larger criminal conspiracies, most often drug conspiracies, and often rely on accomplice testimony.[552] State prosecutions are focused on the common law crimes of murder, rape, robbery, and assault in which an innocent bystander is commonly a witness.[553] Regardless, the use of declarant-accomplice hearsay raises questions about the reliability of the testimony.

The elements of the exception and its procedural aspects are now well established, and courts have substantial experience in addressing the issues that arise when the hearsay statements of intimidated witnesses are proffered and admitted. The least problematic cases are those in which there is direct evidence of the defendant's participation in the intimidation.[554] When there is strong evidence of a defendant's misconduct, there is strong justification for the loss of constitutional and evidentiary objections. The problems with the misconduct exception arise when prosecutors attempt to go beyond the direct participants in the violence, and reach those ordering or benefiting from the intimidation.[555] Then there are more difficult problems of proof, and also the greater potential for abuse of the exception. The "acquiescence" standard was intended to reach those individuals, but in my view, it does not provide a reliable means of determining, in addition to the direct perpetrators of the violence, who should be held responsible for the intimidation. Likewise, the *Pinkerton* doctrine provides

548. *See supra* note 162 and accompanying text.
549. *See* discussion *supra* Part IV.B.2.
550. *See supra* notes 72-74 and accompanying text.
551. *See supra* note 74 and accompanying text.
552. *See supra* note 72 and accompanying text.
553. *See supra* note 74 and accompanying text.
554. *See supra* note 162 and accompanying text; *see also* discussion *supra* Part IV.A.
555. *See* discussion *supra* Part IV.B.1-3.

another method of reaching coconspirators, but at the cost of potential misapplication of the Rule to minor figures in the conspiracy.[556] Those cases will present significant problems under the Confrontation Clause. When there is direct evidence of intimidation, it is easy to find and uphold a knowing waiver of rights. When the evidence is weaker, the rationale for the loss of rights is also weaker, and the need for constitutional protection is higher. These issues will arise more frequently in federal courts because the language of the Rule encourages its application in marginal cases, and also because federal prosecutions tend to be multi-defendant or conspiracy cases involving drugs or organized crime in which intimidation by proxy is more common.[557] The practical solution to these problems is to require individual proof of complicity in the intimidation to justify the loss of evidentiary and constitutional rights. That is how the misconduct exception is applied today.

The misconduct exception, however, may have an unintended impact beyond being a response to witness intimidation. Two other crimes are often hampered by the loss of victim testimony. Violence against spouses and crimes against children, particularly sexual abuse, often involve witnesses who recant,[558] or who are unable to testify because of the emotional impact of the crime on a vulnerable child.[559] Both have generated a call for greater use of victim hearsay.[560] Federal Rule 804(b)(6) is clearly limited to cases where the violence against the declarant was aimed at preventing testimony,[561] but there are statements in the dissenting opinions of state cases suggesting that the principle should be broadened beyond cases where there is a specific intent to prevent the

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556. *See* discussion *supra* Part IV.B.4.

557. *See supra* notes 550-52 and accompanying text.

558. *See, e.g.*, Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L.J. 1041, 1044, 1049 (2000) (citing State v. MacArthur, 644 A.2d 68 (N.H. 1994); State v. Marcy, 680 A.2d 76 (Vt. 1996)).

559. *See, e.g.*, Donna Meredith Matthews, Note, *Making the Crucial Connection: A Proposed Threat Hearsay Exception*, 27 GOLDEN GATE U. L. REV. 117, 132 (1997) (discussing the unavailability of children as witnesses because of their tender years).

560. *See* Peter R. Dworkin, *Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Exception*, 37 WILLAMETTE L. REV. 299 (2001); Hudders, *supra* note 558, at 1041; Matthews, *supra* note 559, at 117; Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691.

561. The language "intended to and did procure the unavailability of the witness" establishes that the defendant must intend to prevent trial testimony. *See* FED. R. EVID. 804(b)(6). The Advisory Committee relied on this language to reject some proposed amendments because the Committee viewed the exception as narrowly drawn. Minutes of the Advisory Committee on Federal Rules of Evidence (Apr. 22, 1996).

victim's testimony and to reach situations where the defendant is responsible for the witness's absence.[562] Thus, the victim's testimony would be admissible whenever the spouse refuses to testify, or the child victim is unable to do so because the effect of the crime and the vulnerability of the victim make it difficult or impossible. It can be argued that because there is no significant difference between the loss of testimony when the defendant intends it and when it is the foreseeable consequence of the crime committed, the Rule should be the same in both instances. The forfeiture rationale of the misconduct exception supports expanding the doctrine because forfeiture is based on the perceived interest of the State in protecting the victims and obtaining evidence, both of which are present in abuse of women and children. Extending the misconduct exception to reach these cases presents difficult issues which cannot be addressed here, not the least of which is that it would remove confrontation in an entire class of criminal prosecutions. The acceptance of the principle that a defendant can forfeit evidentiary rights because of the nature of the crime committed, and its impact on a witness, however, is an important step in extending it to other situations.

Another area where the Rule may have consequences is in its application to the government. Rule 804(b)(6) was drafted to reach government conduct, and undoubtedly the defense will make attempts to introduce their witness's hearsay statements. As suggested above, this raises the possibility that the Rule may be applied differently to defendants than it is to the government, or the possibility that the strict rules applied to the defendant may be ameliorated to prevent overuse against the government. In either event, the government has greater exposure to sanctions than has been recognized previously.

Finally, the misconduct exception originally was used to address confrontation claims when hearsay evidence was admitted under other provisions.[563] Now that the exception has been promulgated into a Federal Rule of Evidence, the issue has come full circle, and its use to admit hearsay will raise the question of the scope of the Confrontation Clause when the defendant is responsible or has acquiesced in the wrongdoing that led to a witness's unavailability. The forfeiture rationale suggests that the Confrontation Clause may have no role when the confrontation problem is self-generated. Yet, I believe the Confrontation Clause does apply, and does impose a requirement that the hearsay statements introduced under the misconduct exception meet the same

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562. *E.g.*, State v. Hansen, 312 N.W.2d 96, 106 (Minn. 1981) (Yetka, J., dissenting); Commonwealth v. Laich, 777 A.2d 1057, 1064 (Pa. 2001) (Castille, J., dissenting).

563. *See supra* notes 47-55 and accompanying text.

standard of reliability that all new and not firmly rooted hearsay exceptions must meet.

The misconduct exception is a subject where looking behind the Rule, and to its reasoning—that no one should benefit from his own wrongdoing—identifies significant problems. No problem exists when there is proof that the defendant engaged in misconduct toward a witness, but problems do arise in proving that a defendant acquiesced in the wrongdoing. When looking beyond the government's need for the evidence, one sees a problem with the reliability of the evidence. Similarly, applying the Rule to defendants appears obvious, but applying it to the prosecution reveals how low the standards for admission are. How the courts address these issues will greatly influence the scope of the misconduct exception and the confrontation rights of defendants.

The misconduct exception, and its formulation in Rule 804(b)(6), works best when there is proof that the defendant engaged in misconduct that intended to, and succeeded in, making the witness unavailable to testify. How the courts address the cases of "acquiescence" in the wrongdoing will do much to determine whether the principle can be expanded to cases where the defendant is responsible for the witness's absence.


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