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# The Unavailability Requirements of Rule 804(a) of the Federal Rules of Evidence

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# THE UNAVAILABILITY REQUIREMENTS OF RULE 804(a) OF THE FEDERAL RULES OF EVIDENCE

## I. INTRODUCTION

The Federal Rules of Evidence provide twenty-nine separate exceptions[1] to the general rule that hearsay is inadmissible into evidence at trial.[2] The first twenty-four are embodied in rule 803, and apply regardless of the availability of the declarant.[3] The remaining five — former testimony, dying declarations, statements against interest, statements of pedigree, and "other exceptions"[4] — are set out in rule 804(b), and apply only when the declarant is "unavailable."[5]

The standards for determining unavailability under the Federal Rules are set out in rule 804(a).[6] There are five situations in which the witness will be considered unavailable — when the witness has a valid privilege not to testify, refuses to testify, claims lack of memory, is dead or unable to testify due to illness, or is absent and the proponent of his statement has been unable to secure his attendance.[7] A witness will not be considered unavailable, however, if the proponent of his statement has procured his absence for the purpose of preventing him from testifying.[8]

Although the Federal Rules of Evidence have been in effect since 1975, there have to date been relatively few reported decisions

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1. FED. R. EVID. 803, 804(b). North Dakota has adopted rules 803 and 804 nearly verbatim from the Federal Rules, with minor alterations in rules 803(22) and 804(b)(2), (3), (4), and (5). N.D.R. EVID. 803, 804. Rule 804(a) of the North Dakota Rules, setting out the unavailability requirements, is identical to the corresponding federal rule. N.D.R. EVID. 804(a).
2. FED. R. EVID. 802.
3. FED. R. EVID. 803.
4. FED. R. EVID. 804(b).
5. FED. R. EVID. 804.
6. FED. R. EVID. 804(a).
7. *Id.*
8. *Id.*

which have extensively discussed the unavailability requirements of rule 804(a).[9] The cases which have been decided, however, provide invaluable assistance in assessing the scope of the unavailability requirements. The purpose of this Note will be to outline the general scope of the unavailability requirements of rule 804(a), with particular emphasis placed on court decisions which have focused on specific problem areas encountered under the rules.

It should be noted that the confrontation clause of the sixth amendment to the United States Constitution[10] comes into play in any criminal case in which an unavailable witness's prior statement is offered as evidence of a material fact against a defendant.[11] The United States Supreme Court has noted that, although the hearsay rules and confrontation clause generally protect similar values, their reach is not co-extensive:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.[12]

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9. It should also be noted that the drafters' comments and advisory committee notes to rule 804(a) provide little guidance in determining the scope and applicability of the unavailability requirements. These comments and notes, so far as they are of assistance, are discussed below in the context of specific unavailability requirements.

10. "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

11. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804-34 (1979) [hereinafter cited as WEINSTEIN]. Justice Harlan, however, has suggested that the confrontation clause may not apply at all when the witness is unavailable: "[T]he Confrontation Clause of the Sixth Amendment reaches no further than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial." California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) (emphasis in original). Several commentators have suggested that the Supreme Court adopt Justice Harlan's theory. *See, e.g.*, 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, 41-42 (1973). The Court, however, has not as yet embraced this theory, and, in fact, Justice Harlan himself has repudiated his earlier position. *See* Dutton v. Evans, 400 U.S. 74, 94-96 (1970) (Harlan, J., concurring).

12. California v. Green, 399 U.S. 149, 155-56 (1970).

The general conflict between the confrontation clause and the hearsay rules will not be discussed in detail in this note.[13] Confrontation problems applicable to specific unavailability requirements under the Federal Rules, however, will be addressed.

## II. DEVELOPMENT OF THE UNAVAILABILITY REQUIREMENTS

It is helpful, prior to discussing in-depth the specific unavailability requirements of the Federal Rules, to note the historical development of the hearsay rule and the unavailability requirements at common law. Hearsay evidence has been defined as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[14] Such evidence is inadmissible unless it falls within a recognized exception to the general rule excluding hearsay.[15] There are three reasons generally advanced for excluding hearsay evidence: "the statement may not have been made under oath; the declarant may not have been subjected to cross-examination when he made the statement; and the jury cannot observe the declarant's demeanor at the time he made the statement."[16]

Several of the exceptions to the hearsay rule which developed at common law required as a prerequisite that the declarant be unavailable as a witness at trial.[17] The requirement of unavailability has been interpreted to be a rule of preference:

> When unavailability of the declarant is made a condition precedent to admitting his hearsay statement, a rule of preference is in fact being stated. His personal presence in court, under oath and subject to cross-examination, would be preferred. If, however, that

13. For a more complete discussion of the conflict between the admission of hearsay evidence and the confrontation clause, see Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978); Jaffe, *The Constitution and Proof By Dead or Unconfrontable Declarants*, 33 ARK. L. REV. 227, 236-260 (1979); 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).

14. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 246, at 584 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

15. *Id.* § 325, at 751.

16. California v. Green, 399 U.S. 149, 154 (1970).

17. MCCORMICK, *supra* note 14, § 253, at 608.

> cannot be had, then his hearsay statement falling within the particular hearsay exception, although admittedly inferior, is still to be preferred over doing entirely without evidence from that source. Thus the group of hearsay exceptions where unavailability is required are in a sense second class in comparison with the far larger number of exceptions where availability or unavailability is simply not a factor.[18]

The generally recognized forms of unavailability at common law were death, absence, physical disability, mental incapacity, failure of memory, exercise of privilege, refusal to testify, and supervening disqualification.[19] Historically, the requirements for unavailability for certain hearsay exceptions were developed in connection with each particular exception to the hearsay rule.[20] As a result, the requisites of unavailability varied depending upon the particular exception invoked.[21]

Only recently has there been a move toward adopting a uniform standard of unavailability for all hearsay exceptions which require unavailability.[22] The Federal Rules recognize privilege, refusal to testify, lack of memory, death or infirmity, and absence as instances in which the declarant is "unavailable."[23] These standards apply uniformly to all of the exceptions which require unavailability as a prerequisite.[24]

Although the federal rule speaks of the unavailability of the *declarant,* commentators and courts have pointed out that the critical factor is the unavailability of the declarant's *testimony.*[25] Obviously, if the declarant, in court, exercises a privilege or refuses to testify, he is present at trial; nevertheless, the unavailability of his *testimony* satisfies the requirement.

Under the Federal Rules, the burden of establishing the witness's unavailability is on the party seeking to introduce the prior statements.[26] Various federal courts have also stated that the

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18. *Id.*
19. *Id.* at 609-12.
20. *Id.* at 608.
21. For example, some jurisdictions required the declarant to be dead to satisfy the unavailability requirement when introducing declarations against interest. *Id.* § 280, at 678. Similarly, only death satisfied the unavailability requirement when dying declarations were offered as evidence. *Id.* § 282, at 681.
22. *Id.* § 253, at 608; WEINSTEIN, *supra* note 11, at 804-33.
23. FED. R. EVID. 804(a).
24. *Id.*
25. *See* MCCORMICK, *supra* note 14, § 253, at 608; WEINSTEIN, *supra* note 11, at 804-33; Mason v. United States, 408 F.2d 903, 906 (10th Cir. 1969), *cert. denied,* 400 U.S. 993 (1971).
26. *See, e.g.,* United States v. Amaya, 533 F.2d 188, 191 (5th Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977); United States v. Lynch, 499 F.2d 1011, 1022 (D.C. Cir. 1974).

trial court's determination of unavailability will only be reversed if there has been abuse of discretion.[27]

The preceding material provides a context within which the unavailability requirements of the Federal Rules may be discussed. The following is a rule-by-rule discussion of the various forms of unavailability which are recognized in the Federal Rules.

## III. RULE 804(a)(1)—PRIVILEGE

Rule 804(a)(1) provides that a declarant will be unavailable when he "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement."[28] The rule requires that the declarant assert a recognized privilege and that the court rule on this assertion. The rule is most commonly invoked by claims of spousal immunity or the privilege against self-incrimination.[29]

### A. REQUIREMENT OF ASSERTION OF THE PRIVILEGE AND RULING BY THE COURT

Rule 804(a)(1) provides that a witness will be unavailable if "exempted by ruling of the court."[30] This implies that the declarant must first assert the privilege in court and that the court must rule that the declarant or his testimony is in fact privileged. Recent federal court decisions have expressly recognized these requirements.

In *United States v. Pelton*,[31] a defendant attempted to introduce into evidence the prior grand jury testimony of a witness.[32] Defendant's counsel contended that the witness was unavailable under rule 804(a)(1) because the witness's attorney had indicated that he would advise his client to invoke her privilege under the fifth amendment and refuse to testify.[33] The United States Court of Appeals for the Eighth Circuit, noting that the burden of producing an unavailable declarant is upon the proponent of the evidence,[34]

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27. *See, e.g.*, United States v. Amaya, 533 F.2d 188, 191 (5th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977); United States v. Bell, 500 F.2d 1287, 1290 (2d Cir. 1974).

28. FED. R. EVID. 804(a)(1). This rule is in accord with previous practice in the federal courts. *See, e.g.*, United States v. Elmore, 423 F.2d 775, 778 (4th Cir.), *cert denied*, 400 U.S. 825 (1970); United States v. Allen, 409 F.2d 611, 613 (10th Cir. 1969).

29. *See* WEINSTEIN, *supra* note 11, at 804-35.

30. FED. R. EVID. 804(a)(1).

31. 578 F.2d 701 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978).

32. United States v. Pelton, 578 F.2d 701, 709 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978).

33. *Id.*

34. *Id.*

held that the defendant had failed to establish that the witness would in fact invoke her fifth amendment privilege and thus be unavailable to testify.[35] The court concluded that, without a first-hand, in-court assertion of privilege, the trial court had only a speculative basis for determining whether the witness was available.[36] The decision in *Pelton* indicates that rule 804(a) (1) requires an in-court assertion of the privilege by the declarant and a ruling by the court.

Other federal courts have, in dicta, discussed the requirement of an in-court assertion of the privilege and a ruling by the court. In *United States v. Oropeza,*[37] the United States Court of Appeals for the Ninth Circuit noted that the declarant had indicated that he would assert his privilege against self-incrimination if called to testify, although he never expressly asserted the privilege.[38] The court stated that, "[b]ecause the rule requires a finding of unavailability, an express claim of privilege and a ruling thereon should be made."[39] Similarly, in *United States v. Mangan,*[40] the United States Court of Appeals for the Second Circuit stated that rule 804(a) (1) "requires a ruling from the court that the desired testimony is privileged."[41]

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35. *Id.* at 709-10.

36. *Id.* The court stated:

> Our review of the record convinces us that Rich utterly failed to carry this burden. Counsel for Rich made no effort to produce Waggoner, whom he had subpoenaed, and to demonstrate first-hand and in the court's presence that she did intend to refuse to testify in reliance on her fifth amendment privilege against self-incrimination. Rather, he chose to raise the issue of her privilege in an extenuated and circuitous manner which gave the court nothing more than a speculative basis for determining whether she was available. Rich's proof that Waggoner was unavailable under Rule 804(a)(1) was that Waggoner's attorney had said that he was going to advise Waggoner not to testify. There was no indication that Waggoner had in fact been so advised or that, if she had been, she had decided to exercise her privilege. We consider Rich's suggestion, that Waggoner might in the future be advised of and then choose to exercise her fifth amendment privilege, to be a wholly inadequate showing of unavailability under Rule 804(a)(1). The trial court did not err in refusing, on this speculative basis, to allow Rich to introduce into evidence the transcript of Waggoner's testimony before the grand jury.

*Id.* (footnote omitted).

37. 564 F.2d 316 (9th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978).

38. United States v. Oropeza, 564 F.2d 316, 325 n.8 (9th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978).

39. *Id.* The issue of unavailability apparently had not been raised by the parties in this case. The court in a footnote raises the issue, noting that there was some question as to the declarant's unavailability, but stated that it would assume the declarant's unavailability for the purpose of reaching the merits in the case. *Id.*

40. 575 F.2d 32 (2d Cir.), *cert. denied,* 439 U.S. 931 (1978).

41. United States v. Mangan, 575 F.2d 32, 45 n.14 (2d Cir.), *cert. denied,* 439 U.S. 931 (1978). The court discussed rule 804(a)(1) only in explaining why it was not invoking one of the rule 804(b) exceptions. The court noted that, because there had been no ruling by a court that the declarant's testimony was privileged, he was not unavailable, and his prior statements were not admissible as statements against interest under rule 804(b)(3). *Id.*

In one federal case, however, the court apparently reached the conclusion that it may be proper to find a declarant unavailable even though he has not expressly asserted a privilege. In *Lowery v. Maryland,*[42] petitioner sought to introduce the sworn affidavit of a witness who had testified against him at his earlier murder trial. In the affidavit, the witness stated that he had testified falsely at the earlier trial due to police pressure.[43] The witness failed to appear at a scheduled hearing, and the State objected to introduction of his affidavit.[44] The court noted that the witness did have a valid fifth amendment privilege, although he had not appeared in court to assert his privilege.[45] The court apparently held that the mere fact that he had a valid privilege was sufficient to support a determination that he was unavailable under rule 804(a) (1).[46]

It appears that the better rule, as set out in *Pelton,* is to require an express assertion of the privilege and a ruling by the court before finding a declarant unavailable under rule 804(a) (1). Allowing a trial court to determine unavailability without an express assertion of privilege by the declarant renders its decision speculative at best. Requiring an in-court assertion of the privilege provides positive proof that the declarant's testimony is in fact unavailable. Because the declarant's presence at trial and in-court testimony is preferred over his out-of-court prior statements,[47] the courts should require a strong showing that the declarant is actually unavailable before admitting his earlier statements. A speculative determination that the declarant would assert his privilege if called to testify does not provide a sufficiently strong showing of unavailability to allow into evidence his earlier statements.

The import of the federal court decisions is that the privilege must be expressly asserted in court, and the court must rule on the assertion. The Advisory Committee's Note to rule 804 lends further support to this conclusion: "A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made."[48] If the declarant, after asserting the privilege, is found to have a valid privilege, he is unavailable under rule 804(a) (1). Failure to comply with these requirements renders the

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42. 401 F. Supp. 604 (D. Md.), *aff'd,* 532 F.2d 750 (4th Cir. 1975), *cert. denied,* 429 U.S. 919 (1976).

43. Lowery v. Maryland, 401 F. Supp. 604, 605 (D. Md.), *aff'd* 532 F.2d 750 (4th Cir. 1975), *cert. denied,* 429 U.S. 919 (1976).

44. *Id.* at 605-06.

45. *Id.* at 606.

46. *Id.*

47. MCCORMICK, *supra* note 14, § 253, at 608.

48. FED. R. EVID. 804 (Advisory Committee's Note), *quoted in* WEINSTEIN, *supra* note 11, at 804-16. *See also* WEINSTEIN, *supra* note 11, at 804-35.

declarant available under rule 804(a) (1), although he may still be found unavailable under a different rule.[49]

### B. PRIVILEGE AGAINST SELF-INCRIMINATION

It has been generally recognized that a declarant who asserts a valid fifth amendment claim will be considered unavailable under rule 804(a) (1).[50] Various federal courts, however, have recently more fully outlined the scope of the rule.

In *United States v. Rogers,*[51] the court indicated that one who has pleaded guilty on a charge relating to the incident which is in question will not be considered unavailable under rule 804(a) (1).[52] Although the court did not elaborate, it appears that this result is proper in light of the requirement that the assertion of privilege be valid. Because a guilty plea has been held to involve a simultaneous waiver of the privilege against self-incrimination,[53] it is clear that a declarant who has pleaded guilty to offenses arising out of the incident in question no longer has a valid privilege, and is not, therefore, unavailable under rule 804(a) (1). The court in *Rogers* noted, however, that if the declarant could be charged with another offense arising out of the same incident he may still have a valid fifth amendment privilege.[54] Taking into account the wide variety of offenses which might arise out of a given criminal transaction, particularly under federal law, it appears that in many cases the declarant will still have a valid privilege.

In *United States v. Lang,*[55] a defendant challenged the admissibility of prior statements of one of his accomplices.[56] The

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49. For example, if the witness refuses to testify after a ruling by the court that the claimed privilege is invalid, he may be declared unavailable under rule 804(a)(2). *See infra* notes 86-87 and accompanying text.

50. *See, e.g.*, United States v. Toney, 599 F.2d 787, 789 (6th Cir. 1979); Witham v. Mabry, 596 F.2d 293, 297 (8th Cir. 1979); United States v. Lang, 589 F.2d 92, 95 (2d Cir. 1978); United States v. Benveniste, 564 F.2d 335, 341 (9th Cir. 1977).

In one recent federal case, the defendant made the novel argument that a co-defendant who had asserted a valid fifth amendment privilege was not unavailable under rule 804(a)(1) because, "as a defendant,in a criminal trial, he [could] invoke his fifth amendment privilege without any exemption by ruling of the court." United States v. Zurosky, 614 F.2d 779, 792 (1st Cir. 1979), *cert. denied,* ____ U.S. ____, 100 S. Ct. 2945 (1980). Although noting that a ruling by the court is required, the court concluded that unavailability under the federal rule "includes the situation where a witness invokes his fifth amendment privilege against self-incrimination." *Id.*

51. 549 F.2d 490 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977).

52. United States v. Rogers, 549 F.2d 490, 498 n.8 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977).

53. Boykin v. Alabama, 395 U.S. 238, 243 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969).

54. 549 F.2d at 498 n.8. In *Rogers,* the declarant had pleaded guilty to robbery, but the court noted that he could also have been charged with illegal purchase of a firearm. *Id.* The court did not rule on whether this fact affected the declarant's privilege, however, because it was merely discussing in a footnote issues which were not raised by the parties. *Id.*

55. 589 F.2d 92 (2d Cir. 1978).

56. United States v. Lang, 589 F.2d 92, 95 (2d Cir. 1978).

accomplice had appeared in court and invoked a valid fifth amendement privilege.[57] The defendant contested the court's finding of unavailability, claiming that the prosecution had "procured" the declarant's unavailability by wrongfully refusing to grant the declarant immunity.[58] The court rejected the defendant's contention, noting that the Executive Branch's power to grant immunity is discretionary and no obligation exists on the part of the United States Attorney to seek such immunity.[59]

The court in *Lang* did note, however, that under a different fact situation such an argument might prevail. Citing an earlier federal decision[60] in which the witness initially had indicated her willingness to testify for the defendant but had been induced into invoking her fifth amendment privilege by continual, harrassing threats of prosecution made by an Assistant United States Attorney, the court recognized that in exceptional situations it may be proper for the trial court to require the prosecution to grant immunity to the witness.[61] The court in *Lang* went on to conclude, however, that no such prosecutorial misconduct existed in the instant case, and therefore the declarant's unavailability had not been procured by the prosecution.[62] The court apparently left open the question whether a failure to provide immunity in a case of blatant prosecutorial misconduct would constitute "procuring" the absence of the witness, thereby precluding a finding of unavailability and rendering the witness's earlier statements inadmissible.[63]

One court has noted that a declarant's unavailability under rule 804(a) (1) may be temporary. In *United States v. Henry,*[64] the court noted that, although the witnesses in question had already asserted their fifth amendment rights and had been declared unavailable by the trial court, their status as unavailable witnesses was "necessarily 'for the time being'; it is a potentially evanescent status."[65] Indicating that the witnesses could be subpoenaed again and thereafter might waive their fifth amendment rights or be granted immunity,[66] the court stated that "the ruling on

57. *Id.*
58. *Id.* The last sentence of rule 804(a) provides that a witness is not unavailable if his exemption is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from testifying. FED. R. EVID. 804(a).
59. 589 F.2d at 95-96.
60. United States v. Morrison, 535 F.2d 223 (3d Cir. 1976).
61. 589 F.2d at 96.
62. *Id.*
63. *Id.*
64. 448 F. Supp. 819 (D.N.J. 1978).
65. United States v. Henry, 448 F. Supp. 819, 821 (D.N.J. 1978).
66. *Id.*

'unavailability' was based on the facts as they stood then, and that the ruling might be different in the future if the facts changed."[67] The court's decision implies that trial courts must be aware of changing circumstances which might render a previously unavailable witness available.

The decisions which have discussed assertion of a self-incrimination privilege under rule 804(a) (1) have focused on the validity of the privilege and on wrong-doing by the proponent of the evidence to procure assertion of the privilege. In *Rogers,* the court stressed that a declarant who had waived his privilege by pleading guilty was no longer unavailable under rule 804(a) (1); in *Lang,* the court hinted that serious prosecutorial misconduct which procures the declarant's assertion of privilege might require court-ordered immunity. In discussing spousal immunity, the other frequently invoked privilege under rule 804(a) (1), similar questions of validity of the claim and procurement of assertion of the privilege will arise.

### C. SPOUSAL IMMUNITY

It has been generally recognized that a declarant's valid assertion of spousal immunity will render him unavailable under rule 804(a) (1).[68] Difficulties may arise, however, when the validity of the claim is called into question. In *United States v. Mathis,*[69] the defendant and the declarant had previously been divorced.[70] When the wife began cooperating with the authorities relating to her former husband's criminal activities, she was coerced into remarrying him by bribes, promises of custody of their child, and, finally, threats upon the lives of her child and herself.[71] At trial the wife exercised her right not to testify against her husband, and the trial court admitted her prior statements into evidence.[72] In concluding that the trial court had erred in admitting these statements, the United States Court of Appeals for the Fifth Circuit

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67. *Id.*

68. *See, e.g.,* United States v. Lilley, 581 F.2d 182 (8th Cir. 1978); United States v. Mathis, 559 F.2d 294 (5th Cir. 1977).

It should be noted, however, that the United States Supreme Court has recently limited the scope of spousal immunity in federal criminal trials. In Trammel v. United States, 445 U.S. 40 (1980), the Court held that a defendant in a federal criminal trial could not prevent his spouse from testifying against him. *Id.* at 53. The witness spouse, however, may still refuse to testify against the defendant spouse. *Id.* The Court also left intact the privilege for marital communications, which protects confidential communications between spouses. *Id.* at 51.

69. 559 F.2d 294 (5th Cir. 1977).

70. United States v. Mathis, 559 F.2d 294, 296 (5th Cir. 1977).

71. *Id.*

72. *Id.* at 296-97.

held that the witness was available.[73] Citing the well-established rule that the spousal privilege is invalid if the trial judge determines that the marriage was fraudulent, the court held that in the instant case the privilege was invalid, the witness was available, and therefore the witness should have been ordered to testify.[74]

## IV. RULE 804(a) (2) — REFUSAL

Rule 804(a) (2) provides that a declarant will be considered unavailable if he "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so."[75] Initially, the rule requires a court order directing the witness to testify. This requirement is clearly met when the witness is cited for contempt by the court for refusing to testify.[76]

In *United States v. Oliver,*[77] however, the United States Court of Appeals for the Second Circuit indicated that mere judicial pressure to testify, without an express order of the court to do so, may not satisfy the requirement.[78] In *Oliver,* the witness was advised by the trial court that he had no fifth amendment privilege not to testify, although he was never expressly ordered to testify.[79] The Court of Appeals, although noting that the trial court's denial of the witness's privilege claim constituted judicial pressure to testify, nevertheless refused to find the witness unavailable, concluding that a specific court order to testify "is an essential requisite to the invocation of Rule 804(a) (2)."[80]

One federal court, however, has apparently held that a court order is *not* required before a witness may be declared unavailable under rule 804(a) (2). In *Lowery v. Maryland,*[81] the court held that a declarant was unavailable, apparently under rule 804(a)(2), al-

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73. *Id.* at 298.

74. *Id.* The court stated that a refusal to testify after the court has declared the privilege invalid may render the witness unavailable under rule 804(a)(2), but noted that in this case the wife had indicated she would testify if compelled to do so. *Id.; see infra* notes 86-87 and accompanying text.

75. FED. R. EVID. 804(a)(2).

76. United States v. Gonzalez, 559 F.2d 1271, 1272-73 (5th Cir. 1977); United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977). In both of these cases the declarants had been granted immunity, and were cited for contempt when they persisted in refusing to testify. 559 F.2d at 1272-73; 547 F.2d at 1354. This result is in accord with previous practice in the federal courts. *See* Mason v. United States, 408 F.2d 903, 905 (10th Cir. 1969), *cert. denied,* 400 U.S. 993 (1971).

77. 626 F.2d 254 (2d Cir. 1980).

78. United States v. Oliver, 626 F.2d 254, 261 (2d Cir. 1980).

79. *Id.*

80. *Id.*

81. 401 F. Supp. 604 (D. Md.), *aff'd,* 532 F.2d 750 (4th Cir. 1975), *cert. denied,* 429 U.S. 919 (1976).

though he had not appeared in court to refuse to testify and the court had not ordered him to testify:

> Even if [declarant] is compelled to testify, he would still be considered unavailable as a witness if he has refused to do so, Fed.R.Evid. 804(a) (2), and [declarant's] attorney has indicated that [declarant] would refuse to testify even if compelled to do so. By any applicable theory, [declarant] is unavailable as a witness.[82]

In order to reach this result, the court in *Lowery* apparently disregarded the unambiguous language of rule 804(a) (2), which requires that the declarant persist in refusing to testify "despite an order of the court to do so."[83] In *Lowery,* the declarant had not even appeared in the courtroom; his attorney had merely indicated that, if compelled to do so, the declarant would refuse to testify.[84] Under these circumstances, a determination by the court that the declarant would indeed refuse to testify was speculative at best.[85] Furthermore, the end result in such cases would be that the witness, although present in the jurisdiction, would be allowed to avoid testifying without suffering any penalty whatsoever. If he fails to appear and his attorney advises the court that he will refuse to testify, the witness is declared unavailable without being subjected to a contempt charge. It is not difficult to imagine that many witnesses, given the opportunity to abstain from testifying with no sanctions imposed, would refuse to testify. The debilitating effect on the judicial process which would result is obvious.

Clearly the better rule is to require the declarant to appear and make his refusal to testify before the court. In this way it may be impressed upon the witness that he may face contempt charges if he continues to refuse to testify. If the witness continues his refusal even after being charged with contempt, the court's last resort is to declare the witness unavailable and to admit his earlier statements, provided they are admissible under one of the exceptions to the

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82. Lowery v. Maryland, 401 F. Supp. 604, 606 (D. Md.), *aff'd,* 532 F.2d 750 (4th Cir. 1975), *cert. denied,* 429 U.S. 919 (1976). It should be noted that the court recognized that the declarant may have had a valid claim of privilege, and apparently would have found him unavailable under rule 804(a)(1) also, although the defendant had not appeared in court to assert his privilege and the trial court had not ruled on the validity of the privilege. *Id.; see supra* notes 42-49 and accompanying text.

83. FED. R. EVID. 804(a)(2).

84. 401 F.Supp. at 606.

85. *Cf.* United States v. Pelton, 578 F.2d 701 (8th Cir.), *cert. denied,* 439 U.S. 964 (1978) (declarant's attorney's indication that his client would exercise fifth amendment privilege if called to testify insufficient to establish that declarant was unavailable under rule 804(a)(1)). *Pelton* is discussed *supra* at notes 31-36 and accompanying text.

hearsay rule set out in rule 804(b). The court is thereby giving full effect to the law's preference for live testimony, and accepting hearsay statements only if no other evidence on the subject matter is available. Finally, the language of the rule clearly contemplates a court order compelling the declarant to testify as a prerequisite to a finding of unavailability.

The United States Court of Appeals for the Fifth Circuit, in *United States v. Mathis,*[86] has indicated that a witness who erroneously asserts a privilege and refuses to testify may be declared unavailable under rule 804(a) (2).[87] It appears that, in certain circumstances, such a result is proper. If the declarant explicitly refuses to testify, even after a court ruling that his claimed privilege is invalid and a court order requiring that he testify, a finding of unavailability under rule 804(a) (2) would be proper. Refusal to testify despite a court order to do so is precisely the situation comprehended in rule 804(a) (2); the fact that the declarant's refusal to testify is based upon an erroneous assertion of privilege should not render the rule inapplicable.

In *United States v. Garner,*[88] the United States Court of Appeals for the Fourth Circuit was faced with the difficult problem of the witness who *selectively* refuses to testify, about certain matters. The declarant refused to testify, even after a grant of immunity and threat of a contempt citation.[89] He subsequently indicated that he might answer some questions of the defense counsel.[90] At trial, he recanted his earlier grand jury testimony and declined to answer or gave evasive answers to questions put by defense counsel.[91] The trial court found that his "disclaimers of knowledge" were "the equivalent of a refusal to testify,"[92] and found him unavailable, apparently under rule 804(a) (2).[93] The court therefore admitted into evidence the declarant's prior grand jury testimony.[94]

The court's somewhat strained determination of unavailability apparently was an attempt to avoid conflict with the United States Supreme Court's ruling in *California v. Green.*[95] Clearly the proper

86. 559 F.2d 294 (5th Cir. 1977).

87. United States v. Mathis, 559 F.2d 294, 298 (5th Cir. 1977). In *Mathis*, however, the witness did not persist in her refusal to testify, but explicitly stated that she would testify if ordered to do so. *Id.* The court, noting that the declarant's privilege was found to be invalid, concluded that she was not unavailable under rule 804(a)(2) because she had not expressly refused to testify. *Id.*

88. 574 F.2d 1141 (4th Cir.), *cert. denied,* 439 U.S. 936 (1978).

89. United States v. Garner, 574 F.2d 1141, 1143 (4th Cir.), *cert. denied,* 439 U.S. 936 (1978).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* The court did not explicitly state which subdivision of rule 804(a) it was interpreting, but it appears that the basis of its finding was the declarant's refusal to testify.

94. *Id.* at 1146.

95. 399 U.S. 149 (1970).

avenue for admission of the declarant's grand jury testimony would have been as a prior inconsistent statement under rule 801(d) (1) (A).[96] *Green,* however, requires that such prior statements are admissible at trial only if full and complete cross-examination of the witness is afforded at trial.[97] Absent the opportunity for full and complete cross-examination at trial, admission of prior inconsistent statements violates the confrontation clause.[98] Apparently in order to avoid the confrontation clause issue, the court in *Garner* went to great lengths to find the witness unavailable, and then admitted the prior testimony under the less-stringent reliability requirements of rule 804.[99] Such a result is in direct contravention of the policy bases supporting the confrontation clause and the Federal Rules. As noted by one commentator, "[c]ourts should not escape having to analyze the factors crucial to the application of the confrontation clause by manipulating the concept of unavailability."[100]

## V. RULE 804(a) (3) — LACK OF MEMORY

Rule 804(a) (3) provides that a declarant will be unavailable if he "testifies to a lack of memory of the subject matter of his statement."[101] The rule is clearly applicable when a witness testifies that he told the truth at the time of his earlier statement but does not now have any personal recollection of the events in question.[102] The rule has also been applied to admit a declarant's prior statements to refresh his memory after he claimed he could not recall the events in question.[103]

Although the rule provides that the witness is unavailable if he testifies to a lack of memory, the House of Representatives' Committee Report on the rule clearly indicates that the court may choose to disbelieve the declarant's claimed lack of memory: "[T]he Committee intends no change in existing Federal Law under which the court may choose to disbelieve the declarant's

96. Rule 801(d)(1)(A) provides that a statement is not hearsay if it is a prior statement of a declarant who testifies at trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with his testimony and was given under oath subject to penalty of perjury. FED. R. EVID. 801(d)(1)(A). In *Garner,* the grand jury testimony was a prior inconsistent statement given under oath, and the declarant testified at trial and was subject to cross-examination. 574 F.2d at 1143-44. Although the declarant's cross-examination was not full and complete, it does not appear that this is a requirement under rule 801(d)(1)(A).

97. California v. Green, 399 U.S. 149, 158 (1970).

98. *Id.*

99. 574 F.2d at 1144-46.

100. WEINSTEIN, *supra* note 11, at 804-37.

101. FED. R. EVID. 804(a)(3).

102. *See* McDonnell v. United States, 472 F.2d 1153, 1154-55 (8th Cir.), *cert. denied,* 412 U.S. 942 (1973) (decided prior to effective date of the Federal Rules but citing then-proposed rule 804(a)(3)).

103. United States v. Davis, 551 F.2d 233 (8th Cir.), *cert. denied,* 431 U.S. 923 (1977).

testimony as to his lack of memory."[104] In discussing this issue, the Committee Report cites an earlier federal decision, *United States v. Insana.*[105] In *Insana,* the trial court had allowed admission of the defendant's prior testimony when he became evasive and claimed he could not recall the events in question.[106] Although unavailability was not at issue in this case, the court noted that a trial court has discretion to choose to disbelieve a declarant's asserted lack of memory:

> Where, as here, a recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to so testify is not a lack of memory but a desire "not to hurt anyone," then the court has discretionary latitude in the search for truth . . . . To be sure there may be circumstances where the witness in good faith asserts that he cannot remember the relevant events . . . . However, this does not mean that the trial judge's hands should be tied where a witness does not deny making the statements nor the truth thereof but merely falsifies a lack of memory.[107]

The import of the Committee Report and *Insana* is that courts are not required to find a witness unavailable upon his mere assertion of lack of memory, but are allowed to determine whether, in light of the surrounding circumstances and other testimony, the declarant's assertion is truthful. Thus, if the court determines that the declarant's claimed lack of memory is not genuine, it may declare him available and refuse to admit his prior statements under rule 804.[108]

In *United States v. Amaya,*[109] the United States Court of Appeals for the Fifth Circuit was presented with a somewhat different challenge to the declarant's claimed loss of memory. The trial court had declared the witness unavailable under rule 804(a) (3), based on his loss of memory regarding his prior testimony.[110] The defendant challenged this conclusion on the ground that it had not

104. WEINSTEIN, *supra* note 11, at 804-4, *citing* HOUSE COMM. ON THE JUDICIARY, FED. R. EVID., H.R. DOC. NO. 650, 93d Cong., 1st Sess. 15 (1973).

105. 423 F.2d 1165 (2d Cir.), *cert. denied,* 400 U.S. 841 (1970).

106. United States v. Insana, 423 F.2d 1165, 1167-68 (2d Cir.), *cert. denied,* 400 U.S. 841 (1970).

107. *Id.* at 1170.

108. Such statements may nevertheless be admissible as prior inconsistent statements under rule 801(d)(1)(A) if the requirements of that rule are met.

109. 533 F.2d 188 (5th Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977).

110. United States v. Amaya, 533 F.2d 188, 190 (5th Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977).

been established by expert testimony that the declarant's lack of memory was permanent.[111]

Initially it should be noted that the express language of rule 804(a) (3) does not require a showing of permanence of the loss of memory. The court in *Amaya,* although citing rule 804(a) (3), apparently based its holding upon rule 804(a) (4), which generally provides that a witness is unavailable if unable to be present or to testify because of physical or mental illness.[112] The court discussed the declarant's loss of memory as an *illness,* and therefore was confronted with the issue of the duration of the disability:

> Defendant alleges that a continuance should have been given to allow expert testimony bearing on the permanence of the loss of memory before establishing unavailability for trial. Although the duration of an illness is a proper element of unavailability, the establishment of permanence as to the particular illness is not an absolute requirement. The duration of the illness need only be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed.[113]

The court in *Amaya,* however, never should have reached the issue of the permanence of the declarant's lack of memory. Although the declarant's lack of memory had been precipitated by an automobile accident,[114] it does not appear that this is the type of "physical or mental illness" contemplated by rule 804(a) (4). Rule 804(a) (4) requires a finding of unavailability only if the declarant is unable to attend or testify at the trial.[115] In any case of lack of memory the declarant will be able to attend the trial and testify, although he may not be able to fully describe the incidents in question. Rule 804(a) (4) seemingly is applicable only to those situations in which the witness is physically unable to attend the trial, or, by reason of physical or mental illness, is unable to effectively communicate his answers to counsel's questions.

Support is lent to this conclusion by the fact that the rules specifically provide for unavailability due to lack of memory. The fact that a separate provision for lack of memory was provided

111. *Id.* at 191.

112. FED. R. EVID. 804(a)(4).

113. 533 F.2d at 191. Although the court apparently applied the wrong rule, it eventually reached the proper result. The court noted that there was no guarantee that the witness's memory would ever return, and therefore declared him unavailable. *Id.*

114. *Id.* at 190.

115. FED. R. EVID. 804(a)(4).

indicates that this is a different type of "illness" than contemplated in rule 804(a) (4). Additionally, it is apparent that trial courts will become involved in extremely complex medical issues if they are required in each case to make a determination of the duration and permanency of a declarant's claimed loss of memory. Rather than requiring courts to make necessarily speculative determinations regarding the projected duration of the declarant's loss of memory, it is preferable to find that any declarant who has suffered a loss of memory concerning the subject matter of his statement is unavailable.

## VI. RULE 804(a) (4) — DEATH OR INFIRMITY

Rule 804(a) (4) provides that a witness is unavailable if he "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."[116] In virtually all circumstances a witness who dies prior to trial will be considered unavailable under the rule.[117] A more difficult problem is encountered, however, when the declarant is physically or mentally infirm.

Initially, the court must determine if the declarant's disability is a "physical or mental illness or infirmity" as contemplated within the rule. As noted in the previous discussion of *United States v. Amaya,*[118] one federal court has apparently determined that a loss of memory caused by an injury is an "illness" under the rule.[119] It appears that the better interpretation, however, is that loss of memory is covered by rule 804(a) (3), and should not be considered an "illness" under rule 804(a) (4).[120]

Further difficulties are encountered when the duration or permanency of the declarant's illness is called into question. Rule 804(a) (4) speaks of "then existing" illness; it does not address the issue of duration.[121] In a criminal case, there is strong support for

116. *Id.*

117. *See, e.g.,* United States v. Thevis, 84 F.R.D. 57, 61 (N.D. Ga. 1979); United States v. Driscoll, 445 F. Supp. 864, 866 (D.N.J. 1978); Depew v. Hanover Ins. Co., 438 F. Supp. 358, 359 (E.D. Tenn. 1977); *In re* Master Key Antitrust Litigation, 72 F.R.D. 108, 110 (D. Conn.), *aff'd,* 551 F.2d 300 (2d Cir. 1976); Brennan v. Braswell Motor Freight Lines, Inc., 396 F. Supp. 704, 708 n.9 (N.D. Tex. 1975).

The only conceivable situation in which a deceased declarant might be considered "available" under the rules is when the declarant was deposed prior to death. Because unavailability under the rules is based upon the unavailability of the declarant's *testimony*, a deceased declarant whose deposition is available could arguably be held "available" under the Federal Rules.

118. 533 F.2d 188 (5th Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977); *see supra* notes 109-15 and accompanying text.

119. United States v. Amaya, 533 F.2d 188, 191 (5th Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977).

120. *See supra* notes 114-15 and accompanying text.

121. FED. R. EVID. 804(a)(4).

the conclusion that a reasonable delay to permit the witness to attend is required by the confrontation clause.[122] The scope of this requirement, however, is at present unclear.

The United States Court of Appeals for the Fifth Circuit has discussed this issue in *Peterson v. United States.*[123] In *Peterson,* the defendant raised a confrontation clause claim when the trial court admitted the prior testimony of a witness who was unavailable due to a complicated pregnancy.[124] Although the witness's doctor had testified that she would be unable to testify until over six months later,[125] the appellate court held that a continuance was necessary to comply with the confrontation clause.[126] The court apparently left open the question of precisely how lengthy a delay to allow a witness to attend would be tolerated.

In *Amaya,* the Fifth Circuit retreated somewhat from its holding in *Peterson.* The court, although apparently applying the wrong rule,[127] stated that *Peterson* did not control when there was no guarantee that the witness's disability would abate:

> Although the duration of an illness is a proper element of unavailability, the establishment of permanence as to the particular illness is not an absolute requirement. The duration of the illness need only be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed.[128]

The United States Court of Appeals for the Second Circuit has impliedly rejected the Fifth Circuit's holding in *Peterson.* In *United States v. Bell,*[129] the witness had recently undergone surgery and would have been unable to testify for at least two-and-a-half

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122. *Cf.* Barber v. Page, 390 U.S. 719 (1968). McCormick has stated that "[a] mere temporary disability appears not to conform with the standard established by Barber v. Page." MCCORMICK, *supra* note 14, § 253, at 610.

123. 344 F.2d 419 (5th Cir. 1965).

124. Peterson v. United States, 344 F.2d 419, 422-25 (5th Cir. 1965).

125. *Id.* at 423. The doctor, testifying on April 1, stated that the witness would not be able to travel to the trial until at least six weeks after her due date in September.

126. *Id.* at 425. The court stated:

> [The witness] was not dead, beyond the reach of process nor permanently incapacitated. She was simply unavailable at the time of trial because of her pregnancy. Considering the seriousness of the charges and if the Government desired to use [the witness's] testimony, it should have requested a continuance to a time when she could probably be present. . . . [T]he Government should have been required to elect either to proceed without [the witness's] testimony or to request a continuance.

*Id.*

127. *See supra* notes 114-15 and accompanying text.

128. 533 F.2d at 191.

129. 500 F.2d 1287 (2d Cir. 1974).

months.[130] The trial court found that the witness was unavailable, and admitted his prior testimony.[131] The appellate court affirmed, stating that it disagreed with *Peterson* "if indeed it meant to imply that in every case where a witness is ill but will sometime recover, the prosecution must suffer a continuance (in this instance, one of several months . . .) or forego entirely the use of the evidence."[132]

It appears that the *Bell* court's criticism of *Peterson* was justified. It is clear that an inelastic rule which requires a continuance in criminal cases whenever the witness will at some time in the future sufficiently recover to be able to testify at trial (even if the resulting delay extends for several months) would have a debilitating effect on the judicial process. Judge Weinstein has advocated a standard whereby the trial judge may declare the witness unavailable if he is suffering from a physical condition which renders him unable to testify within a reasonable time.[133] The demands of speedy trial rules and calendar pressure require that the trial court be given broad discretion in granting adjournments, continuances, and mistrials because of unavailability of witnesses.[134]

It should be stressed, however, that in cases in which the delay would be reasonably short a continuance would be proper, and is probably required by the confrontation clause in criminal prosecutions.[135] One federal court recently opened the door for an interpretation that any time the witness is unable to attend the trial he may be considered unavailable, holding that a witness who was recovering from surgery was unavailable without inquiring into the expected duration of his convalescence.[136] Such a result is in direct contravention of the rights protected by the confrontation clause. A court should not automatically declare a witness unavailable merely because he is at present unable to attend the trial and testify. The court should determine the probable length of the delay caused thereby and grant a continuance if the delay would be reasonable.

In all civil cases, and in criminal cases in which the defendant is the proponent of the hearsay evidence, the confrontation clause considerations discussed above are inapplicable. In such cases a lesser standard of unavailability will suffice.[137] Judge Weinstein

130. United States v. Bell, 500 F.2d 1287, 1290 n.5 (2d Cir. 1974).
131. *Id.* at 1290. The court cited then-proposed rule 804(a)(4), but apparently based its ruling on the confrontation clause claim. *Id.*
132. *Id.* (footnote omitted).
133. WEINSTEIN, *supra* note 11, at 804-39.
134. *Id.*
135. *See supra* note 118.
136. M.S.D. Inc. v. United States, 434 F. Supp. 85, 91 n.16 (N.D. Ohio 1977).
137. *See* WEINSTEIN, *supra* note 11, at 804-39 to -40.

suggests that the determination be left in the discretion of the trial court, which should take into account the nature and expected duration of the illness, the nature of the case, the length of time the case has been pending, the significance of the unavailable witness's testimony, the availability of other evidence on point, and whether the nature of the expected testimony is such that cross-examination would be expected to be particularly helpful.[138]

## VII. RULE 804(a)(5) — ABSENCE

Rule 804(a)(5) provides that a witness will be considered unavailable if he "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."[139] Thus, a proponent seeking to introduce a declarant's prior statements under rule 804(b)(1) or (5) must attempt to secure the attendance of the declarant by reasonable means;[140] a proponent seeking to introduce statements under rule 804(b)(2), (3), or (4) must use reasonable means to procure the declarant's attendance or testimony.[141]

### A. REQUIREMENT OF SECURING DECLARANT'S TESTIMONY IF INVOKING RULE 804(b)(2), (3), OR (4)

If seeking to introduce prior statements under rule 804(b)(2), (3), or (4), the proponent of the statements must establish that he was unable to secure the declarant's testimony, in addition to attendance, by reasonable means.[142] The rule as originally submitted by the United States Supreme Court did not include this requirement.[143] The Judiciary Committee of the House of Representatives amended the rule to include the requirement of an attempt to depose the declarant, indicating that "[t]he amendment [was] designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a

138. *Id.*
139. FED. R. EVID. 804(a)(5).
140. Rule 804(b)(1) provides an exception for former testimony; rule 804(b)(5) is a residual, catch-all exception.
141. Rule 804(b)(2) provides an exception for dying declarations, rule 804(b)(3) excepts statements against interest, and rule 804(b)(4) excepts statements of personal or family history.
142. FED. R. EVID. 804(a)(5).
143. 56 F.R.D. 183, 320.

precondition to the witness being deemed unavailable."[144] Although the Senate Judiciary Committee opposed the amendment,[145] it became part of the rule as finally adopted.[146]

The rule, when read in light of the drafters' comments, clearly requires that the proponent of the prior statements attempt to depose the witness as a prerequisite to a finding of unavailability. It logically follows that a witness who has been deposed is *not* unavailable if the proponent seeks to introduce his prior statements under rule 804(b) (2), (3), or (4). His prior statements will therefore not be admissible.

This was the conclusion reached by the Supreme Court of North Dakota in *State v. Poitra,*[147] in which the court construed a North Dakota rule which is identical to federal rule 804(a) (5).[148] In *Poitra,* the defendant, charged with aggravated assault, sought unsuccessfully to introduce the testimony of a witness who had overheard one Ortley admit that he, not the defendant, had caused the injury in question.[149] Ortley was unable to attend trial, but had been deposed by agreement of counsel.[150] In his deposition Ortley denied any participation in the affray.[151] The trial court refused to admit the witness's testimony regarding Ortley's confession,[152] and the Supreme Court of North Dakota affirmed.[153] The court based its decision on rule 804(a) (5), holding that Ortley was not unavailable under the rule because his testimony had been obtained by deposition.[154] The court made it clear that, under rule 804(a)

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144. WEINSTEIN, *supra* note 11, at 804-4, *citing* HOUSE COMM. ON THE JUDICIARY, FED. R. EVID., H.R. DOC. NO. 650, 93d Cong., 1st Sess. 15 (1973).

145. *See* WEINSTEIN, *supra* note 11, at 804-6, *quoting* SENATE COMM. ON THE JUDICIARY, FED. R. EVID., S. DOC. NO. 1277, 93d Cong., 2d Sess. 20 (1974).

> Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases. . . .
>
> In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.
>
> Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them.

*Id.*

146. FED. R. EVID. 804(a)(5).
147. 266 N.W.2d 544 (N.D. 1978).
148. N.D.R. EVID. 804(a)(5).
149. State v. Poitra, 266 N.W.2d 544, 545-46 (N.D. 1978).
150. *Id.* at 545.
151. *Id.*
152. *Id.* at 546.
153. *Id.* at 547.
154. *Id.*

(5), a declarant who has been deposed is no longer unavailable, and his prior statements may not be admitted under rule 804(b) (2), (3), or (4).[155]

### B. REASONABLE MEANS OF PROCURING ATTENDANCE

Rule 804(a) (5) provides that a declarant will be considered unavailable if he is absent and the proponent of his statement has been unable to procure his attendance at trial "by process or other reasonable means."[156] Several courts, in a variety of contexts, have grappled with the problem of what constitutes "reasonable means."

In *United States v. Jones,*[157] the court concluded that a lesser effort at obtaining the witness's presence may satisfy the "reasonable means" requirement when the evidence to be offered is cumulative and was uncontradicted by the defendant at his earlier trial.[158] In *Jones,* the trial court admitted the prior testimony of a DEA agent who was out of the country on special assignment at the time of the second trial.[159] The court affirmed, stressing that it would have been "unreasonable and overburdensome" to require the prosecution to bring the agent in from out of the country.[160] The import of this decision is that determination of what constitutes "reasonable means" requires a case-by-case examination of the attendant circumstances.

A similar conclusion was reached in a dissenting opinion in *United States v. Brown.*[161] The prosecution had introduced the testimony of an Internal Revenue Service agent who had interviewed approximately 160 taxpayers whose fraudulent tax returns had been prepared by the defendant.[162] The majority held, without reaching the unavailability issue, that introduction of the evidence was reversible error.[163] The dissent raised the unavailability issue, noting that the taxpayers' statements would be admissible as statements against interest[164] if the taxpayers were unavailable.[165] The dissent concluded that, in a practical sense, the

155. *Id.*
156. FED. R. EVID. 804(a)(5).
157. 404 F. Supp. 529 (E.D. Pa. 1975), *aff'd,* 538 F.2d 321 (3d Cir. 1976).
158. United States v. Jones, 404 F. Supp. 529, 540-41 (E.D. Pa. 1975), *aff'd,* 538 F.2d 321 (3d Cir. 1976).
159. *Id.* at 540.
160. *Id.* at 541.
161. 548 F.2d 1194 (5th Cir. 1977).
162. United States v. Brown, 548 F.2d 1194, 1204-05 (5th Cir. 1977).
163. *Id.* at 1206.
164. FED. R. EVID. 804(b)(3).
165. 548 F.2d at 1212 (Gec. J., dissenting).

sheer number of taxpayers made them unavailable under rule 804(a) (5).[166] This seems to be an inaccurate reading of the rule, however. The rule requires that the proponent of the evidence use reasonable means to produce each individual witness. To imply that the rule allows the court to declare a large group of witnesses unavailable, merely because the size of the group would make calling each individual witness impractical, is arguably an improper application of the rule. The rule's purpose apparently is to ensure that a proponent of hearsay evidence uses reasonable means to procure the attendance of individual witnesses.

The United States Court of Appeals for the First Circuit has concluded that the requirement that the proponent use reasonable means to secure the attendance of the witness implies a duty to prevent the witness from becoming absent in the first place. In *United States v. Mann,*[167] the declarant, a seventeen-year-old Australian woman, had been arrested with the defendant on charges of smuggling drugs.[168] After taking the declarant's deposition, the government, having dismissed the charges against her, returned her passport and airline tickets, and allowed her to return to Australia.[169] The prosecution at the time of trial attempted to subpoena the declarant in Australia through the State Department, although it appears clear that this was merely an effort to establish her unavailability, thereby allowing her deposition to be introduced at trial.[170]

The court stated that rule 804(a) (5) requires a "relatively high good faith standard" which "cannot be satisfied by perfunctory efforts":

> Here the witness is vital to the government's case. The government did not make as vigorous an attempt to secure the presence of the witness as it would have made if it did not have the prior recorded testimony. The language of Rule 804(a)(5) suggests that "other reasonable means" besides subpoenas must be tried before a witness can be found unavailable. This relatively high good faith standard cannot be satisfied by perfunctory efforts, if the rule is not to sanction the government's procuring depositions of witnesses, especially shaky

166. *Id.*
167. 590 F.2d 361 (1st Cir. 1978).
168. United States v. Mann, 590 F.2d 361, 363 (1st. Cir. 1978).
169. *Id.*
170. *Id.*

> witnesses, but then discourage attempts to bring the witness to trial so long as the government is satisfied with what is in the transcript.[171]

The court further stated that the prosecution had a duty to prevent the witness from becoming unavailable:

> [T]he government's burden included more than that it attempt to get the witness to return from Australia. Here the problem arose only because the government abused Rule 15(a) [of the Federal Rules of Criminal Procedure] by using it to enable the key witness to leave Puerto Rico. This misuse directly made possible the witness' later absence on which the government seeks to rely to establish her unavailability within the meaning of Rule 804(a). *Implicit, however, in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent.* As we have already said, in this case the government has such means at its disposal but did not choose to use them. The defendant should not suffer the injury from the government's choice. On this independent basis we would find that the government failed to demonstrate that the witness was unavailable. Therefore, it was error to admit the deposition.[172]

Thus, it appears that the proponent of the hearsay evidence must use reasonable means to prevent the witness from becoming absent.

The United States Court of Appeals for the District of Columbia Circuit has recently applied a very minimal standard for the "reasonable means" requirement. In *United States v. Bowman,*[173] a prosecution witness moved out of state between the defendant's first and second trials.[174] The prosecution did not learn of her move until shortly before the second trial.[175] At the beginning of the second trial, the prosecutor notified the court "that he had . . . learned about [the witness's] move, and that she would not return for several days."[176] Although there was no indication that the prosecution had made any attempt to secure the witness's

171. *Id.* at 367 (footnotes omitted).
172. *Id.* at 368 (emphasis added).
173. 609 F.2d 12 (D.C. Cir. 1979).
174. United States v. Bowman, 609 F.2d 12, 19 (D.C. Cir. 1979).
175. *Id.*
176. *Id.*

attendance at trial after learning of the move,[177] the Court of Appeals held that she was unavailable.[178] The court's holding apparently indicates that it will accept a very minimal showing by the proponent of the evidence that he has used reasonable means to procure the attendance of the witness. The mere fact that the witness would not return for several days, however, does not appear to be the type of "absence" contemplated under rule 804(a)(5).[179]

At least two state courts, contruing rules modeled after rule 804(a)(5), have dealt with the issue of what constitutes "reasonable means" when attempting to secure the attendance of a witness from another state.[180] In *State v. Waits,*[181] the prosecution attempted to subpoena a witness in Texas with a New Mexico subpoena,[182] although the declarant was not thereby compelled to appear because the New Mexico subpoena was invalid in Texas.[183] The court held that this was not a sufficiently reasonable attempt to procure the attendance of the witness, in light of the fact that both Texas and New Mexico had enacted the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings.[184] The court held that, in order to satisfy the "reasonable means" requirement of rule 804(a)(5), the state must attempt to utilize the procedures of the Uniform Act.[185]

The Supreme Court of North Dakota recently reached a similar conclusion in *State v. Larson,*[186] although its decision was premised on a confrontation challenge rather than on rule 804(a)

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177. *Id.* It appears that the prosecution attempted to subpoena the witness at her last known in-state address before learning of her move. *Id.*

There may be a lesser standard for "reasonable means" in civil cases. In Bailey v. Southern Pacific Transportation Co., 613 F.2d 1385 (5th Cir. 1980), for example, the court held that a witness who was residing out-of-state at the time of trial was unavailable under rule 804(a)(5). *Id.* at 1390. Unlike federal criminal trials, in federal civil cases there is no nation-wide service of process, and therefore the witness was beyond the court's process and could not be returned to Texas to testify. *Id.*

178. 609 F.2d at 19.

179. Beyond the court's rather questionable holding, it appears that the defendant might have raised a valid confrontation clause claim. The failure of the prosecution to even attempt to subpoena an out-of-state witness, when such a procedure was available, would almost certainly violate the confrontation clause in light of recent United States Supreme Court decisions on the issue. *See infra* notes 192-218 and accompanying text.

180. It should be noted that this is not a problem in the federal courts, because there is nation-wide jurisdiction for process in federal criminal trials. *See* WEINSTEIN, *supra* note 11, at 804-42.

181. 92 N.M. 275, 587 P.2d 53 (Ct. App. 1978). The court applied that state's version of rule 804(a)(5), which is identical to the federal rule except that it does not require an attempt to depose the witness. *See* N.M.R. EVID. 804(a)(5).

182. State v. Waits, 92 N.M. 275, _____, 587 P.2d 53, 54 (Ct. App. 1978).

183. *Id.* at _____, 587 P.2d at 55.

184. *Id.* at _____, 587 P.2d at 54-55. The Uniform Act, which generally provides for compelled attendance of out-of-state witnesses under certain conditions in criminal cases, has been enacted in every state except Alabama. *See* Uniform Act to Secure Attendance of Witnesses (U.L.A.) (table of adopting jurisdictions).

185. 92N.M. at ____, 587 P.2d at 55.

186. 277 N.W.2d 120 (N.D. 1979).

(5). In *Larson,* the trial court, faced with the probability that the declarant would be working out-of-state at the time of the trial, declined to issue a subpoena detaining the declarant as a material witness until trial.[187] The trial court instead directed that a summons be issued to the declarant on the date of the trial.[188]

The Supreme Court of North Dakota reversed, first noting that the Uniform Act was available as a possible means of procuring the witness's attendance.[189] The court based its reversal, however, on the fact that the trial court could have issued a subpoena which would not have required the declarant to remain in the state during the period prior to trial, but rather would only have required him to return to the state on the date of trial.[190] The court held that, under the circumstances, that was the minimum effort which should have been made to procure the witness's attendance.[191]

Both *Waits* and *Larson* imply that a subpoena alone is not sufficient to satisfy the "reasonable means" requirement of rule 804(a) (5) when other, more effective methods of procuring the declarant's attendance are available. Implicit in the rule is a requirement that the proponent exhaust *all* reasonable means of securing the declarant's attendance as a prerequisite to a finding of unavailability.

### C. THE CONFRONTATION CLAUSE AND "OTHER REASONABLE MEANS"

An alleged failure by the prosecution in a criminal case to exhaust all reasonable means in attempting to procure the

187. State v. Larson, 277 N.W.2d 120, 121 (N.D. 1979). The court noted that the two-week detention of the witness would have unduly jeopardized his employment. *Id.*

188. *Id.*

189. *Id.* at 122. Although the court recognized the Uniform Act as a possible means of procuring the witness's attendance, it did not specifically hold that resort to the Act was required for compliance with rule 804(a)(5) or the confrontation clause. It appears that this issue remains open, and the applicability of the *Waits* holding in North Dakota remains unclear.

190. *Id.* at 123. The court stated:

> In the instant case, an error resulted from the view that there were only two reasonable alternatives: (1) that the court subpoena Goughnour as a material witness and detain him 14 days for the trial on the 24th, or (2) that a subpoena be issued on the 24th for service upon Goughnour on the 24th to be present for trial on the 24th.
>
> The latter is the course which the court took, apparently believing the first to be too drastic. Actually, at least one other alternative was available. An attempt should have been made on the day the witness was discovered to be present within the court's jurisdiction to serve the witness with a subpoena requiring him to be present at trial on the 24th. Such a subpoena would not have detained the witness within the court's jurisdiction pending the date of the trial.

*Id.*

191. *Id.*

attendance of a witness may raise constitutional claims as well as evidentiary issues. In *Barber v. Page,*[192] the United States Supreme Court was presented with a case in which a co-conspirator's prior testimony was introduced against the defendant.[193] At the time of trial the witness was incarcerated in a federal prison in Texas, 225 miles from the trial site in Oklahoma.[194] It appeared that the prosecution made absolutely no effort to obtain the presence of the declarant at trial after learning that he was not within the state.[195]

The Court stated that, although it had previously been presumed that the absence of a witness from the jurisdiction made him immune to process, there had been recent developments which provided methods for securing the attendance of out-of-state witnesses.[196] The Court noted that the Uniform Act To Secure the Attendance of Witnesses had been widely adopted, and provided a means by which authorities from one state could procure the attendance of witnesses from another state.[197] For witnesses in prison, as in *Barber,* the Court further noted that the federal court power to issue writs of habeas corpus *ad testificandum* and United State Bureau of Prisons policy provided means of securing the attendance of federal prisoners.[198]

Because the prosecution had made no effort to procure the declarant's attendance, the Court held that the defendant's sixth amendment rights had been violated:

> In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.[199]

The clear import of the Court's decision in *Barber* is that the confrontation clause requires a good-faith effort to produce absent

192. 390 U.S. 719 (1968).
193. Barber v. Page, 390 U.S. 719, 720 (1968).
194. *Id.*
195. *Id.* at 723.
196. *Id.* at 723-24.
197. *Id.* at 723-24 n.4.
198. *Id.* at 724.
199. *Id.* at 724-25.

witnesses before their prior statements will be admissible in a criminal trial. The Court somewhat restricted this holding, however, in *Mancusi v. Stubbs.*[200] In *Mancusi,* the witness was an American citizen residing in Sweden.[201] After discovering this fact, the prosecution made no further efforts to procure his attendance.[202] At trial the witness's prior testimony was admitted.[203]

The Supreme Court held that there had been no abridgement of the defendant's sixth amendment rights, distinguishing *Barber* on the fact that the prosecution here apparently had no appropriate method of procuring the declarant's attendance:

> The Uniform Act to secure the attendance of witnesses from without a State, the availability of federal writs of habeas corpus *ad testificandum,* and the established practice of the United States Bureau of Prisons to honor state writs of habeas corpus *ad testificandum,* all supported the Court's conclusion in *Barber* that the State had not met its obligations to make a good-faith effort to obtain the presence of the witness merely by showing that he was beyond the boundaries of the prosecuting State. There have been, however, no corresponding developments in the area of obtaining witnesses between this country and foreign nations. Upon discovering that Holm resided in a foreign nation, the State of Tennessee, so far as this record shows, was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government. . . . We therefore hold that the predicate of unavailability was sufficiently stronger here than in *Barber* that a federal habeas court was not warranted in upsetting the determination of the state trial court as to Holm's unavailability.[204]

Justice Marshall, with Justice Douglas joining, filed a thoughtful dissent. Marshall particularly chastized the majority for accepting a presumption of unavailability without any showing of an attempt to procure attendance:

> The difficulty with [the majority's] position is that

200. 408 U.S. 204 (1972).
201. Mancusi v. Stubbs, 408 U.S. 204, 209 (1972).
202. *Id.*
203. *Id.*
204. *Id.* at 212-13 (citation omitted).

> there never has been any factual inquiry resulting in a determination as to Holm's unavailability. Rather, the courts have consistently presumed his unavailability from the bare fact that he lives in Sweden. . . . [I]n *Barber v. Page* we squarely rejected any such presumption of unavailability. In that case, the claim was made that the court had no power to compel the absent witness to appear. We held that nevertheless the State was obliged to make a good-faith effort to secure his appearance, for " 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' "[205]

Marshall concluded that the failure to even attempt to procure the witness's attendance violated the defendant's sixth amendment rights:

> I cannot agree, however, that if neither state nor federal authorities had the power to compel Holm's appearance, that fact relieved the State of its obligation to make a good-faith effort to secure his presence. It simply reduced the likelihood that any effort would succeed. The State's obligation would hardly be framed in terms of "good-faith effort" if that effort were required only in circumstances where success was guaranteed. If, as the Court contends, it is more difficult to produce at trial a resident of Sweden than a federal prisoner, that fact might justify a failure to produce the witness; it cannot justify a failure even to try. At a minimum, the State could have notified Mr. Holm that the trial was scheduled, and invited him to come at his own expense. Beyond that, it could have offered to pay his expenses. Finally, it could have sought federal assistance in invoking the cooperation of Swedish authorities, as a matter of international comity.[206]

It should be noted that *Mancusi* apparently is not applicable in federal prosecutions, because federal courts have statutory authority to compel the attendance of United States nationals or residents who are outside the country.[207] This statute is limited to

205. *Id.* at 221 (Marshall, J., dissenting).
206. *Id.* at 223 (Marshall, J., dissenting).
207. 28 U.S.C. § 1783 (1976). Marshall's dissent points out that it is arguable that this statute permits federal courts to assist state courts in compelling attendance at state trials of witnesses out-

nationals and residents, and does not authorize federal courts to compel the attendance of aliens.[208]

In its most recent opportunity to examine confrontation clause "unavailability," the Supreme Court further delineated its "good-faith effort" standard. In *Ohio v. Roberts,*[209] the defendant challenged admission of a prosecution witness's preliminary hearing testimony at his trial.[210] At the time of trial it was established that the witness was not within the state and her parents did not know where she could be located.[211] The parents indicated that they had not heard from her since the preceding summer, when she was living in San Francisco.[212] The prosecution issued subpoenas to the witness at her parents' home on five separate occasions.[213]

The Court held that, based on these facts, the prosecution had not breached its duty of "good-faith effort."[214] Although the Court noted that the prosecution might have attempted to telephone a social worker in San Francisco who had been in contact with the witness while she was living there, the Court concluded that "the great improbability that such efforts would have resulted in locating the witness, and would have led to her production at trial, neutralizes any intimation that a concept of reasonableness required their execution."[215]

The Court, in reaching its conclusion, distinguished *Barber.* In *Barber,* the Court noted, "the prosectution knew where the witness was, procedures existed whereby the witness could be brought to trial, and the witness was not in a position to frustrate efforts to secure his production."[216] In the instant case, however, the Court noted that the witness's whereabouts were unknown, and there was no assurance that, if found, the witness could be forced to return for trial.[217]

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side the United States. 408 U.S. at 222 (Marshall, J., dissenting).

208. *See* Webber v. United States, 395 F.2d 397, 399-400 (10th Cir. 1968).

209. _____ U.S. _____, 100 S. Ct. 2531 (1980).

210. Ohio v. Roberts, _____ U.S. _____, _____, 100 S. Ct. 2531, 2543 (1980).

211. *Id.* at _____, 100 S. Ct. at 2544.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* In dissent, Justice Brennan indicated that the prosecution had failed to meet its burden of establishing the witness's unavailability. Brennan noted that the prosecution's total effort to secure her presence consisted of five subpoenas sent to her parents' home, three issued after the prosecution knew she was no longer living there. _____ U.S. at _____, 100 S. Ct. at 2546 (Brennan, J., dissenting). Noting that there were other possible leads to follow in attempting to secure her attendance, and rejecting the majority's determination that any such efforts would have been fruitless, Brennan concluded that the prosecution had failed to establish that it had used "good-faith efforts" to secure the witness's attendance. *Id.* at _____, 100 S. Ct. at 2456-57 (Brennan, J., dissenting).

216. ____ U.S. at ____, 100 S. Ct. at 2544.

217. *Id.* at _____, 100 S. Ct. at 2544-45.

The import of the Supreme Court's decisions on this issue is that the prosecution must use reasonable "good-faith efforts" to attempt to produce the witness at trial. What is reasonable, however, will vary according to the facts of each particular case. It appears that if the prosecution knows where the witness is and there is an available procedure for securing the witness's attendance at trial, *Barber* mandates that the prosecution produce the witness. If, however, the witness's whereabouts are unknown or there is doubt that a valid procedure exists to secure the witness's attendance, the prosecution is only required to establish that it used reasonable good-faith efforts, based on the facts of the particular case, to secure the witness's attendance. The Court's holding in *Roberts,* however, indicates that the prosecution need not exhaust every possible lead before seeking to have the witness declared unavailable.[218]

## VIII. UNAVAILABILITY PROCURED BY CONDUCT OF THE PROPONENT

Rule 804(a) provides that "[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."[219] The rule implies a two-fold requirement: that the declarant's unavailability is due to the "procurement or wrongdoing" of the proponent of his statement, and that such procurement was for the express purpose of preventing the witness from presenting live testimony in court. Federal courts have addressed the rule in a variety of factual situations.

One issue which has been raised is whether the government's refusal to grant immunity may amount to "procurement" under the rule. In *United States v. Lang,*[220] the United States Court of Appeals for the Second Circuit addressed the defendant's claim that the prosecution had "procured" the unavailability of a witness who had asserted a valid fifth amendment privilege by refusing to grant him immunity.[221] Noting that the power to grant immunity is discretionary, and that the United States Attorney generally has no obligation to seek immunity for a witness,[222] the court rejected the

218. *Id.* at _____, 100 S. Ct. at 2544.
219. FED. R. EVID. 804(a).
220. 589 F.2d 92 (2d Cir. 1978). *Lang* has been discussed previously, *supra* notes 55-63 and accompanying text.
221. United States v. Lang, 589 F.2d 92, 95 (2d Cir. 1978).
222. *Id.* at 95-96.

defendant's contention.[223] The court did indicate, however, that a different result might have been reached if the prosecution had *actively* procured the declarant's unavailability through harrassment, repeated threats of criminal prosecution, or other questionable prosecutorial conduct.[224]

Another issue which has been raised is whether the requirement that the procurement be for the purpose of preventing the witness from testifying is to be interpreted literally. In *United States v. Seijo,*[225] the defendant claimed that the government had procured the absence of five material witnesses who had been deported by the Immigration and Naturalization Service.[226] The prosecutor had in fact gone to extreme lengths in an attempt to retain the witnesses in the country until trial.[227] The trial court, however, held that the government had procured the absence of the witnesses, primarily because the Immigration and Naturalization Service, which had deported the witnesses, was also the governmental department with jurisdiction over the crime which the defendant had been charged with.[228]

The trial court held that the Service's deportation of the material witnesses, for whatever reason, amounted to "having done so for the purpose of preventing them from attending or testifying,"[229] and stated that "they must be charged with having intended the consequences of their own acts."[230] The United States Court of Appeals for the Second Circuit disagreed, stating that there was no reason not to apply "the plain and literal language" of rule 804(a).[231] Noting that the prosecution had in fact done everything in its power to detain the witnesses for trial, and, as a last resort, had secured their depositions to preserve their testimony, the court found no evidence that the deportation of the witnesses had been "for the purpose of preventing" the attendance of the witnesses.[232]

The court in *Seijo* was apparently advocating a very literal

223. *Id.* at 96.
224. *Id.*; *see supra* notes 60-63 and accompanying text.
225. 595 F.2d 116 (2d Cir. 1979).
226. United States v. Seijo, 595 F.2d 116, 118-19 (2d Cir. 1979).
227. *Id.* at 117-18. The court noted that the prosecutor had requested that the Immigration and Naturalization Service not deport the witnesses until after trial, requested a magistrate to order them held as material witnesses, and fought their deportation in court. The prosecutor succeeded in detaining the witnesses in the country for over a month. After a court ruling that the witnesses could no longer be held, he secured a court order requiring that depositions be taken from the witnesses before they were deported. *Id.*
228. *Id.* at 119. The defendant had been charged with harboring illegal aliens. *Id.* at 117.
229. *Id.* at 119.
230. *Id.*
231. *Id.* at 120.
232. *Id.*

interpretation of the "purpose" requirement. The United States Court of Appeals for the Fourth Circuit, however, apparently disagrees with the Second Circuit's literal interpretation of the "purpose" requirement. In *United States v. Mathis,*[233] the court completely overlooked the "purpose" requirement in applying rule 804(a) (5). A witness had been mistakenly released from prison prior to the defendant's trial.[234] Although the court reached the correct result, it apparently applied the wrong standard. The court correctly held that the witness was unavailable,[235] but concluded that her unavailability had not been procured by the government because her release had not been due to government negligence.[236] The federal rule, however, does not speak of the proponent's negligence. The proper analysis under the rule would have been that the witness's absence had not been procured for the purpose of preventing her from testifying. The witness was therefore unavailable under rule 804(a), regardless of whether the government had been negligent in releasing her.

Although negligence is apparently irrelevant under rule 804(a), the dissent in *Mathis* points out that there may be a valid confrontation claim when a witness's absence has been caused by government negligence.[237] In *Motes v. United States,*[238] a prosecution witness (who was also involved in the crime) was being held in jail.[239] For some inexplicable reason, the witness was released into the custody of another prosecution witness only two days prior to trial.[240] The witness absconded before testifying,[241] and the defendants raised confrontation claims when the government sought to introduce the witness's prior testimony.[242]

The United States Supreme Court upheld the defendant's challenge:

> We are of opinion that the admission in evidence of Taylor's statement or deposition taken at the examining trial was in violation of the constitutional right of the

233. 550 F.2d 180 (4th Cir. 1976), *cert. denied,* 429 U.S. 1107 (1977).

234. United States v. Mathis, 550 F.2d 180, 181, 183 n.2 (4th Cir. 1976), *cert. denied,* 429 U.S. 1107 (1977). It appears that there were two prisoners with the same name. The government inadvertently released the witness in question. *Id.*

235. *Id.* at 181-82.

236. *Id.* Both the majority and the dissent in *Mathis* discuss the case on the basis of the government's negligence, citing Motes v. United States, 178 U.S. 458 (1900), which is discussed *infra* at notes 238-44 and accompanying text.

237. 550 F.2d at 182-84 (Widener, J., dissenting).

238. 178 U.S. 458 (1900).

239. Motes v. United States, 178 U.S. 458, 468 (1900).

240. *Id.*

241. *Id.*

242. *Id.* at 470.

> defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the Government.[243]

The court concluded:

> We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution.[244]

It therefore appears that the confrontation clause mandates that, in criminal cases, an unavailable witness's prior statements may not be admitted at trial when the witness's unavailability is the result of government negligence. Although such a witness may be considered unavailable under the federal rules, the confrontation clause will preclude the admission of his prior testimony at trial.

## IX. CONCLUSION

This Note is intended to present the reader with the current state of the law concerning the unavailability requirements under the Federal Rules of Evidence. The law in this area, however, is constantly in flux; as more courts are presented with opportunities to discuss the various aspects of the unavailability requirements, the precise scope of these requirements will become more clearly defined. Although at present several issues have been left unresolved, the court decisions to date provide an invaluable insight into the likely direction those future decisions will take.

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243. *Id.* at 471.
244. *Id.* at 474.