Journal of Criminal Law and Criminology

Volume 74
Issue 4 *Fall*

Article 15

Fall 1983

The Admissibility of Grand Jury Testimony under 804(b)(5): A Two-Test Proposal

Patrick S. Casey

0091-4169/83/7404-1446
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 74, No. 4
Printed in U.S.A.

THE ADMISSIBILITY OF GRAND JURY TESTIMONY UNDER 804(b)(5): A TWO-TEST PROPOSAL

I. INTRODUCTION

The common law rule against hearsay precludes the admission into evidence of out-of-court statements offered to establish the truth of the matter asserted.[1] The hearsay rule is designed to prevent the trier of fact from considering unreliable evidence.[2] By excluding many reliable out-of-court statements from trial, however, the hearsay rule also obstructs the trier of fact's determination of the truth.[3] Consequently, courts began to admit reliable out-of-court statements into evidence notwithstanding the hearsay rule.[4] After a time, these reliable statements became well-established exceptions to the rule against hearsay.[5]

In 1975, Congress enacted the Federal Rules of Evidence[6] to promote uniform evidentiary rulings among the federal courts.[7] Rules 803 and 804 catalogue the hearsay exceptions permitted in federal trials.[8] Rule 804(b)(5) is the residual or "catch-all" hearsay exception that al-

---

[1] *See* 5 J. WIGMORE, EVIDENCE § 1362 (J. Chadbourne rev. 1974); C. MCCORMICK, EVIDENCE § 246 (2d ed. 1972).

[2] 5 J. WIGMORE, *supra* note 1, at § 1362; C. MCCORMICK, *supra* note 1, at § 245. McCormick states that the rule against hearsay ensures that witnesses testify under three ideal conditions: under oath, in the personal presence of the trier of fact, and subject to cross-examination. C. MCCORMICK, *supra* note 1, at § 245. Wigmore emphasizes that the hearsay rule excludes only noncross-examined statements. 5 J. WIGMORE, *supra* note 1, at § 1362. Consequently, a previously cross-examined statement (such as a deposition or former trial testimony) is not hearsay according to Wigmore. *Id.* at § 1370.

[3] *See* 5 J. WIGMORE, *supra* note 1, at §§ 1420, 1427.

[4] *Id.* Wigmore notes that two considerations underlie the exceptions to the hearsay rule. First, according to the necessity principle, courts should admit hearsay only when no better evidence is available for trial. *Id.* at § 1421. Second, under the circumstantial probability of trustworthiness principle, courts should admit hearsay when circumstances indicating the probable reliability of the statement can substitute for the test of cross-examination. *Id.* at § 1422.

[5] For a general history of the development of the hearsay rule and its exceptions, see *id.* at §§ 1364, 1426.

[6] Act of Jan. 2, 1975, Pub. L. No. 93-595, 1974 U.S. CODE CONG. & AD. NEWS (88 Stat.) 2215.

[7] H.R. REP. NO. 650, 93rd Cong., lst Sess. 1, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075.

[8] FED. R. EVID. 803 & 804. Rule 803 lists 24 hearsay exceptions that courts may use to admit hearsay irrespective of the hearsay declarant's availability to testify at trial. The five

lows federal judges to admit reliable non-excepted hearsay as substantive evidence when the hearsay declarant is unavailable to testify at trial.[9] Congress enacted Rule 804(b)(5) to prevent federal judges from stretching the specifically enumerated hearsay exceptions beyond their intended scope and to provide for the admission into evidence of reliable non-excepted hearsay in exceptional circumstances.[10]

Grand jury testimony offered as substantive evidence at trial is hearsay because it is an out-of-court statement offered to establish the truth of the matter asserted.[11] Because no specific hearsay exception for grand jury testimony exists in the federal rules, federal judges must exclude grand jury testimony from trial under Rule 802[12] unless the testimony is sufficiently reliable to meet the requirements of a residual hearsay exception.[13] The Fourth, Sixth, and Eighth Circuit Courts of Appeals have held that corroborated grand jury testimony meets the requirements of Rule 804(b)(5).[14] The Fifth Circuit Court of Appeals,

---

hearsay exceptions enumerated in Rule 804 apply only when the hearsay declarant is unavailable to testify at trial.

[9] FED. R. EVID. 804(b)(5) states:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (5) *Other exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

[10] *See* S. REP. NO. 1277, 93rd Cong., 2d Sess. 19, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7065; *see also infra* note 121.

[11] *See* FED. R. EVID. 801(c). Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

[12] FED. R. EVID. 802 provides that "hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

[13] Two residual or "catch-all" hearsay exceptions exist in the federal rules. Rule 804(b)(5) applies only when the hearsay declarant is unavailable for trial. Rule 803(24) applies when the declarant's availability to testify at trial is immaterial.

This Comment addresses only the admissibility of grand jury testimony of an unavailable declarant under 804(b)(5). Federal courts have admitted grand jury testimony at trial as substantive evidence when the declarant is available to testify. *See, e.g.*, United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970); United States v. Insana, 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970); United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

[14] United States v. Murphy, 696 F.2d 282 (4th Cir. 1982); United States v. Walker, 696 F.2d 277 (4th Cir. 1982); United States v. Barlow, 693 F.2d 954 (6th Cir. 1982); United

however, has held that grand jury testimony does not meet the requirements of Rule 804(b)(5).[15] The Supreme Court has yet to grant certiorari to resolve this dispute.

In addition to the hearsay issue, a potential violation of the sixth amendment Confrontation Clause exists when courts admit grand jury testimony of a declarant who is unavailable to testify at trial. The Confrontation Clause guarantees defendants the right to cross-examine their accusers at trial.[16] Because grand jury investigations are not adversarial proceedings,[17] defense counsel does not cross-examine adverse witnesses before grand juries.[18] Consequently, when a grand jury declarant is unavailable for trial, the defendant is deprived of the constitutional right to test the accuracy of the testimony by cross-examining the declarant.

This Comment proposes two tests to aid federal judges in determining whether an unavailable witness's grand jury testimony is sufficiently reliable to admit under Rule 804(b)(5). The procedural test requires that the grand jury testimony conform to trial evidentiary rules. The corroborative test requires that sufficient independent evidence exist to support the truth of the grand jury testimony. The grand jury testimony must pass both tests before the judge can admit the testimony into evidence under 804(b)(5).

This Comment demonstrates that the procedural and corroborative tests would resolve the disagreement among the federal courts about whether to admit grand jury testimony into trial under 804(b)(5). Moreover, the two tests also would ensure that all grand jury testimony admitted under 804(b)(5) satisfies the Supreme Court's sixth amend-

---

States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *see also* United States v. Mastrangelo, 533 F. Supp. 389 (E.D.N.Y.), *remanded on other grounds*, 693 F.2d 269 (2d Cir. 1982).

[15] United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977); *see also* United States v. Turner, 475 F. Supp. 194 (E.D. Mich. 1978). The Fifth Circuit has strongly suggested in dicta that even corroborated grand jury testimony can never meet the Rule 804(b)(5) requirements. United States v. Thevis, 665 F.2d 616, 629 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982).

[16] *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980); Barber v. Page, 390 U.S. 719, 725 (1968); Douglas v. Alabama, 380 U.S. 415, 418 (1965); Pointer v. Texas, 380 U.S. 400, 404 (1965).

The Confrontation Clause of the sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

[17] Garner v. United States, 439 U.S. 936, 938 (1978) (Stewart, J., dissenting), *denying cert. to* 574 F.2d 1141 (4th Cir.); United States v. Calandra, 414 U.S. 338, 343 (1974); Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 177 (1973); M. FRANKEL & G. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 26, 67 (1977) [hereinafter cited as FRANKEL, THE GRAND JURY].

[18] FRANKEL, THE GRAND JURY, *supra* note 17, at 30. The accused has no right to counsel at grand jury proceedings. *See* FED. R. CRIM. P. 6(d); Rodis, *A Lawyer's Guide to Grand Jury Abuse*, 14 CRIM. L. BULL. 123, 127 (1978); Campbell, *supra* note 17, at 177; FRANKEL, THE GRAND JURY, *supra* note 17, at 24, 59.

ment Confrontation Clause standards. Finally, this Comment demonstrates that the procedural and corroborative tests would be easy to implement and are consistent with the legislative intent of Rule 804(b)(5).

II. THE SUSPECT RELIABILITY OF GRAND JURY TESTIMONY

Although a federal judge must consider six factors before admitting grand jury testimony into evidence under 804(b)(5),[19] the disagreement among the federal courts has focused upon one requirement in particular: the grand jury testimony must contain "equivalent circumstantial guarantees of trustworthiness."[20] More specifically, the disagreement is about what circumstances make grand jury testimony sufficiently reliable for courts to admit it as substantive evidence at trial.

Grand jury testimony contains several inherent guarantees of reliability. The grand jury witness testifies in a formal setting, under oath, and subject to penalties for perjury.[21] The formal setting and the oath impress upon the witness the seriousness of the proceeding,[22] while the sanctions for perjury threaten the witness with serious consequences for testifying falsely.[23]

Although these factors support the reliability of grand jury testi-

---

[19] First, the hearsay declarant must qualify as an unavailable witness under Rule 804(a). Second, the hearsay statement must contain equivalent circumstantial guarantees of trustworthiness. Third, the proponent of the statement must offer it as evidence of a material fact. Fourth, the statement must be more probative on the point for which it is offered than any other evidence reasonably obtainable. Fifth, the admission of the evidence must serve the general purposes of the Federal Rules of Evidence and the interests of justice. Sixth, the proponent of the statement must give the adverse party sufficient pre-trial notice of the proponent's intention to offer the statement at trial. *See* FED. R. EVID. 804(b)(5), *supra* note 9.

[20] United States v. Barlow, 693 F.2d 954, 960 (6th Cir. 1982). *Compare* United States v. Murphy, 696 F.2d 282 (4th Cir. 1982); United States v. Walker, 696 F.2d 277 (4th Cir. 1982); United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); United States v. Mastrangelo, 533 F. Supp. 389 (E.D.N.Y.), *remanded on other grounds*, 693 F.2d 269 (2d Cir. 1982) (corroborated grand jury testimony contains "equivalent circumstantial guarantees of trustworthiness") *with* United States v. Thevis, 665 F.2d 616 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977); United States v. Turner, 475 F. Supp. 194 (E.D. Mich. 1978) (grand jury testimony does not contain "equivalent circumstantial guarantees of trustworthiness").

[21] *Garner*, 439 U.S. 936, 938 (1978) (Stewart, J. dissenting), *denying cert. to* 574 F.2d 1141 (4th Cir.); FRANKEL, THE GRAND JURY, *supra* note 17, at 20, 102; *see Carlson*, 547 F.2d at 1354; *Mastrangelo*, 533 F. Supp. at 391.

[22] *See* California v. Green, 399 U.S. 149, 158 (1970); 56 F.R.D. 183, 288 (1973) (Advisory Committee's Notes to the proposed Federal Rules of Evidence) [hereinafter cited as Advisory Committee's Notes].

[23] FRANKEL, THE GRAND JURY, *supra* note 17, at 102. Under federal law, a person guilty of perjury before a grand jury may be fined up to $2000 or imprisoned for as many as five years, or both. 18 U.S.C. § 1621 (1970).

mony, courts should not admit all grand jury testimony into evidence under 804(b)(5) because modern grand jury procedural practices make the reliability of grand jury testimony highly suspect.[24] First, the party seeking the indictment, the prosecutor, typically controls modern grand jury proceedings.[25] The prosecutor determines which witnesses to call, what evidence to hear, and which criminal violations to consider.[26] The prosecutor also explains the applicable law to the grand jury and instructs the grand jury on the standard of proof needed to indict.[27]

Moreover, prosecutors often lead their witnesses and introduce multiple hearsay at grand jury proceedings because ordinary rules of evidence do not apply.[28] Prosecutors also may threaten, pressure, or harass the grand jury witness to elicit testimony supporting an indictment.[29] In *United States v. Gonzalez*,[30] for example, the Fifth Circuit Court of Appeals refused to admit grand jury testimony under 804(b)(5) in part because the prosecutor threatened to call the grand jury witness before successive grand juries and give the witness repeated six-month

---

24 Admitting all grand jury testimony into evidence also would contravene the legislative intent of 804(b)(5) to avoid a major judicial revision of the hearsay rule. *Thevis*, 665 F.2d at 629; *see infra* notes 124-26 and accompanying text.

25 *See* Campbell, *supra* note 17, at 177; FRANKEL, THE GRAND JURY, *supra* note 17, at 4, 21. In fact, the prosecutor may be the only representative of the legal community present at grand jury proceedings. *See* FED. R. CRIM. P. 6(d).

26 Campbell, *supra* note 17, at 177; FRANKEL, THE GRAND JURY, *supra* note 17, at 21.

27 Campbell, *supra* note 17, at 177.

28 *Garner*, 439 U.S. at 938 (Stewart, J. dissenting), *denying cert. to* 574 F.2d 1141 (4th Cir.); FRANKEL, THE GRAND JURY, *supra* note 17, at 26. The Federal Rules of Evidence do not apply to grand jury proceedings. FED. R. EVID. 1101(d)(2).

The United States Supreme Court has held that grand jury indictments may be based wholly on hearsay evidence. Costello v. United States, 350 U.S. 359 (1956). The Court stated that allowing challenges to grand jury indictments based upon the use of incompetent evidence would substantially delay and hinder the grand jury's investigative function. *Id.* at 363-64.

The Supreme Court also has noted that the traditional duty of the grand jury is to "pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial." United States v. Calandra, 414 U.S. 338, 349 (1974) (refusing to extend the exclusionary rule to grand jury proceedings).

Prosecutors may present hearsay evidence to grand juries for several reasons. The prosecutor may wish to protect the government's witnesses from potential impeachment at trial by the disclosure of the witnesses' grand jury transcript. Consequently, the prosecutor will have "hearsay" witnesses instead of percipient witnesses testify before the grand jury. At the grand jury stage, the prosecutor may not have had enough time to develop or find evidence to corroborate the details of the witnesses' testimony. The prosecutor may wish to save taxpayers the expense of bringing in witnesses from distant locations. Finally, the prosecutor may not wish to impose a burden on the witnesses by forcing them to miss work to testify before grand juries. F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CRIMINAL PROCEDURE: CASES AND COMMENTS 750 n.1 (2d ed. 1980).

29 *See* FRANKEL, THE GRAND JURY, *supra* note 17, at 52-59.

30 559 F.2d 1271 (5th Cir. 1977).

contempt sentences if he refused to testify.[31] In short, the prosecutor "can indict anybody, at any time, for almost anything, before any grand jury."[32]

Second, because grand jury investigations are not adversarial proceedings, defense counsel is not present to cross-examine adverse witnesses, give the defendant's version of the story, or expose any weaknesses in the witnesses' testimony.[33] A promise of leniency may encourage grand jury witnesses to lie or exaggerate their stories to obtain favorable treatment from the government.[34] In addition, grand jury witnesses may lie to protect themselves and their families from physical harm threatened by the defendant.[35] Furthermore, a grand jury witness

---

[31] *Id.* at 1273. In addition, the court noted that the prosecutor elicited the grand jury witness's testimony through leading questions, defense counsel could not cross-examine the witness, no evidence corroborated the witness's testimony, and the grand jury witness had an incentive to testify falsely to protect himself and his family from possible physical reprisals. *Id.* For further examples of the hopeless plight of grand jury witnesses at the mercy of the prosecutor, see United States v. Remington, 208 F.2d 567, 571-75 (2d Cir. 1953) (Hand, J., dissenting), *cert. denied*, 347 U.S. 913 (1954); FRANKEL, THE GRAND JURY, *supra* note 17, at 64-66.

[32] Campbell, *supra* note 17, at 174. Historically, the grand jury protected the accused from malicious and oppressive prosecution. Wood v. Georgia, 370 U.S. 375, 390 (1962). Today, however, "grand juries have largely lost their function as protectors of individual rights and have become agents of the prosecution." United States v. Balano, 618 F.2d 624, 627 n.5 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); *see* Rodis, *supra* note 18, at 139 ("Today, the protective function of the grand jury has taken secondary importance to its role as an investigative tool of the prosecutor."); FRANKEL, THE GRAND JURY, *supra* note 17, at 99-100 (grand juries are "weapons" of the prosecution).

For a general discussion of the historical origins and development of the grand jury system, see FRANKEL, THE GRAND JURY, *supra* note 17, at 6-17.

[33] *Garner*, 439 U.S. at 938 (Stewart, J., dissenting), *denying cert. to* 574 F.2d 1141 (4th Cir.); *see* FED. R. CRIM. P. 6(d). *See generally*, FRANKEL, THE GRAND JURY, *supra* note 17, at 18-32.

[34] *See* United States v. Barlow, 693 F.2d 954, 965 (6th Cir. 1982); United States v. Thevis, 665 F.2d 616, 629 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982); United States v. Turner, 475 F. Supp. 194, 198 (E.D. Mich. 1978); *see also* United States v. Mastrangelo, 533 F. Supp. 389 (E.D.N.Y.), *remanded on other grounds*, 693 F.2d 269 (2d Cir. 1982), where the court found the witness's grand jury testimony to be reliable, in part because the witness was not under investigation for the crime nor under a grant of immunity. 533 F. Supp. at 391. *But see* United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978) and United States v. West, 574 F.2d 1131 (4th Cir. 1978), where the courts admitted corroborated grand jury testimony under 804(b)(5) even though the grand jury witnesses had entered into plea bargaining or leniency arrangements with the government.

[35] *See, e.g.*, *Thevis*, 665 F.2d at 624 (defendant killed grand jury witness to prevent him from testifying at trial); United States v. Balano, 618 F.2d 624, 626, 629-30 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980) (even after being imprisoned for contempt, grand jury witness refused to testify because of defendant's threats); Tolbert v. Jago, 607 F.2d 753, 754 (6th Cir. 1979) (grand jury witness was threatened and shot in the head before trial); *Garner*, 574 F.2d at 1143 (co-conspirators may have pressured grand jury witness into not testifying); United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977) (grand jury witness had an incentive to testify falsely because of fear of physical harm); United States v. Carlson, 547 F.2d 1346, 1352-53 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (even after being sentenced to jail for contempt, grand jury witness refused to testify at trial because of defendant's threats).

may make accusations in a grand jury investigation that the witness would not make in the presence of the accused.[36]

Finally, no complete investigation into the truth of the testimony occurs in grand jury proceedings because grand juries merely determine whether probable cause exists to indict the defendant for a crime; grand juries do not determine a defendant's guilt.[37]

Nevertheless, the grand jury testimony of an unavailable witness may be crucial and necessary at trial to convict a defendant of a crime.[38] The Fourth, Sixth, and Eighth Circuit Courts of Appeals have held that sufficiently corroborated grand jury testimony meets the requirements of Rule 804(b)(5).[39] In *United States v. West*,[40] for example, the Fourth Circuit upheld the admission of the grand jury testimony of a witness who was murdered before trial. In return for leniency on a pending drug charge and parole violation, the witness had cooperated with police by purchasing heroin from the defendants. The witness testified about the heroin purchases before the grand jury. The court found that the witness's grand jury testimony contained "equivalent circumstantial guarantees of trustworthiness" because of the exceptional corroboration of the testimony: the police searched the witness for drugs immediately preceding and following the heroin deals; the police constantly observed the witness except when he was concealed from their view in a building; the police photographed the witness with one of the defendants; the police tape recorded the heroin transactions with a hidden transmitter; and the witness prepared and signed detailed statements immediately following each heroin purchase.[41] In other cases, federal courts have found sufficient corroboration to admit grand jury testimony under

---

[36] *West*, 574 F.2d at 1141 (Widener, J., dissenting); *see* Ohio v. Roberts, 448 U.S. 56, 63 n.6 (1980); 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 800[01], at 800-10 (1981) [hereinafter cited as WEINSTEIN'S EVIDENCE]; Advisory Committee's Notes, *supra* note 22, at 288.

[37] *West*, 574 F.2d at 1141 (Widener, J., dissenting); *see* Campbell, *supra* note 17, at 177; FRANKEL, THE GRAND JURY, *supra* note 17, at 19 ("all grand juries have a common function: to determine if there is sufficient evidence to warrant putting the subject of an investigation on trial, where the question of guilt or innocence can be determined").

[38] *See* United States v. Thomas, 705 F.2d 709, 711 (4th Cir. 1983) (the government's case against the defendants for illegal importation of marijuana "rested largely" on the grand jury testimony of a boat crew member and a commercial fisherman who could not be found to testify at trial); United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (unavailable drug distributor's grand jury testimony was crucial to the government's case against the defendant because no other individual could testify regarding the purchase of cocaine from the defendant); *cf.* United States v. Turner, 475 F. Supp. 194, 203 (E.D. Mich. 1978) (deceased witness's grand jury testimony implicating the defendant in a cocaine smuggling conspiracy would have had a "devastating effect on the defendant's case").

[39] *See supra* note 14 and accompanying text.

[40] 574 F.2d 1131 (4th Cir. 1978).

[41] *Id.* at 1133-35.

804(b)(5) in the grand jury witness's firsthand knowledge,[42] in the witness's prior and subsequent affirmance of the grand jury testimony,[43] in the testimony of another witness,[44] and in travel[45] and business records.[46]

On the other hand, the Fifth Circuit Court of Appeals has strongly suggested that even corroborated grand jury testimony is too unreliable to admit because of modern grand jury procedural practices.[47] No federal court that has admitted corroborated grand jury testimony under 804(b)(5) has specifically considered the suspect reliability of grand jury testimony.

III. THE PROCEDURAL AND CORROBORATIVE TESTS

Federal courts need a standard that takes into consideration the suspect reliability of grand jury testimony, yet allows for the admission of reliable grand jury testimony as substantive evidence at trial. The use of the procedural and corroborative tests would provide such a standard. Under the procedural test, the grand jury testimony must conform to trial evidentiary rules. Under the corroborative test, sufficient independent evidence must exist to support the truth of the grand jury testimony. Only if the testimony satisfies both tests should federal courts

---

42 United States v. Barlow, 693 F.2d 954, 962 (6th Cir. 1982); *Carlson*, 547 F.2d at 1354; United States v. Mastrangelo, 533 F. Supp. 389, 391 (E.D.N.Y.), *remanded on other grounds*, 693 F.2d 269 (2d Cir. 1982); *see* United States v. Walker, 696 F.2d 277, 280 (4th Cir. 1982).

43 *Carlson*, 547 F.2d at 1354; *Mastrangelo*, 533 F. Supp. at 391. *But cf.* United States v. Walker, 696 F.2d 277 (4th Cir. 1982) (the court admitted corroborated grand jury testimony at trial even though the grand jury witness had written a letter to the United States Attorney denying the truth of his testimony); United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978) (the court admitted corroborated grand jury testimony at trial under 804(b)(5) even though the witness had recanted his grand jury testimony).

One commentator cast doubt on the reliability of the evidence corroborating the grand jury testimony in *West* and *Garner*. *See* Note, *Applicability of Federal Rule of Evidence 804(b)(5) to Grand Jury Testimony—United States v. Garner*, 15 WAKE FOREST L. REV. 416 (1979). In *West*, the grand jury witness was motivated to state what the prosecutor wanted to hear to stay out of prison. *Id.* at 424. In *Garner*, the principal corroborator of the grand jury testimony was an accomplice who may have wished to shift the blame for the crime to the defendant. *Id.* at 426.

44 United States v. Murphy, 696 F.2d 282, 286 (4th Cir. 1982); *Walker*, 696 F.2d at 280-81; *Garner*, 574 F.2d at 1144.

45 *Garner*, 574 F.2d at 1144-45.

46 *Mastrangelo*, 533 F. Supp. at 391.

47 *See* United States v. Thevis, 665 F.2d 616 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982). The court noted that a grand jury witness is "not subjected to the vigorous truth testing of cross-examination"; moreover, the grant of immunity often given to grand jury witnesses might encourage the witnesses to "embellish" their stories. *Id.* at 629. Because the defendant had killed the grand jury witness to keep him from testifying at trial, however, the court held that the defendant had waived his right to any hearsay or confrontation objection and admitted the grand jury testimony at trial. *Id.* at 624, 630.

admit an unavailable witness's grand jury testimony at trial under 804(b)(5).

Use of the procedural test would ensure that federal courts admit only grand jury testimony given under conditions closely approximating those at trial. Because prosecutors may not lead their witnesses or threaten any witnesses at trial,[48] the procedural test would prohibit the admission of grand jury testimony elicited by leading questions or threats. Similarly, because the hearsay rule bars non-excepted hearsay from admission at trial,[49] the procedural test would prohibit the admission of grand jury testimony containing non-excepted hearsay. Therefore, use of the procedural test would preclude most unreliable grand jury testimony from entering trial as substantive evidence.[50] In *United States v. Gonzalez*,[51] for example, use of the procedural test automatically would have protected the defendant from the use of the unreliable grand jury testimony by excluding the testimony from trial. Thus, the procedural test would prevent prosecutors from circumventing trial evidentiary rules by introducing otherwise inadmissible testimony into trial through the 804(b)(5) hearsay exception.[52]

---

[48] *See* FED. R. EVID. 611(a)(3): "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . (3) protect witnesses from harassment or undue embarrassment." *See also* Advisory Committee's Notes, *supra* note 22, at 274 ("the trial judge should protect the witness from questions which 'go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate. . . .'" (quoting Alford v. United States, 282 U.S. 687, 694 (1931))).

See FED. R. EVID. 611(c): "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." Leading questions are prohibited on direct examination because they might distort the truth of the witness's answers. United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977). The Advisory Committee's Notes state that the exceptions to the general prohibition against leading questions on direct examination include instances when the witness is hostile, unwilling, or biased; when the witness is a child or an adult with communication problems; when the witness's recollection is exhausted; and when the questions concern undisputed preliminary matters. Advisory Commitee's Notes, *supra* note 22, at 275-76; *see also* 3 J. WIGMORE, *supra* note 1, at §§ 774-778.

[49] *See* FED. R. EVID. 802, *supra* note 12.

[50] The procedural test would not impede prosecutors' efforts to obtain grand jury indictments. The prosecutor could continue to ask leading questions and introduce hearsay in grand jury proceedings. *See* United States v. Calandra, 414 U.S. 338, 349 (1974); Costello v. United States, 350 U.S. 359 (1956); *see also supra* note 28. The procedural test would only protect defendants from the use of the unreliable grand jury testimony at trial.

[51] 559 F.2d 1271 (5th Cir. 1977); *see supra* notes 30-31 and accompanying text.

[52] In Costello v. United States, 350 U.S. 359 (1956), the Supreme Court refused to extend trial evidentiary rules to grand jury proceedings. *See supra* note 28. The Court reasoned that the rules of evidence would adequately protect the defendant at the subsequent trial. *Id.* at 364. Admitting grand jury testimony at trial under 804(b)(5), however, thwarts the protections of the rules of evidence by permitting the prosecutor to use as substantive evidence testimony taken in violation of the rules of evidence. The procedural test closes this loophole by requiring, as a prerequisite for admission under Rule 804(b)(5), that the grand jury testimony conform to trial evidentiary rules.

Under the corroborative test, courts would admit grand jury testimony that passes the procedural test only if independent evidence exists to corroborate the truth of the testimony.[53] The corroborative test also would protect the defendant from the use of unreliable grand jury testimony at trial by ensuring that the testimony admitted under 804(b)(5) is based on independently verifiable facts. Examples of corroborative evidence include tape recordings, photographs, signed statements, police observations, and testimony of other witnesses.[54]

Federal courts must use both the procedural and corroborative tests to ensure that the grand jury testimony is sufficiently reliable to admit at trial under Rule 804(b)(5). Although the use of the procedural test would reduce much of the unreliability of grand jury testimony, the testimony still may be unreliable because a promise of leniency or a fear of physical harm may have encouraged the witness to testify falsely.[55] Furthermore, defense counsel has not cross-examined the witness to test the accuracy of the grand jury testimony.[56]

Similarly, use of the corroborative test alone would not ensure that only reliable grand jury testimony is admitted into evidence under 804(b)(5). First, the corroborative test does not solve the problem of the suspect reliability of grand jury testimony. Although independent evidence might exist to support the truth of the testimony, the prosecutor may have threatened or otherwise led the witness to testify consistently with the corroborative evidence.[57] Second, use of the corroborative test alone would not resolve the conflict in the federal courts because the

---

[53] Courts may require corroboration to give evidence added reliability. *See generally*, 7 J. WIGMORE, *supra* note 1, at §§ 2056-2075. Under Rule 804(b)(3), statements against interest which expose the declarant to criminal liability and which are offered at trial to exculpate the accused must be corroborated. FED. R. EVID. 804(b)(3). The drafters added the corroboration requirement to give the statement greater reliability and trustworthiness. *See* H.R. REP. NO. 650, 93rd Cong., lst Sess. 15-16, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7089-90; 4 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 804(b)(3)[01], at 804-92. The corroboration requirement accommodates two competing interests: first, the high risk of fabrication when a declarant who will not testify at trial makes a statement exculpating the accused; and second, the likely reliability of a statement exposing the declarant to criminal punishment. Advisory Committee's Notes, *supra* note 22, at 327.

Similar competing interests exist when courts decide whether to admit grand jury testimony that passes the procedural test under 804(b)(5). The testimony tends to be reliable because it conforms with trial evidentiary rules. On the other hand, the testimony may be unreliable because no party cross-examined the witness, or because a promise of leniency or a fear of physical harm may have induced the witness to lie. The corroborative test gives the grand jury testimony the necessary additional reliability to accommodate these competing interests.

[54] *See supra* text accompanying notes 41-46. For a discussion of the standard of corroboration that trial judges should use, see *infra* note 120 and accompanying text.

[55] *See supra* notes 34-35 and accompanying text.

[56] *See supra* text accompanying note 33.

[57] *See supra* text accompanying notes 28-31.

Fifth Circuit Court of Appeals has strongly suggested that corroborated grand jury testimony is never sufficiently reliable to admit under 804(b)(5).[58]

Finally, without the procedural test, federal courts would have to require a very stringent corroboration standard to overcome the possible procedural irregularities in the grand jury testimony. A stringent corroboration standard, however, would destroy the utility of admitting grand jury testimony under Rule 804(b)(5). Proponents of the grand jury testimony seldom would be able to meet a corroboration standard that is too strict.[59] Furthermore, even if the proponent could meet a strict corroboration standard, the courts might not admit the testimony under 804(b)(5) because the increased corroboration indicates a reduced need for the testimony at trial.[60] Therefore, federal courts must use both the procedural and corroborative tests to adequately protect a defendant at trial from the admission of unreliable grand jury testimony.

The procedural and corroborative tests would ensure that grand jury testimony admitted at trial meets the 804(b)(5) requirement of "equivalent circumstantial guarantees of trustworthiness." Federal courts have uniformly interpreted "equivalent circumstantial guarantees of trustworthiness" to mean guarantees of trustworthiness equivalent to those of the other Rule 804(b) hearsay exceptions.[61] The

---

58 United States v. Thevis, 665 F.2d 616, 629 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982); *see supra* note 47; *see also* United States v. Turner, 475 F. Supp. 194, 201 (E.D. Mich. 1978) ("trustworthiness is not determined by merely looking at corroborating facts, but also and more importantly, by looking at the circumstances in which the declarant made the statement").

59 *See* 4 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 804(b)(3)[03], at 804-108.

60 United States v. Bailey, 581 F.2d 341, 349 (3d Cir. 1978):

> Since the rule [804(b)(5)] is designed to come into play when there is a need for the evidence in order to ascertain the truth in a case, it would make little sense for a judge, in determining whether the hearsay is admissible, to examine only facts corroborating the substance of the declaration. Such an analysis in effect might increase the likelihood of admissibility when corroborating circumstances indicate a reduced need for the introduction of the hearsay statement.

For example, heavily corroborated grand jury testimony may no longer be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts" and thus would fail to meet the admissibility requirements of Rule 804(b)(5). *See* FED. R. EVID. 804(b)(5), *supra* note 9.

61 United States v. Barlow, 693 F.2d 954, 962 (6th Cir. 1982); United States v. Thevis, 665 F.2d 616, 628-29 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982); United States v. Bailey, 581 F.2d 341, 346 (3d Cir. 1978); United States v. Garner, 574 F.2d 1141, 1144 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. West, 574 F.2d 1131, 1135 (4th Cir. 1978); United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); United States v. Turner, 475 F. Supp. 194, 200 (E.D. Mich. 1978). Such an interpretation is in accord with the language of Rule 804(b)(5) which allows the admission of "[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . . ." FED. R. EVID. 804(b)(5).

804(b) hearsay exceptions include an exception for former testimony,[62] statements under belief of impending death,[63] statements against one's own interest,[64] and statements of personal or family history.[65] Each statement is admissible as a hearsay exception because each is made under conditions that guarantee the truthfulness of the statement.[66] Former testimony is admissible because counsel has previously cross-examined the declarant to test the accuracy of the testimony.[67] Statements under belief of impending death are admissible because of the assumption that a person cognizant of impending death would not lie.[68] Statements against interest are admissible because courts assume that a person would not speak falsely against himself.[69] Statements of personal or family history are admissible because courts assume that persons do not generally lie about statements concerning "ordinary affairs of life."[70]

The procedural and corroborative tests would ensure that grand

---

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

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

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

65 FED. R. EVID. 804(b)(4).

66 *See Bailey*, 581 F.2d at 348. The rationale behind the Rule 804(b) hearsay exceptions is that "hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard." Advisory Committee's Notes, *supra* note 22, at 323.

67 *See* Advisory Committee's Notes, *supra* note 22, at 323 (notes to Rule 804(b)(1)): "Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact." Rule 804(b)(1) limits the former testimony admissible at trial to instances where "the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination." FED. R. EVID. 804(b)(1).

68 *See* Mattox v. United States, 146 U.S. 140, 152 (1892). Wigmore states that "[a]ll courts have agreed, with more or less difference of language, that the *approach of death* produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to misstate." 5 J. WIGMORE, *supra* note 1, at § 1438 (emphasis in original); *see* Advisory Committee's Notes, *supra* note 22, at 326 (notes to proposed Rule 804(b)(3), enacted as Rule 804(b)(2)): "While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present"; *see also* 5 J. WIGMORE, *supra* note 1, at § 1443 ("natural and instinctive awe at the approach of an unknown future" is the essential circumstantial guarantee of reliability of dying declarations).

69 *See* Advisory Committee's Notes, *supra* note 22, at 327 (notes to proposed Rule 804(b)(4), enacted as Rule 804(b)(3)): "The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true"; *see also* 5 J. WIGMORE, *supra* note 1, at § 1457.

70 *See* 5 J. WIGMORE, *supra* note 1, at § 1482; Advisory Committee's Notes, *supra* note 22, at 328 (notes to proposed Rule 804(b)(5), enacted as Rule 804(b)(4)). Judge Weinstein notes that Rule 804(b)(4) "rests on the assumption that the type of declarant specified by the rule [the declarant must be related or intimately associated with the family] will not make a statement about the type of fact covered by the rule [examples include date of birth, adoption,

jury testimony admitted under 804(b)(5) contains guarantees of trustworthiness similar to or exceeding the guarantees of the other 804(b) hearsay exceptions. Unlike a hearsay declarant making a statement under belief of impending death, a statement against interest, or a statement of personal or family history, a grand jury witness always testifies in a formal judicial setting, under oath, and subject to penalties for perjury.[71] The procedural test would ensure that all grand jury testimony admitted under 804(b)(5) conforms with trial evidentiary standards. Only the 804(b) hearsay exception for former testimony admits statements necessarily taken in conformity with the rules of evidence.[72] Furthermore, the corroborative test would ensure that independent evidence supports the truth of all grand jury testimony admitted under 804(b)(5). No other 804(b) hearsay exception requires independent corroboration except when a statement exposing the declarant to criminal liability is offered to exculpate the accused.[73] Thus, the use of the procedural and corroborative tests would ensure that grand jury testimony contains sufficient guarantees of reliability to admit as substantive evidence at trial under Rule 804(b)(5).[74]

IV. THE ADVANTAGES OF THE TWO TESTS

Three principal advantages exist when federal judges use the proce-

---

marriage, divorce, and ancestry] unless it is trustworthy." 4 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 804(b)(4)[01], at 804-117; *see* FED. R. EVID. 804(b)(4).

71 *See* FRANKEL, THE GRAND JURY, *supra* note 17, at 20, 102; FED. R. EVID. 804(b)(2), 804(b)(3), &.804(b)(4).

72 *See* FED. R. EVID. 804(b)(1).

73 *See* FED. R. EVID. 804(b)(3); *see also supra* note 53.

74 The hearsay rule ensures that witnesses testify under three ideal conditions: (1) under oath; (2) in the personal presence of the trier of fact; and (3) subject to cross-examination. *See supra* note 2; Advisory Committee's Notes, *supra* note 22, at 288. No one advocates the exclusion of all testimony that does not comply with the three ideal conditions.

> Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without.

Advisory Committee's Notes, *supra* note 22, at 289.

Under no hearsay exception has the declarant testified in the personal presence of the trier of fact, and thus met McCormick's second condition. *Id.* at 323. Because grand jury witnesses always testify under oath, an unavailable witness's grand jury testimony fails to satisfy only one of the ideal conditions that other hearsay exceptions may satisfy: the test of cross-examination.

Where a party cannot cross-examine the witness (such as in a Rule 804(b)(5) situation where the witness is unavailable), "it is clear at least that, so far as in a given instance *some* substitute for cross-examination is found to have been present, there is ground for making an exception." 5 J. WIGMORE, *supra* note 1, at § 1420 (emphasis in original). This Comment posits that the procedural and corroborative tests provide an adequate substitute for cross-examination by ensuring that the grand jury testimony offered under 804(b)(5) is "free enough from the risk of inaccuracy and untrustworthiness." *Id.*

dural and corroborative tests to determine whether grand jury testimony contains "equivalent circumstantial guarantees of trustworthiness." First, the two tests would resolve the disagreement in the federal courts about what circumstances are necessary to admit grand jury testimony at trial under 804(b)(5) without violating the Confrontation Clause of the sixth amendment. Second, the two tests would be easy to implement. Third, the two tests are consistent with the legislative history of Rule 804(b)(5).

A. RESOLVING THE 804(b)(5) AND CONFRONTATION CLAUSE DISAGREEMENT IN THE FEDERAL COURTS

1. Admitting Grand Jury Testimony Under 804(b)(5)

The federal courts have taken one of two approaches when deciding whether to admit grand jury testimony into evidence under 804(b)(5). Several federal courts have excluded the grand jury testimony because grand jury procedures make the testimony unreliable.[75] Other federal courts have admitted the grand jury testimony when sufficient corroborative evidence exists to support the truth of the testimony.[76] Using the procedural and corroborative tests, federal courts could combine both approaches in their 804(b)(5) analyses.

The two tests would allow federal courts to determine clearly when to admit grand jury testimony at trial under Rule 804(b)(5). Under the procedural test, courts must exclude grand jury testimony elicited in violation of trial evidentiary rules. Under the corroborative test, courts must also exclude grand jury testimony that conforms with trial evidentiary rules but is uncorroborated by independent evidence. Courts may admit grand jury testimony elicited in conformity with trial evidentiary rules when independent evidence exists to support the truth of the testimony. Thus, the procedural and corroborative tests would enable federal courts to take into account both the unreliable nature of grand jury testimony and the necessity of admitting crucial corroborated grand jury testimony at trial.

2. Admitting Grand Jury Testimony Under the Confrontation Clause

The procedural and corroborative tests also would ensure that any grand jury testimony admitted at trial under 804(b)(5) meets the Supreme Court's Confrontation Clause standards. The Confrontation Clause of the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

---

[75] *See supra* note 15 and accompanying text.

[76] *See supra* note 14 and accompanying text.

against him."[77] The primary purpose of the Confrontation Clause is to prevent trials by deposition and *ex parte* affidavits.[78] Although little legislative history exists to explain the Confrontation Clause,[79] the Supreme Court has held that confrontation primarily guarantees defendants the right to cross-examine their accusers and, secondarily, it provides the jury with the opportunity to observe the demeanor of witnesses at trial to determine whether the witnesses are telling the truth.[80]

Consequently, the admission of grand jury testimony under 804(b)(5) may violate the defendant's confrontation right because the witness is not present at trial for defense counsel to cross-examine and

---

77 U.S. CONST. amend. VI.

78 Mattox v. United States, 156 U.S. 237, 242 (1895).

79 The brief congressional debate on the Confrontation Clause is recorded in 1 ANNALS OF CONG. 452, 784-85, 948 (J. Gales ed. 1789).

The Confrontation Clause may have originated in the abuses in the trial of Sir Walter Raleigh. *See* Park v. Huff, 506 F.2d 849, 861-62 (5th Cir. 1975) (Gewin, J., concurring); United States v. Payne, 492 F.2d 449, 458 (4th Cir.) (Widener, J., dissenting), *cert. denied*, 419 U.S. 876 (1974); F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104-06 (1969). *But see* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4, 104 n.23 (1972) (the theory that the Confrontation Clause originated in the evils of Raleigh's trial is a "highly romantic myth"); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 395-97 (1959) (Confrontation Clause originated in the abuses allowed in admiralty courts).

80 Ohio v. Roberts, 448 U.S. 56, 63 (1980); Barber v. Page, 390 U.S. 719, 725 (1968); Pointer v. Texas, 380 U.S. 400, 404 (1965); *Mattox*, 156 U.S. at 242-43; *see also* 5 J. WIGMORE, *supra* note 1, at § 1365.

Because of the paucity of legislative history on the Confrontation Clause, commentators have proposed many theories to guide the Court's Confrontation Clause analysis. Wigmore, for example, argued that the Confrontation Clause constitutionalizes the hearsay rule with its past, present, and future hearsay exceptions. 5 J. WIGMORE, *supra* note 1, at § 1397; *see also* Dutton v. Evans, 400 U.S. 74, 94-97 (1970) (Harlan, J., concurring) (Confrontation Clause regulates trial procedure through the rules of evidence); Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978) (author adopts Wigmore's approach but applies the Confrontation Clause only to accusatory statements); Note, *The Confrontation Test for Hearsay Exceptions: An Uncertain Standard. California v. Green*, 59 CALIF. L. REV. 580 (1971) (Confrontation Clause is congruent with the hearsay rules of evidence).

Another theory suggests that the Confrontation Clause applies only to available, not unavailable, witnesses. *See* California v. Green, 399 U.S. 149, 173-92 (1970) (Harlan, J., concurring); Baker, *The Right to Confrontation, The Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979); Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32 (1973).

Another commentator suggests that the right of confrontation is a constitutional bar to hearsay evidence irrespective of any hearsay exceptions unless (1) no alternative means exist to obtain the same evidence without denying the accused the opportunity for confrontation, (2) the evidence possesses a high degree of trustworthiness, and (3) the evidence was created without motive to falsify or affect criminal proceedings. Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 92 (1971); *cf.* Graham, *supra* note 79, at 107 (the use of the witness's statements determines when a person is a "witness against" the accused).

The Supreme Court has refused to adopt any of the proposed theories because none satisfactorily resolves all confrontation problems. Ohio v. Roberts, 448 U.S. 56, 68 n.9 (1980).

for the jury to observe the witness's demeanor.[81] The Supreme Court has recognized, however, that the right of confrontation is not an absolute right.[82] For example, the Court has found no Confrontation Clause bar to the admission at trial of dying declarations[83] and unavailable witnesses' former trial[84] and preliminary hearing[85] testimony.

In the Supreme Court's most recent Confrontation Clause decision, *Ohio v. Roberts*,[86] the Court adopted a two-part test to determine when a court may admit an unavailable witness's out-of-court statement without violating the Confrontation Clause. First, the prosecution must show that it made a good-faith effort to secure the witness's presence at trial.[87] Second, the statement must contain sufficient "indicia of reliability" to provide the jury with an adequate basis upon which to evaluate the truth of the statement.[88] Courts can automatically presume that

---

81 *See* FED. R. EVID. 804(b).

82 Pointer v. Texas, 380 U.S. 400, 407 (1965). In *Pointer*, the Court applied the Confrontation Clause to the states through the fourteenth amendment. The Court held that uncross-examined preliminary hearing testimony admitted at trial as substantive evidence violated the defendant's right to confrontation. *Id.* at 407. Because the Court held that confrontation included the right of cross-examination, many commentators feared that the Supreme Court had constitutionalized the hearsay rule in the sixth amendment. *See, e.g.*, Advisory Committee's Notes, *supra* note 22, at 291; Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966). If the right of confrontation was absolute, the Confrontation Clause would "abrogate virtually every hearsay exception" because statements admitted under most hearsay exceptions lack cross-examination. Ohio v. Roberts, 448 U.S. 56, 63 (1980); United States v. Balano, 618 F.2d 624, 627 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); *see* the federal exceptions to the hearsay rule in FED. R. EVID. 803 & 804. The Court, however, has refused to equate the Confrontation Clause with the hearsay rule. Dutton v. Evans, 400 U.S. 74, 86 (1970); California v. Green, 399 U.S. 149, 155 (1970).

83 *Pointer*, 380 U.S. at 407; Mattox v. United States, 156 U.S. 237, 243-44 (1895).

84 Mancusi v. Stubbs, 408 U.S. 204 (1972); Mattox v. United States, 156 U.S. 237 (1895).

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

86 448 U.S. 56 (1980).

87 *Id.* at 65. The Supreme Court first required that prosecutors demonstrate the unavailability of a witness in Barber v. Page, 390 U.S. 719 (1968). The Court held that the admission at trial of a witness's preliminary hearing testimony violated the defendant's confrontation right because the prosecutor had not made a good-faith effort to obtain the witness's presence at trial. *Id.* at 724-25. In two subsequent cases, the Court noted that the prosecutor had made a good-faith effort to secure the witness for trial. *See* Mancusi v. Stubbs, 408 U.S. 204, 212 (1972); California v. Green, 399 U.S. 149, 167 (1970). In Dutton v. Evans, 400 U.S. 74 (1970), however, the Court admitted hearsay evidence without requiring the prosecutor to demonstrate the unavailability of the witness.

88 *Roberts*, 448 U.S. at 65-66. The Supreme Court first mentioned the "indicia of reliability" test in Dutton v. Evans, 400 U.S. 74 (1970). In *Dutton*, the defendant objected to the admission at trial of a statement made by one prisoner who had overheard another prisoner implicate the defendant in a murder. *Id.* at 77. The Court refused to find a Confrontation Clause violation because the statement contained sufficient "indicia of reliability" to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. *Id.* at 88. The statement contained no factual assertions which, on its face, warned the jury against overweighing it; the prisoner who implicated the defendant had personal knowledge of the identity and role of the persons involved in the murder; only a remote chance existed that the prisoner's recollection was faulty; one prisoner made the incriminating statement to another

the statement contains sufficient "indicia of reliability" if the statement falls within a firmly rooted hearsay exception.[89] If the statement does not fall within a recognized hearsay exception, the statement must contain "particularized guarantees of trustworthiness" before a court can admit the statement without violating the defendant's right of confrontation.[90]

The witness unavailability requirements of Rule 804[91] satisfy the first part of the Supreme Court's confrontation test. Before a court may admit grand jury testimony at trial under 804(b)(5), 804(a)(5) requires that the prosecutor use "process or other reasonable means" to procure the witness's presence at trial.[92] The Supreme Court has held that the prosecutor's use of "reasonable means" to procure the witness's presence

---

prisoner, which suggested that the statement did not misrepresent the defendant's role in the crime; and the statement was spontaneous and against the declarant's penal interest. *Id.* at 88-89. In a subsequent case, Mancusi v. Stubbs, 408 U.S. 204, 216 (1972), the Court held that previously cross-examined trial testimony admitted at a retrial for the same offense also contained adequate "indicia of reliability."

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

90 *Id.* The Supreme Court's confrontation standard was uncertain before the Court promulgated the two-part test in *Roberts*. *Compare* Pointer v. Texas, 380 U.S. 400 (1975) (preliminary hearing testimony inadmissible because it was not cross-examined) *with* Dutton v. Evans, 400 U.S. 74 (1970) (uncross-examined statement admissible because it contained sufficient "indicia of reliability"); *compare also* Barber v. Page, 390 U.S. 719 (1968) (prosecutor has to make a good-faith effort to obtain witness's presence at trial) *with* Dutton v. Evans, 400 U.S. 74 (1970) (Court did not require a good-faith showing of the unavailability of the witness).

In United States v. Carlson, 547 F.2d 1346, 1357 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977), the Eighth Circuit Court of Appeals refused to decide whether grand jury testimony admitted under 804(b)(5) would violate the Confrontation Clause because the Supreme Court had not yet set a clear confrontation standard. The Supreme Court currently views the Confrontation Clause as restricting the range of admissible hearsay by the two-part test. *Roberts*, 448 U.S. at 65. For a brief summary of the Supreme Court's Confrontation Clause decisions before 1970, see Advisory Committee's Notes, *supra* note 22, at 291-92.

91 FED. R. EVID. 804(a). Courts may admit hearsay evidence under the Rule 804(b) hearsay exceptions only if the declarant is unavailable for trial. FED. R. EVID. 804(b). Rule 804(a) defines unavailability:

> "Unavailability as a witness" includes situations in which the declarant:
> (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
> (2) Persists in refusing to testify concerning the subject matter of his statement despite order of the court to do so; or
> (3) Testifies to a lack of memory of the subject matter of his statement; or
> (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

92 FED. R. EVID. 804(a)(5).

at trial satisfies the good-faith confrontation standard.[93]

The procedural and corroborative tests would satisfy the second part of the Supreme Court's confrontation test by ensuring that grand jury testimony admitted under 804(b)(5) contains "particularized guarantees of trustworthiness."[94] The procedural test would ensure that the grand jury witness has testified in a formal judicial setting, under oath, subject to penalties for perjury, and in conformance with trial evidentiary rules.[95] These are the same conditions under which an accuser would testify against a defendant at trial.

Moreover, the procedural and corroborative tests would ensure that grand jury testimony admitted under 804(b)(5) contains "particularized guarantees of trustworthiness" similar to or exceeding the guarantees of the Supreme Court's recognized exceptions to the Confrontation Clause: dying declarations[96] and an unavailable witness's former trial[97] and preliminary hearing[98] testimony. Dying declarations contain none of the guarantees of reliability present when courts use the procedural and corroborative tests to admit grand jury testimony as substantive evidence at

---

93 *See Roberts*, 448 U.S. at 74 ("The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.") (quoting California v. Green, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring)).

The Court has required that the prosecutor make only a minimal effort to obtain the witness's presence at trial. For example, in *Roberts*, the prosecutor's sole effort to locate the witness was to issue five subpoenas to the witness's parents' home, three of which were issued after the prosecutor learned that the witness no longer lived with her parents. 448 U.S. at 79 (Brennan, J., dissenting). Although possible leads to the witness's whereabouts existed, *id.* at 81, the Court held that the prosecution had not breached its duty to make a good-faith effort. *Id.* at 75.

Similarly, in Mancusi v. Stubbs, 408 U.S. 204, 209 (1972), the State sent one subpoena to the witness's former residence and then relied wholly upon the witness's son's testimony that the witness had moved to Sweden. Although the State made no other effort to secure the witness's presence, *id.* at 220 (Marshall, J., dissenting), the Court held that the State had adequately established the unavailability of the witness. *Id.* at 212.

The Court distinguished the situations in *Roberts* and *Mancusi* from Barber v. Page, 390 U.S. 719 (1968). *See Roberts*, 448 U.S. at 76-77; *Mancusi*, 408 U.S. at 210-12. In *Barber*, the prosecutor knew the exact location of the witness (in an adjacent state's federal penitentiary), standard procedures existed to allow the prosecutor to bring the witness to trial (the federal writ of habeas corpus *ad testificandum*, *see* 28 U.S.C. § 2241(c)(5) (1976), and the established practice of the United States Bureau of Prisons to honor state writs of habeas corpus *ad testificandum*), and the witness was not in a position to frustrate prosecutorial efforts to secure the witness's presence at trial (the witness was incarcerated). *Barber*, 390 U.S. at 723-24.

94 Courts cannot merely infer that grand jury testimony admitted under 804(b)(5) is reliable under the Supreme Court's confrontation test because Rule 804(b)(5) is not a "firmly rooted hearsay exception." United States v. Barlow, 693 F.2d 954, 964 (6th Cir. 1982) (quoting *Roberts*, 448 U.S. at 66).

95 *See supra* text accompanying notes 71-72.

96 Pointer v. Texas, 380 U.S. 400, 407 (1965); Mattox v. United States, 156 U.S. 237, 243-44 (1895).

97 Mancusi v. Stubbs, 408 U.S. 204 (1972); Mattox v. United States, 156 U.S. 237 (1895).

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

trial.[99] Although former trial or preliminary hearing testimony contains the same procedural reliability guarantees as grand jury testimony admitted under 804(b)(5), the trial or preliminary hearing testimony is not necessarily corroborated by independent evidence.[100] Because use of the procedural and corroborative tests would ensure that the grand jury testimony meets both the "equivalent circumstantial guarantees of trustworthiness" requirement of 804(b)(5) and the "particularized guarantees of trustworthiness" standard of the Confrontation Clause, federal courts would not have to make a separate Confrontation Clause determination when admitting an unavailable witness's grand jury testimony under 804(b)(5).

Furthermore, the use of the procedural and corroborative tests would serve two additional purposes of confrontation: first, to impress upon the witness the seriousness of the matter and to guard against the

---

[99] *See supra* text accompanying notes 71-74. The Supreme Court has noted that dying declarations are reliable because "certain expectation of almost immediate death will remove all temptation to falsehood." Mattox v. United States, 146 U.S. 140, 152 (1892). Many commentators have challenged the reliability of dying declarations, however. The desire for revenge, self-exoneration, or to protect loved ones may continue until the moment of death. The declarant's physical or mental state at the time of impending death may impair the declarant's faculties of perception, memory, or communication. Moreover, the declarant may have made the statement in response to the prompting and questioning of interested bystanders such as policemen, insurance agents, or investigators. *See* 4 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 804(b)(2)[01] at 804-81; Quick, *Some Reflections on Dying Declarations*, 6 HOW. L.J. 109, 111-12 (1960); Note, *Dying Declarations*, 46 IOWA L. REV. 375, 376 (1961).

McCormick characterizes dying declarations as the hearsay exception "most mystical in its theory and traditionally the most arbitrary in its limitations." C. MCCORMICK, *supra* note 1, at § 281. The House Committee on the Judiciary "did not consider dying declarations as among the most reliable forms of hearsay." H.R. REP. NO. 650, 93rd Cong., lst Sess. 15, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7089.

[100] *See supra* text accompanying notes 71-74. Defense counsel, however, may have cross-examined a former trial witness or preliminary hearing witness. Although Wigmore characterized cross-examination as "the greatest legal engine ever invented for the discovery of truth," 5 J. WIGMORE, *supra* note 1, at § 1367, cross-examination contains error-producing hazards.

> It is, in truth, quite doubtful whether it is not the honest but weak or timid witness, rather than the rogue, who most often goes down under the fire of cross-examination. . . . Cross-examination, it is submitted, should be considered as useful but not indispensable as an agency of discovering truth, and absence of opportunity to cross-examine should only be one factor to be weighed in determining whether the statement or testimony should be received.

C. MCCORMICK, *supra* note 1, at § 31.

The Supreme Court noted in *United States v. Wade* that "even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability." 388 U.S. 218, 235 (1967); *see also* United States v. Balano, 618 F.2d 624, 628 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980)(" 'The Supreme Court has never intimated [,however,] that cross-examination is the only means by which prior recorded testimony may be qualified for admission under the Confrontation Clause.' " (quoting United States v. West, 574 F.2d 1131, 1137 (4th Cir. 1978))).

lie,[101] and second, to maintain the "accuracy of the truth-determining process."[102] The procedural test and the inherent guarantees of reliability of grand jury testimony[103] would satisfy the first purpose by requiring that grand jury witnesses testify under oath, in a formal judicial setting, subject to penalties for perjury, and in conformance with trial evidentiary rules. The corroborative test would satisfy the second purpose by requiring that independent evidence exist to support the truth of the grand jury testimony. The Fourth Circuit Court of Appeals has held that sufficient corroboration alone provides grand jury testimony with adequate "indicia of reliability" to satisfy the Confrontation Clause.[104]

Irrespective of the use of the procedural and corroborative tests, the requirements of 804(b)(5) should satisfy the Supreme Court's confrontation test for two additional reasons. First, although the drafters of the Federal Rules of Evidence explicitly avoided codifying constitutional principles,[105] the 804(b)(5) requirements and the Supreme Court's confrontation test are strikingly similar. Both 804(b)(5) and the confrontation test require prosecutors to make a reasonable effort to secure the witnesses' presence at trial.[106] Both 804(b)(5) and the confrontation test also contain similar standards of reliability. While the confrontation test requires that the statement contain "particularized guarantees of trustworthiness,"[107] 804(b)(5) requires that the statement contain "equivalent circumstantial guarantees of trustworthiness."[108] If strictly followed, the 804(b)(5) requirements may even be more stringent than the Supreme Court's confrontation test because 804(b)(5) also requires that the statement be evidence of a material fact, that the statement be

---

101 The Confrontation Clause ensures reliability by requiring "that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." *Roberts*, 448 U.S. at 64 n.6 (quoting California v. Green, 399 U.S. 149, 158 (1970)).

102 Dutton v. Evans, 400 U.S. 74, 89 (1970).

103 *See supra* text accompanying notes 21-23.

104 *See* United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. West, 574 F.2d 1131 (4th Cir. 1978); *see also* United States v. Mastrangelo, 533 F. Supp. 380, 391 (E.D.N.Y.), *remanded on other grounds*, 693 F.2d 269 (2d Cir. 1982) (corroborated grand jury testimony passes the Supreme Court's two-part confrontation test).

105 S. REP. NO. 1277, 93rd Cong., 2d Sess. 22, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7068; Advisory Committee's Notes, *supra* note 22, at 292. The Senate report noted that "the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise." S. REP. NO. 1277 at 22, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 7068.

106 *See supra* notes 91-93 and accompanying text.

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

108 FED. R. EVID. 804(b)(5).

more probative on the point for which it is offered than any other evidence readily obtainable, that the purposes of the Federal Rules of Evidence and the interests of justice be served by the admission of the statement, and that the proponent of the statement give the adverse party timely notice of the proponent's intention to admit the statement under 804(b)(5).[109]

Second, as the Fifth Circuit Court of Appeals has noted, the 804(b)(5) requirements satisfy the Supreme Court's confrontation test by definition.[110] A court may not admit evidence under 804(b)(5) unless the evidence contains "circumstantial guarantees of trustworthiness" equivalent to the trustworthiness of other 804(b) hearsay exceptions.[111] The Supreme Court has stated that two 804(b) hearsay exceptions, former testimony (804(b)(1)) and dying declarations (804(b)(2)), are also exceptions to the Confrontation Clause.[112] Because evidence admitted under 804(b)(5) must contain guarantees of trustworthiness equivalent to the trustworthiness of dying declarations and former testimony, and dying declarations and former testimony contain sufficient "indicia of reliability" to pass Confrontation Clause standards, evidence admitted under 804(b)(5) should automatically satisfy Confrontation Clause standards.

B. IMPLEMENTING THE PROCEDURAL AND CORROBORATIVE TESTS

The procedural and corroborative tests would be easy for federal judges to implement. Pursuant to Rule 104,[113] United States District

---

109 *Id.* The Sixth Circuit Court of Appeals has acknowledged that "many of the 'particularized guarantees of truthworthiness' required by *Roberts* are ensured by the threshold [Rule 804(b)(5)] evidentiary question." United States v. Barlow, 693 F.2d 954, 965 n.10 (6th Cir. 1982). Furthermore, "there are occasions, such as in the instant case, in which the rules of evidence provide more than enough protection for the defendant and no confrontation issue is actually present." *Id.* In *Barlow*, the defendant was charged with stealing fur garments. The defendant claimed that he was with his girlfriend at the time of the theft. The defendant's girlfriend testified before the grand jury that she had not seen the defendant for approximately three and one-half hours during the night of the theft. The government introduced the girlfriend's grand jury testimony at trial under Rule 804(b)(5). The girlfriend was unavailable at the trial because she had married the defendant in the interim and had exercised her marital privilege not to testify. *Id.* at 956-57. The court held that the circumstances surrounding the grand jury testimony satisfied both the Rule 804(b)(5) and the Confrontation Clause requirements. *Id.* at 963, 965. The court noted that the girlfriend had no motive to implicate the defendant, she testified from personal knowledge, and other testimonial and physical evidence allowed the trier of fact to infer that the defendant had participated in the fur theft. *Id.* at 962.

110 United States v. Thevis, 665 F.2d 616, 628-29 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982).

111 FED. R. EVID. 804(b)(5).

112 *See supra* notes 83-85 and accompanying text.

113 *See* FED. R. EVID. 104(a) and 104(c); *see also* FED. R. CRIM. P. 12(b)(3) and 57(b). The Advisory Committee's Notes to Rule 104(a) state that the trial judge is to determine the

Court judges routinely hold evidentiary hearings before trial to decide whether to admit evidence under Rule 804(b)(5).[114] Because Rule 804(b)(5) requires the proponent of the hearsay evidence to give the adverse party timely notice of the proponent's intention to offer the evidence under Rule 804(b)(5),[115] the trial judge has the opportunity to apply the procedural and corroborative tests to the grand jury testimony at the pre-trial evidentiary hearing.[116]

To implement the procedural test, the trial judge may treat the grand jury transcript as a deposition and strike the portions of the testimony elicited through violations of trial evidentiary rules.[117] The judge may wish to permit the adverse party to examine the grand jury transcript and insert appropriate evidentiary objections. The trial judge then may rule on the objections at the evidentiary hearing.[118]

The trial judge must also determine whether independent evidence adequately corroborates the grand jury testimony. The proponent of the grand jury testimony should present the corroborative evidence before the trial judge at the evidentiary hearing.[119] The sufficiency of the corroboration is a matter best left solely to the discretion of the trial judge because the corroborative evidence will vary from case to case.[120]

---

admissibility of evidence. Advisory Committee's Notes, *supra* note 22, at 197; *see* United States v. Walker, 696 F.2d 277, 281 (4th Cir. 1982) ("The technical requirements of Rule 804(b)(5) and the Confrontation Clause are concerns of the judge and not the jury."); C. MCCORMICK, *supra* note 1, at § 53; 1 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 104[06], at 104-45 ("The trial judge has primary responsibility under Rule 104(a) for determining those circumstances which offer adequate assurance of accuracy and which therefore justify admission of evidence.").

114 *See* United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); United States v. West, 574 F.2d 1131, 1134 (4th Cir. 1978); United States v. Carlson, 547 F.2d 1346, 1353 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); United States v. Mastrangelo, 533 F. Supp. 389 (E.D.N.Y.), *remanded on other grounds*, 693 F.2d 269 (2d Cir. 1982); United States v. Turner, 475 F. Supp. 194, 196 (E.D. Mich. 1978).

115 *See supra* note 9.

116 4 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 803(1)[01], at 803-68: "The pretrial conference affords an excellent opportunity for bringing the matter [the admissibility of evidence] to the Court's attention, permitting it to require briefs where needed and to rule on the issue before trial."

117 *See* FED. R. CRIM. P. 15(e):

> At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition.

118 *See, e.g.*, United States v. Murphy, 696 F.2d 282, 285 (4th Cir. 1982), where the government supplied defense counsel with a copy of the grand jury testimony and counsel discussed the admissibility problems with the trial judge before the trial.

119 *See* 4 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 804(b)(3)[03], at 804-104.

120 7 J. WIGMORE, *supra* note 1, at §§ 2059, 2062; *see supra* text accompanying notes 41-46. In United States v. Barlow, 693 F.2d 954, 962 (6th Cir. 1982), the Sixth Circuit Court of Appeals suggested that the degree of corroboration should vary depending upon the purpose for which the grand jury testimony is offered. Corroboration need not be great when the

Thus, the pre-trial evidentiary hearing allows the trial judge to implement both the procedural and corroborative tests and rule on the admissibility of the grand jury testimony under 804(b)(5) without disrupting or delaying the criminal trial.

C. THE TWO TESTS AND THE LEGISLATIVE HISTORY OF RULE 804(b)(5)

The procedural and corroborative tests are consistent with the legislative intent of Rule 804(b)(5) and the spirit of the Federal Rules of Evidence.[121] The drafters of the federal rules intended for courts to use Rule 804(b)(5) rarely, and only in exceptional circumstances.[122] Furthermore, the drafters did not intend to give trial judges unfettered discretion to create new categories of hearsay exceptions such as a new exception for grand jury testimony.[123]

---

testimony is offered for a limited purpose such as refuting a defendant's alibi. Courts should require a high degree of corroboration, however, when the grand jury testimony is offered as direct evidence of criminal activity. *Id.*

Nevertheless, a too strict corroboration standard would destroy the utility of admitting grand jury testimony under Rule 804(b)(5). *See supra* notes 59-60 and accompanying text. Perhaps "[t]he court should only ask for sufficient corroboration to 'clearly' permit a reasonable man to believe that the statement might have been made in good faith and that it could be true." 4 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 804(b)(3)[03], at 804-104.

121 Rule 804(b)(5) originated in the Supreme Court's proposed draft of the Federal Rules of Evidence. Advisory Committee's Notes, *supra* note 22. The Supreme Court favored a broad residual hearsay exception to promote the "growth and development of the law of evidence in the hearsay area." *Id.* at 320.

The United States House of Representatives deleted the proposed residual hearsay exception because such a broad exception would inject too much uncertainty into the law of evidence, thereby hindering an attorney's ability to prepare for trial. H.R. REP. NO. 650, 93rd Cong., lst Sess. 6, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7079.

The Senate reinstated the residual hearsay exception. Without a residual hearsay exception, the Senate feared that courts, in order to admit reliable hearsay into trial, would stretch existing hearsay exceptions beyond their intended scope. S. REP. NO. 1277, 93rd Cong., 2d Sess. 19, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7065. In addition, the Senate wanted to provide for the admission into evidence of reliable non-excepted hearsay in exceptional cases. *Id.*

The Conference Committee adopted the Senate's version of the residual hearsay exception but added a notice requirement. H.R. CONF. REP. NO. 1597, 93rd Cong., 2d Sess. 13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098, 7106. For a compilation of the legislative history of the Federal Rules of Evidence, see ALI-ABA COURSE OF STUDY: PRACTICE UNDER THE NEW FEDERAL RULES OF EVIDENCE (1975); WEINSTEIN'S EVIDENCE, *supra* note 22, vols. 1-5.

122 S. REP. NO. 1277 at 20, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7066. For an example of a case in which the residual hearsay exception would apply, see S. REP. NO. 1277 at 19, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 7065-66 (citing Dallas County v. Commercial Union Ass'n, Co., Ltd., 286 F.2d 388 (5th Cir. 1961) (fifty-six-year-old newspaper article admitted under general principles of trustworthiness as substantive evidence of a previous fire in a courthouse)).

123 S. REP. NO. 1277 at 20, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7066: "The committee does not intend to establish a broad license for trial judges to admit hearsay

Because grand jury testimony is neither rare nor exceptional,[124] admitting all grand jury testimony at trial would be a major judicial revision of the hearsay rule.[125] The drafters of 804(b)(5), however, intended that only Congress would have the power to substantially revise the federal rules.[126] Thus, the drafters intended for courts to use a case-by-case approach when admitting hearsay under 804(b)(5).[127]

The procedural and corroborative tests would be consistent with the drafters' restrictive case-by-case approach to Rule 804(b)(5). The tests would permit courts to admit grand jury testimony at trial under 804(b)(5) only when the testimony conforms with trial evidentiary rules and independent evidence adequately corroborates the testimony. The trial judge would have to decide whether the grand jury testimony passes both the procedural and corroborative tests based upon the circumstances of each case. Depending upon prosecutors' willingness to conform to trial evidentiary rules in grand jury proceedings and upon trial judges' standards of corroboration, grand jury testimony may satisfy both tests only in rare and exceptional cases.

Finally, the procedural and corroborative tests are consistent with the spirit of the Federal Rules of Evidence. The purpose of the federal rules is to promote the growth and development of the law of evidence so as to ascertain the truth and justly determine proceedings.[128] Although grand jury testimony is hearsay, the drafters' flexible approach

---

statements that do not fall within one of the other exceptions contained in rules 803 and 804(b)." The Advisory Committee's Notes to the proposed Federal Rules of Evidence state that the residual hearsay exceptions "do not contemplate an unfettered exercise of judicial discretion, but they do provide for new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." Advisory Committee's Notes, *supra* note 22, at 320; *see also* 4 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 804(b)(5)[01], at 804-126 ("Rule 804(b)(5) should not become an automatic formula for introducing uncross-examined grand jury statements or other statements of dubious reliability which do not meet the requirements of other hearsay exceptions.").

124 United States v. Thevis, 665 F.2d 616, 629 (5th Cir.), *cert. denied*, 102 S. Ct. 2300 (1982). In the federal judicial system, no person may be brought to trial for a felony unless first indicted by a grand jury: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." U.S. CONST. amend. V.

The use of grand juries is less prevalent in the states, however. Twenty-two states require grand jury indictments in felony cases, three states require grand jury indictments only when the crime is punishable by death or life imprisonment, and 25 states give the prosecutor the choice whether to seek a grand jury indictment or file an information charging the defendant with the crime. FRANKEL, THE GRAND JURY, *supra* note 17, at 3, 16 (1977 data). Prosecutors seldom seek grand jury indictments in those states that give the prosecutor a choice. *Id.*

125 *Thevis*, 665 F.2d at 629.

126 *Id.*; S. REP. NO. 1277 at 20, *reprinted in* U.S. CODE CONG. & AD. NEWS 7051, 7066.

127 *See* 1 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 102[01], at 102-9.

128 FED. R. EVID. 102: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of

to the rules of evidence encourages courts to admit reliable hearsay at trial if it is the best evidence available.[129] The procedural and corroborative tests would ensure that courts admit only reliable grand jury testimony under 804(b)(5). Thus, the two tests would further the ascertainment of truth by providing the jury with additional reliable evidence to better enable them to arrive at a "just" verdict.

V. CONCLUSION

Federal judges should use two tests to determine the reliability of an unavailable witness's grand jury testimony under Rule 804(b)(5). Use of the procedural test would protect defendants from unreliable grand jury testimony containing inadmissible hearsay or elicited through leading questions or prosecutorial threats. Use of the corroborative test would ensure that independent evidence supports the truth of any grand jury testimony admitted under 804(b)(5).

The two tests would ensure that grand jury testimony admitted at trial under 804(b)(5) contains "circumstantial guarantees of trustworthiness" equivalent to other 804(b) hearsay exceptions. The tests also would ensure that grand jury testimony admitted at trial under 804(b)(5) does not violate the defendant's sixth amendment right of confrontation. Finally, the tests would contribute to the growth of the law of evidence by permitting the jury to consider reliable grand jury testimony as substantive evidence in its determination of the defendant's innocence or guilt.

PATRICK S. CASEY

---

the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

129 1 WEINSTEIN'S EVIDENCE, *supra* note 36, ¶ 102[01], at 102-5 to 102-16; Advisory Committee's Notes, *supra* note 22, at 289 (the relevant text of which is at *supra* note 74), 323 (Rule 804(b)(5) "expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant"); *see* 5 J. WIGMORE, *supra* note 1, at § 1420.