

A More Reliable Right To Present a Defense: The Compulsory Process Clause After *Crawford v. Washington*

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The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.¹

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INTRODUCTION

The Sixth Amendment of the United States Constitution arms the American criminal defendant with a catalogue of meaningful powers designed to protect his interests during trial. He is guaranteed, first and foremost, the right to a speedy trial by jury² at which he is effectively represented by counsel.³ He also retains powerful rights that bear specifically on the evidence that may be introduced against him at trial. For instance, evidence obtained through an unconstitutional search and seizure may not be admitted against him;⁴ he may not be forced to testify against himself;⁵ the government must disclose to him favorable material evidence prior to trial;⁶ and certain statements may not be

2. U.S. CONST. amend. VI; *see also id.* art. III, § 2, cl. 3 (“The Trial of all Crimes . . . shall be by Jury . . .”).

3. *See id.* amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding that Sixth Amendment right to counsel in criminal trials applies to the states through the Fourteenth Amendment); *see also Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“[T]he purpose of the effective assistance guarantee of the Sixth Amendment is . . . to ensure that criminal defendants receive a fair trial.”).

4. *See Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (“To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.”).

5. U.S. CONST. amend. V; *see also Fisher v. United States*, 425 U.S. 391, 409 (1976) (holding that the Fifth Amendment “protects a person . . . against being incriminated by his own compelled testimonial communications”).

6. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that due process requires that the prosecution disclose evidence favorable to an accused upon request when such evidence is material to his guilt or innocence).

admitted against him unless he has an opportunity to cross-examine the speaker.⁷

An often overlooked right among these, however, is the affirmative evidentiary right granted to the criminal defendant by the Compulsory Process Clause of the Sixth Amendment—the right “to have compulsory process for obtaining witnesses in his favor.”⁸ Although the Court has rarely considered the scope and content of the Clause, it remains extremely important and relevant to criminal defense. Most famously, the Clause was invoked over assertions of executive privilege to uphold both the compelled production of letters from an American general to President Thomas Jefferson during Aaron Burr’s 1807 treason trial⁹ and the compelled production of President Richard Nixon’s famous Oval Office tape recordings in 1974.¹⁰ And, most recently, the scope of the right to compulsory process has become relevant in evaluating the extent to which “enemy combatants” being tried in connection with the War on Terror may subpoena and examine witnesses in the government’s custody.¹¹

The Supreme Court has, in a number of contexts, held that the right to compulsory process does more than grant subpoena power to criminal defendants.¹² Indeed, it requires admission of relevant evidence offered by the defense in certain circumstances, and it is an important part of the Sixth Amendment’s assurance of the “right to present a defense.”¹³ In this respect, the right to compulsory process shares a common and general goal with the law of evidence: that relevant evidence should generally be admissible in the absence of strong reasons for its exclusion.¹⁴ Admitting relevant evidence not only

7. U.S. CONST. amend. VI; *see also* Crawford v. Washington, 541 U.S. 36, 67 (2004) (holding that cross-examination is required for all “testimonial” statements).

8. U.S. CONST. amend. VI; *see also* Brief for the Petitioner at 13, Chambers v. Mississippi, 410 U.S. 284 (1973) (No. 71-5908) (“[The Compulsory Process Clause] operates as a constitutional rule of evidence to render admissible on behalf of the accused the material testimony of witnesses in his favor.”).

9. *See* United States v. Burr, 25 F. Cas. 187, 190 (C.C.D. Va. 1807) (No. 14,694); United States v. Burr, 25 F. Cas. 30, 32–33 (C.C.D. Va. 1807) (No. 14,692).

10. United States v. Nixon, 418 U.S. 683, 711–13 (1974) (upholding claim of compulsory process against President’s claim of executive privilege).

11. *See* Roberto Iraola, *Compulsory Process, Separation of Powers, and the Prosecution of Zacarias Moussaoui*, 35 U. MEM. L. REV. 15 (2004) (suggesting the possibility that the Compulsory Process Clause could apply to detainees held at Guantanamo Bay, Cuba); Megan A. Healy, Note, *Compulsory Process and the War on Terror: A Proposed Framework*, 90 MINN. L. REV. 1821 (2006) (considering the potential use of the right to compulsory process by persons charged with crimes in the War on Terror and prosecuted in Article III courts).

12. *See, e.g.*, Washington v. Texas, 388 U.S. 14 (1967).

13. *Id.* at 19; *see also* Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1612 (2006) (“[M]any of the criminal procedural protections in the Bill of Rights, as they are interpreted by the Court—the public trial requirement, the jury right, the confrontation and compulsory process clauses, the right to counsel during interrogation and at post-indictment lineups, and due process discovery guarantees, among others—are meant to ensure that the state does not shape evidence in secret.”).

14. *See, e.g.*, FED. R. EVID. 402 (“All relevant evidence is admissible, except as otherwise provided”); FED. R. EVID. 403 (permitting exclusion of relevant evidence only when “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

serves the end of determining the truth in a given case but also serves the coextensive end of achieving justice.¹⁵

Apart from relevancy, however, every code of evidence provides for the exclusion of evidence for other reasons—most commonly, where a certain category of evidence is deemed inherently unreliable.¹⁶ As the Court has recognized in several contexts, there is a point where rules excluding relevant evidence in criminal trials on the basis of its supposed unreliability implicates a defendant's constitutional right under the Compulsory Process Clause to a "meaningful opportunity to present a complete defense."¹⁷ At the same time, the Court has consistently upheld state authority to establish rules of evidence that exclude categories of evidence on the basis of unreliability.¹⁸

The problem posed by the tension between the defendant's right to present a meaningful defense and the state's right to categorically exclude unreliable evidence stands unresolved, and often ignored, in the Court's Compulsory Process Clause jurisprudence.¹⁹ If reliability-based rules of evidence are within

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). Relevance embodies two requirements: (1) probativeness—that the piece of evidence has a "tendency to make the existence of [a] fact . . . more probable or less probable than it would be without the evidence"; and (2) materiality—that it "is of consequence to the determination of the action." FED. R. EVID. 401.

15. See 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 490 (Fred B. Rothman & Co. ed., 1975) (1827) ("Evidence is the basis of justice: to exclude evidence is to exclude justice."); see also *Nixon*, 418 U.S. at 709 ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.").

16. The classic example of this type of evidence rule is the rule barring hearsay evidence. See, e.g., FED. R. EVID. 802. Hearsay is generally banned because the reliability of out-of-court statements that qualify as hearsay cannot be assessed by the trier of fact. Traditionally, the factors by which the truthfulness and accuracy of a witness's testimony are thought to be evaluated are the witness's perception, memory, narrative, and sincerity, as demonstrated through his in court testimony which is subjected to cross-examination. See generally Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948). The trier of fact evaluates these factors primarily through three techniques unique to the trial setting: (1) the witness is placed under oath; (2) the witness testifies "in the personal presence of the trier of fact"; and (3) the witness is subject to cross-examination. FED. R. EVID. art. VIII advisory committee's note; see *id.* ("The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross-examination as aids in determining credibility."); see also *id.* (describing cross-examination as "beyond doubt the greatest legal engine ever invented for the discovery of truth" (quoting 5 JOHN H. WIGMORE, EVIDENCE § 1367 at 32 (James H. Chadbourne ed., rev. ed. 1974))). Because the reliability of hearsay cannot typically be evaluated through these methods, it is barred unless it qualifies under an exception to the rule. See *Williamson v. United States*, 512 U.S. 594, 598 (1994).

17. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

18. See, e.g., *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules . . .").

19. Although not the focus of this Note, the Compulsory Process Clause is implicated in situations other than where defense evidence is excluded by a state rule of evidence. See *Taylor v. Illinois*, 484 U.S. 400, 416 (1988) (precluding admission of defense evidence may be an appropriate sanction in

the sole province of state legislatures, states have absolute discretion to decide what kinds of evidence and what categories of witnesses are reliable, and to exclude those defined as unreliable. However, granting states absolute authority in this manner could reduce the Sixth Amendment to a scope the Court has expressly rejected, a guarantee only of subpoena power that includes no federal standards governing when evidence must actually be admitted.²⁰ To avoid this result, there must be a line somewhere in the middle. That is, there must be circumstances where an exclusionary rule of evidence violates the right to compulsory process without calling into question our entire body of established reliability-based evidence law.

This Note attempts to draw this line, consistent with the original scope of the Compulsory Process Clause as construed in *Washington v. Texas*²¹ and the Court's recent transformation of the requirements of the Confrontation Clause in *Crawford v. Washington*.²² Specifically, this Note argues that the right to compulsory process requires that where the credibility of testimony depends on the sincerity of the witness, that determination must be made by the trier of fact. This interpretation is not only more consistent with the Court's recent approach to the Sixth Amendment in *Crawford*, it also dismantles the doctrinal confusion that began in *Chambers v. Mississippi*²³ and has since plagued the constitutional standards applicable to a criminal defendant's right to admit evidence in his favor.

Part I examines the original scope of the Compulsory Process Clause as applied in *Washington v. Texas*, the Court's first and seminal case on the issue. Part II explores the Court's departure from the specific protections of the right to compulsory process in *Chambers v. Mississippi*. While *Chambers* and its progeny initially appeared to be a powerful weapon for criminal defendants seeking to introduce evidence particularly critical to their defense, the reliance on an ill-defined general right to "present a defense" under the Due Process Clause, instead of the specific requirement of the Compulsory Process Clause, laid the foundation for later Courts to restrict the constitutional protections that may apply to the introduction of evidence in a criminal trial. Part III argues that a narrower, bright-line test for the right to compulsory process, informed by *Crawford v. Washington*'s interpretation of the Confrontation Clause, would not only clarify this area of law but may also increase the constitutional protections—specifically, the due process requirement that guilt be proven beyond a reasonable doubt—that apply to the introduction of evidence by a defendant in a criminal trial.

some circumstances and does not violate the Compulsory Process Clause); *Nixon*, 418 U.S. at 711 (suggesting that the Fifth and Sixth Amendments require "that all relevant and admissible evidence be produced" in a criminal trial).

20. See *infra* Part I.A.

21. 388 U.S. 14 (1967).

22. 541 U.S. 36 (2004).

23. 410 U.S. 284 (1973).

I. THE ORIGINAL SCOPE OF THE RIGHT OF COMPULSORY PROCESS

The Compulsory Process Clause, as a textual matter, only preserves the right to “obtain” witnesses, and appears silent as to rules that may compel introduction of their testimony—in part, or altogether—once subpoenaed and present in court.²⁴ The Clause itself does not specifically provide that the testimony offered by a witness who has been compelled to appear by the court must be admissible.²⁵ Read in such a manner, the Clause stands as a narrow rule of procedure, rather than a rule of evidence.

Section A of this Part examines the Court’s rejection of this strict reading of the Sixth Amendment, which came in its first substantial discussion of the scope of the Clause in *Washington*. Section B considers *Washington* in depth and argues that two principles—non-discrimination and the preservation of the proper role of the jury—animated the Court’s decision and define the standards by which criminal defendants may not only subpoena witnesses but compel the admission of their testimony.

A. A RIGHT TO SUBPOENA POWER OR A RIGHT OF ADMISSION?

At common law, there were virtually no procedural rules guaranteeing a criminal defendant the right to present a defense, much less a “meaningful” defense. In fact, the Sixth Amendment was, in part, a response to the “notorious” common law rule flatly prohibiting defendants charged with a felony or with treason from calling *any* witnesses in their defense.²⁶ Although this *per se* rule was ultimately abolished, defendants continued to be prevented from testifying on their own behalf, and codefendants were prohibited from testifying in support of one another, on the theory that allowing either would encourage perjured testimony.²⁷ The risk of perjured testimony was so great for this category of witnesses that a *per se* rule barring their testimony was supposedly necessary to preserve the integrity of the process.²⁸

Despite this legacy, there was no substantive debate regarding the Compulsory Process Clause in the First Congress.²⁹ The only mention of the Clause

24. See U.S. CONST. amend. VI.

25. See Richard A. Nagareda, *Reconceiving the Right To Present Witnesses*, 97 MICH. L. REV. 1063, 1074 (1999).

26. *Washington*, 388 U.S. at 19 (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1786–88 (1st ed. 1833)).

27. See *id.* at 20. According to the *Washington* Court, the ban on favorable codefendant testimony rested on the “unstated premise[.]” that “erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured [sic], even if it were the only testimony available on a crucial issue.” *Id.* at 21.

28. See, e.g., *Ferguson v. Georgia*, 365 U.S. 570 (1961) (describing the historical evolution of the rule); *Benson v. United States*, 146 U.S. 325, 336 (1892) (“Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors.”).

29. Janet C. Hoefel, *The Sixth Amendment’s Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1286 & n.45.

during debate was made in connection with the subpoena power, which by itself sheds no light on the scope of the right once a witness has been subpoenaed.³⁰ Several states had passed laws utilizing similar language to that of the Compulsory Process Clause, but the First Congress did not adopt the precise language of any of them.³¹ Some commentators have suggested that Congress's relative silence suggests that the Clause's framers envisioned its scope to be at least as extensive as states' versions of the right in force at the time of adoption, which included some degree of guarantee that, once subpoenaed, a defendant's witnesses must be allowed to testify.³² Others interpret the First Congress's limited debate on the Clause to suggest that it was intended to be a narrow right to subpoena witnesses without establishing a corresponding standard for the admissibility of their testimony that could trump the evidence law of a state.³³ A search for the Framers' intent, in any event, has proved un-enlightening as to the scope of an admissibility standard for the testimony of witnesses subpoenaed by the defendant.

The *Washington* Court rejected a strict reading of the Clause, making clear that the right to compulsory process has to do with admissibility as well as compelling appearance. A contrary interpretation would mean the Clause secures only "the futile act of giving to a defendant the right to secure the

30. See Lisa Graver, Note, *The Current Value of Compulsory Process: Can a Defendant Compel the Admission of Favorable Scientific Testimony?*, 48 CASE W. RES. L. REV. 865, 869 (1998).

31. Eight states provided some form of a right to present evidence favorable to a defendant, none of whose language restricted the scope of the right merely to have witnesses subpoenaed on his behalf. Statements of these rights included the right "to call for evidence in his favor," the right to "examine evidence on oath in his favour," the right to "produce all proofs that may be favorable to him," the right "to have process for his witnesses [and] to examine the witnesses for and against him on oath," [and] the right "to confront the accusers and witnesses with other testimony." Hoeffel, *supra* note 29, at 1284–85; see also Taylor v. Illinois, 484 U.S. 400, 408 n.13 (1988).

32. See Hoeffel, *supra* note 29, at 1286–87. Hoeffel argues:

[B]ecause no state objected to the language of the Clause, the language was intended and understood to encompass each state's concern: the right to call for evidence, the right to compel witnesses, and the right to parity with the government. . . . [T]he compulsion language [might have been included] to make it perfectly clear that part of calling witnesses in one's favor includes, by necessity, the right to have them compelled, especially since that was a right that was overlooked in common law England.

Id.; see also Robert N. Clinton, *The Right To Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 738–39 (1976) ("The history of the Bill of Rights lends some support to the view that the spirit or penumbras of the fifth and sixth amendment rights and the due process clause of the fifth amendment generally protect the criminal defendant's ability to present his defense, above and beyond the express guarantees."). A statute passed in 1790 based on the Clause may support this interpretation, which gave to criminal defendants the right "to make any proof that he can produce by lawful witnesses." Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118, 119 (codified as amended at 18 U.S.C. § 3005 (2000)).

33. See, e.g., Graver, *supra* note 30, at 869 (noting that, in response to a proposed amendment that would have required a continuance if defense subpoenas could not be served, a member of the First Congress suggested that "in securing . . . the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court").

attendance of witnesses whose testimony he ha[s] no right to use.”³⁴ Indeed, the Compulsory Process Clause is a component of the Sixth Amendment’s general scheme of granting criminal defendants the opportunity to “present a defense.”³⁵ Accordingly, while a defendant’s right to compulsory process for the presentation of relevant and material evidence is not absolute,³⁶ the Clause must establish some minimum protections with which rules of evidence governing the admissibility of defense witnesses’ testimony must comply.

B. THE WASHINGTON ARBITRARINESS STANDARD

After its ratification, the Compulsory Process Clause sat virtually unused for much of American history.³⁷ *Washington v. Texas* was decided in 1967, and was the same case in which the Court incorporated the Clause to the states.³⁸ *Washington* involved a constitutional challenge to Texas statutes prohibiting persons who had been charged with or convicted of the same crime from testifying either on their own behalf, or on the behalf of the other.³⁹ *Washington*, the defendant, had been prevented from introducing the exculpatory testimony of Fuller, his alleged co-participant in the murder for which he was charged, on the basis of this rule.⁴⁰ Fuller, who had already been convicted of the murder, would have testified that he had fired the shot that killed the victim.⁴¹ The *Washington* Court found these evidentiary rules unconstitutional under the Compulsory Process Clause of the Sixth Amendment.

The Texas evidentiary rules addressed in *Washington* were classic examples

34. *Washington v. Texas*, 388 U.S. 14, 23 (1967). In a similar vein, Peter Westen argues:

[T]he clause must do more than merely incorporate by reference whatever subpoena rights are available to the accused under state law, lest the right of compulsory process mean no more than what the state chooses to allow. It must operate as an independent standard defining the circumstances under which a defendant is entitled to subpoena witnesses.

Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 587 (1978) (citation omitted).

35. *Washington*, 388 U.S. at 19.

36. *See id.*

37. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 55 (1987) (noting that, since the Court’s holding in *United States v. Burr* that Burr’s compulsory process rights entitled him to serve a subpoena on President Jefferson, “the Compulsory Process Clause rarely was a factor in this Court’s decisions during the next 160 years”).

38. *See Washington*, 388 U.S. at 14 (1967). The right to compulsory process was not incorporated to the states earlier because the idea that the Due Process Clause incorporates the guarantees of other federal constitutional rights had long been rejected by the Court and, according to the *Washington* Court, the question had never been presented. The *Washington* Court stated:

At one time, it was thought that the Sixth Amendment had no application to state criminal trials. That view no longer prevails, and in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law.

Id. at 18 (citation omitted).

39. *Id.* at 16 & n.4.

40. *Id.* at 16.

41. *Id.*

of the categorical competence rules of the common law—rules that, according to the Court, were “arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief.”⁴² When a rule of evidence is “arbitrary,” however, is hardly self-defining. The Texas rules could not have been arbitrary *only* because they excluded an “a priori categor[y]” of evidence presumed to be “unworthy of belief.”⁴³ If this were true, the Compulsory Process Clause would call into question every reliability-based rule of evidence that categorically excludes unreliable evidence without allowing the judge, on a case-by-case basis, to determine whether the evidence is “actually” reliable.⁴⁴ On closer examination, it is apparent that the Court struck down the Texas evidentiary rules on the basis of two distinct rationales: unreasonable discrimination between evidence presented by the prosecution and defense, and an impermissible restriction on the constitutionally protected role of the factfinder to determine the credibility of witnesses.

1. Arbitrariness as Discrimination Between Prosecution and Defense

First, in the Court’s view, the rules lacked any “rational relationship” to the alleged goal of preventing perjured testimony because they irrationally distinguished between convicted coparticipants called as prosecution witnesses and those called as defense witnesses.⁴⁵ Convicted coparticipants called by the prosecution, the Court reasoned, have as much of an incentive to testify falsely as those called by the defense—for example, to secure more lenient treatment in return for providing testimony favorable to the government’s case.⁴⁶ Accordingly, the Texas rules in *Washington* deemed a certain class of witnesses to be unreliable based on their likelihood of presenting perjured testimony, but failed to apply this determination evenhandedly.

Although this basis for invalidating a state rule of evidence under the

42. *Id.* at 22 (emphasis added).

43. *Id.*

44. Such a regime of evidentiary decision-making has been widely rejected. The Advisory Committee for the Federal Rules of Evidence, for example, rejected an approach to the hearsay issue that would admit relevant hearsay on a case-by-case basis depending on factors including its relative weight, probative value, and risk of prejudice. See Mason Ladd, *The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof*, 18 MINN. L. REV. 506 (1934) (suggesting that the traditional rationale for the hearsay ban and its exceptions would remain relevant to determining the probative force of a given hearsay statement under such a system when reviewing the weight of the hearsay evidence); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961). The Advisory Committee feared such an approach would “involv[e] too great a measure of judicial discretion, minimiz[e] the predictability of rulings, enhanc[e] the difficulties of preparation for the trial, add[] a further element to the already over-complicated congeries of pretrial procedures, and requir[e] substantially different rules for civil and criminal cases.” FED. R. EVID. art. VIII advisory committee’s note.

45. *Washington*, 388 U.S. at 22.

46. *Id.* at 22–23; see also Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 394 (1992) (characterizing the hearsay rule as a check on governmental power).

Compulsory Process Clause had seldom seen an opportunity for application, the rationale resurfaced this past Term in *Holmes v. South Carolina*.⁴⁷ *Holmes* involved a constitutional challenge to a South Carolina rule of evidence prohibiting the introduction of evidence of third-party guilt when the prosecution has introduced forensic evidence strongly supporting a finding of guilt.⁴⁸ At his trial for robbery, rape, and murder, Holmes sought to introduce evidence that a third party had admitted his own guilt in those offenses to two other witnesses.⁴⁹ The trial court refused to admit any of this testimony at trial based on this rule.⁵⁰

Justice Alito wrote for a unanimous Court which relied on *Washington* to hold that the South Carolina rule violated Holmes's right to present evidence in his defense. According to Justice Alito's opinion, when the intrinsic probative value of evidence of third-party guilt is extremely low, evidence rules such as Federal Rule of Evidence 403, designed to exclude such evidence, are justified—for example, when evidence of third-party guilt is remote and lacks a substantial connection with the crime, or when the evidence does not tend to prove (or disprove) a fact material to the defendant's trial.⁵¹ The South Carolina rule, however, was unrelated to the relative probative value of evidence of third-party guilt, or the collateral consequences of admitting the evidence. Rather, the rule conditioned admission of evidence of third-party guilt on the *strength of the prosecution's case*, and was thus not evenhanded: “[t]he rule . . . is no more logical than its converse would be, i.e., a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty.”⁵² The “arbitrariness” of the rule was evidenced by its discriminatory application, which was even more extreme than the rule in *Washington*. Making the introduction of one party's evidence contingent on the supposed strength of another party's evidence is a rule incapable, by definition, of equal application.

While important, however, the discrimination rationale is irrelevant to the majority of reliability-based evidence rules. It seemingly would not apply if a state were to deem an entire class of witnesses—for example, the codefendants in *Washington*—unreliable, and consequently bar them from testifying for either

47. 547 U.S. 319 (2006).

48. *Id.* at 324 (“[W]here there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.” (emphasis added) (quoting *State v. Holmes*, 605 S.E.2d 19, 24 (S.C. 2004))).

49. *Id.* at 323–24. At the pretrial hearing, one witness testified that, in response to asking White, the alleged guilty third-party, whether he was innocent of the crimes, he had responded that “you know I like older women.” *Id.* at 323. A second witness who had been incarcerated with White testified that White admitted to him that “he did what they say he did,” and that he had “no regrets about it at all.” *Id.* White also testified at the pretrial hearing, however, and denied making either statement. *Id.*

50. *Id.* at 323–24.

51. *Id.* at 327–28.

52. *Id.* at 330.

the defense *or* the prosecution. Additionally, if this was the true basis for the Court's holding, there is no special reason why the defendant's compulsory process rights were violated—the Due Process Clause independently prohibits this kind of arbitrary government action towards criminal defendants.⁵³ Arbitrary discrimination, while an important rationale for due process concerns, was not the central rationale animating the result in *Washington*.

2. Arbitrariness as Usurping the Traditional Role of the Factfinder

The *Washington* Court was most concerned, instead, with the particular *kind* of evidence these rules categorically excluded—the testimony of a defense witness “physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.”⁵⁴ According to the Court, it is a fundamental principle of American criminal procedure that the reliability of testimony of mentally competent individuals with personal knowledge of the facts of the case must be evaluated and determined by the factfinder, usually a jury:

[It is] the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, *leaving the credit and weight of such testimony to be determined by the jury or by the court.*⁵⁵

Evaluating the credibility of competent witnesses with knowledge of the facts was, according to the Court, a traditional capability of the factfinder which was simply incapable of a priori predetermination by a legislature or code of evidence. Where the reliability of a category of evidence is *solely* susceptible to evaluation by the quintessential functions of the jury—such as in the classic situation of whether a witness with personal knowledge of the facts is telling the truth—the Compulsory Process Clause requires that this decision not be removed from the trier of fact by state evidence rules making those determina-

53. See *Washington v. Texas*, 388 U.S. 14, 24–25 (1967) (Harlan, J., concurring) (arguing that, rather than implicating the defendant's right to compulsory process, the Texas rules “arbitrarily” barred the introduction of evidence that it recognizes as relevant and competent when introduced by the prosecution: “This, I think, the Due Process Clause forbids.”). Edward J. Imwinkelried noted:

[Even] without recognizing an implied [S]ixth [A]mendment right to present defense evidence, the Court has ample power to invalidate arbitrary limitations on the defendant's opportunity to present his case. If the limitations are arbitrary in the sense that they are irrational, the Court could invalidate them on a substantive due process rationale.

Edward J. Imwinkelried, *Chambers v. Mississippi*, __ *US* __ (1973): *The Constitutional Right To Present Defense Evidence*, 62 *MIL. L. REV.* 225, 236–37 (1973).

54. *Washington*, 388 U.S. at 23; see also Peter Westen, *Compulsory Process II*, 74 *MICH. L. REV.* 191, 198 (1975).

55. *Washington*, 388 U.S. at 22 (emphasis added) (quoting *Rosen v. United States*, 245 U.S. 467, 471 (1954)).

tions a priori.⁵⁶

Neither of the rationales relied on by the *Washington* Court—discrimination and the proper role of the factfinder—had anything to do, however, with whether testimony by defendants or codefendants *must* be considered sufficiently reliable to require its admission as a matter of constitutional law. The “arbitrariness” of the Texas rules in *Washington* was not deduced from state error in barring purportedly unreliable evidence that was *actually* reliable in the opinion of the Court.⁵⁷ The *Washington* Court did not challenge either the proposition that there are good reasons for considering the testimony of defendants and co-participants to be untrustworthy, nor the legitimacy of this determination by the state.⁵⁸

Rather, the Court was concerned with which *body* must be permitted to make this determination. The reliability of the testimony of codefendants is determined by assessing their credibility. Juries are uniquely situated to make this difficult determination by being physically present to hear a witness’s testimony, assess her demeanor, and evaluate the consistency of her testimony under cross-examination while under oath.⁵⁹ Instead of announcing a rule that the reliability of *all* evidence submitted by the defendant must be assessed by the factfinder, the *Washington* Court held only that the determination of the credibility of witnesses must be judged by the factfinder.⁶⁰

Indeed, there were important reasons for limiting the holding to these two principles, as evidenced by the *Washington* Court’s identification of the types of evidentiary rules it did *not* interpret its decision to implicate, such as testimonial privileges.⁶¹ Testimonial privileges and similar rules exclude evidence for policy reasons other than reliability.⁶² The Court’s arbitrariness standard also seemingly did not implicate bedrock rules of evidence, such as the ban on hearsay evidence, which exclude evidence whose reliability cannot be evaluated by the trier of fact. Unlike the testimony of a defense witness testifying at trial, the reliability of most non-exempted categories of hearsay statements cannot be

56. *See id.*

57. *See* Westen, *supra* note 54, at 197–98.

58. *See* Graver, *supra* note 30, at 877 (“Nowhere in the opinion . . . was the legitimacy of the state’s interest questioned; rather, it was the unreasonable *means* utilized that proved violative of the Compulsory Process Clause.”).

59. *See* GEORGE FISHER, EVIDENCE 338 (2002) (explaining that, in addition to swearing an oath to tell the truth, demeanor evidence, and submission of the witness’s testimony to cross-examination, “witnesses may be less likely to lie in court simply because they have to testify in view of the defendant or because the dignity of the courtroom makes it feel unseemly to lie”).

60. *Washington*, 388 U.S. at 22. As the Court noted, one unstated premise that rules of the sort involved in *Washington* rested on was that “erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, *even if it were the only testimony available on a crucial issue.*” *Id.* at 21 (emphasis added).

61. *See id.* at 23 n.21.

62. *See, e.g.*, FED. R. EVID. 412, advisory committee’s note (generally barring evidence of a victim’s alleged sexual behavior or predisposition, in an attempt to “safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process”).

assessed by the jury because the statement is made out-of-court.⁶³ The Court's reluctance to call these deeply rooted evidentiary rules into question on constitutional grounds is entirely understandable.⁶⁴

Accordingly, *Washington v. Texas* stands only for the propositions that (1) state evidence rules must operate evenhandedly between the defense and prosecution, and (2) states may not categorically and preemptively deem witnesses to be unreliable where their credibility can be determined by the factfinder through the adversary process. Under this reading, therefore, it is the type of evidence presented and the type of evidence rule excluding it that triggers the Compulsory Process Clause. Or, as Professor Peter Westen—the earliest and most authoritative commentator on the Clause—has described the standard: “the defendant has a constitutional right to produce any witness whose ability to give reliable evidence is something about which reasonable people can differ.”⁶⁵ Thus, the Court did not announce a general constitutional right to have the reliability of evidence determined by the factfinder (rather than the court or legislature) in all instances. Rather, the right to compulsory process requires the admission of excluded evidence only when its reliability can only be evaluated through the traditional tools of the factfinder in the adversary system, including evaluation of the witness's veracity and consistency under cross-examination, as well as the witness's demeanor.

Importantly, the Court did not purport to adopt a balancing test for the right to compulsory process.⁶⁶ Neither the importance of the evidence to the defendant's

63. See FISHER, *supra* note 59, at 337–38 (explaining that the credibility of out-of-court statements cannot be determined by the three core “courtroom tools”—the oath, demeanor evidence, and cross-examination—because the declarant is typically not in court); *id.* at 350 (“[H]earsay is banned because of our inability to test the out-of-court declarant's perception, memory, narrative powers, and sincerity.”).

64. See Hoeffel, *supra* note 29, at 1291 (“By 1967, evidentiary rules which excluded evidence, such as rules against hearsay, were commonplace. The evidentiary structure had been built without consideration of the Compulsory Process Clause and the Court was not going to take down the whole structure in one fell swoop.”).

65. Westen, *supra* note 54, at 203 (emphasis omitted); see also Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 703 (1996) (“[U]nless the evidence is so unreliable, in the context of other evidence in the case, that it cannot properly be assessed by the jury and the public, a defendant should be able to get it in.”).

66. Cf. Westen, *supra* note 34, at 592 (“In *Washington*, the Court invalidated the state's rule of evidence not because it was discriminatory or irrational, but because the governmental interest in the rule was insufficient to justify its impact on the accused's right to present evidence in his defense. The Court did not deny the importance of the state interest in excluding testimony likely to be false and self-serving, but implicitly subjected to a balancing test the interests of the state and the defendant.”). Professor Westen apparently does not mean that this “implicit balance” requires the weighing of the governmental and private interest every time a court is faced with a decision to admit or exclude evidence—rather, the “arbitrariness” standard is the outcome of this balance. *But see* Clinton, *supra* note 32, at 797 (arguing that the “key” to a coherent approach to the right to present evidence in defense is a due process balancing test, which would balance “the constitutional values of fairness protected by the right [to present a defense] against the governmental interests expressed in [a] procedural or evidentiary ruling[]). The application of a balancing test would protect governmental interests in rules of evidence or procedure and would compel constitutional intervention only when the governmental

case nor the state's interest in excluding unreliable testimony were factors in the Court's analysis, and for good reason; a defendant has no constitutional interest in admitting unreliable evidence, regardless of the defendant's assertions of its importance, just as a state's interest in preventing the admission of unreliable testimony is irrelevant where that determination is within the proper and sole province of the jury.⁶⁷ Nonetheless, in the years after *Washington v. Texas*, the Supreme Court strayed from the arbitrariness standard in a manner that ultimately rendered the right to present evidence in one's defense potentially powerless against state rules of evidence excluding unreliable evidence.

II. THE SUBSTITUTION OF THE RIGHT TO PRESENT A DEFENSE FOR THE RIGHT TO COMPULSORY PROCESS

Under the *Washington* "arbitrariness" standard, the proper application of the Compulsory Process Clause begins and ends with a determination of the kind of evidence involved and the kind of evidence rule that excludes it. The Compulsory Process Clause simply requires a specific procedure for determining the reliability of evidence when reliability can be evaluated by the quintessential tools of the factfinder, regardless of its importance to a defendant's particular case or a state or court's independent opinion as to its reliability. The Court's later departure from *Washington*, however, has produced several disparate constitutional standards in its compulsory process cases. This Part examines the evolution of the right to compulsory process in the Court's limited precedents on the issue and argues that the Court's failure to apply the specific requirements of the right as interpreted in *Washington*, although initially generous to criminal defendants, ultimately laid the groundwork for the Court to substantially limit the constitutional protections that apply to a defendant's attempt to introduce evidence in his favor. Section A of this Part discusses *Chambers v. Mississippi*⁶⁸ and *Crane v. Kentucky*⁶⁹ and the replacement of the right to compulsory process with the due process right to present a defense. Section B examines *Rock v. Arkansas*⁷⁰ and the Court's struggle to reconcile this right with circumstances when the jury is unable to perform its traditional role—specifically, where the defendant's memory had been refreshed by hypnosis. Section C explores the change in focus from the defendant's interests and needs

interest does not outweigh the accused's right to present a complete defense.").

67. This Note argues that the Sixth Amendment, as applied in *Washington*, establishes a required procedure for determining reliability—a balancing test that treats this procedure as only one "interest" to be weighed against others circumvents that requirement. A balancing test that treats reliability as one among several interests to be weighed, such as the importance of the evidence to the defense or the State's interest in preserving its own rules of evidence, ends up weighing non-constitutional interests against constitutional ones. Cf. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 989 (1987) (noting that many of the Court's tests for other constitutional rights result in balancing constitutional and non-constitutional interests).

68. 410 U.S. 284 (1973).

69. 476 U.S. 683 (1986).

70. 483 U.S. 44 (1987).

to the states' interests, in the context of scientific evidence, in *United States v. Scheffer*⁷¹ and *Montana v. Egelhoff*.⁷² Section D summarizes and critiques the Court's evolving compulsory process jurisprudence.

A. BALANCING IN FAVOR OF THE DEFENDANT: THE DEFENDANT'S NEED AND "ACTUAL RELIABILITY" IN *CHAMBERS* AND *CRANE*

Six years after *Washington v. Texas*, the Supreme Court decided *Chambers v. Mississippi*⁷³ in 1973, a decision that ushered in the doctrinal confusion that has plagued the Court's Compulsory Process Clause jurisprudence ever since. In *Chambers*, the Court struggled to find a workable standard to invalidate the exclusion of evidence critical to the defendant's case by virtue of an unquestionably valid state evidence rule—the ban on hearsay evidence.⁷⁴ Hesitant to announce a general constitutional standard that would call into question the validity of the hearsay rule in all cases, the Court expressly limited its holding to the peculiar facts of the case, but nevertheless adopted a new and seemingly sweeping standard.⁷⁵ It declared that exclusion may violate the right to present a defense when the evidence is critical to the defense and bears "persuasive assurances of trustworthiness."⁷⁶ The Court subsequently expanded this standard in *Crane v. Kentucky*,⁷⁷ suggesting that the Compulsory Process Clause, in conjunction with the Confrontation Clause and the Due Process Clause of the Fourteenth Amendment, guarantees an independent constitutional right to a "meaningful opportunity to present a complete defense."⁷⁸ This section discusses both cases and concludes that reliance on these sweeping standards was unnecessary; both *Chambers* and *Crane* could have come out the same way based on the more narrow Compulsory Process Clause requirement that the reliability of evidence be evaluated by the factfinder whenever the traditional tools of the adversary process can be employed.

1. The *Chambers* Decision

*Chambers v. Mississippi*⁷⁹ is one of those decisions with which the Court was uncomfortable as soon as it was decided.⁸⁰ Leon Chambers, the defendant, was convicted of murdering a police officer despite substantial conflicting testimony

71. 523 U.S. 303 (1998).

72. 518 U.S. 37 (1996).

73. 410 U.S. 284 (1973).

74. *See id.* at 298–301; *cf. supra* note 61 and accompanying text.

75. *See id.* at 302–03.

76. *Id.* at 302.

77. 476 U.S. 683 (1986).

78. *Id.* at 690 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

79. 410 U.S. 284 (1973).

80. The Court noted:

In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we

as to the identity of the shooter.⁸¹ Although one police officer testified at trial that he saw Chambers shoot the officer, another witness testified that he viewed Chambers during the incident and that Chambers did not fire any shots.⁸² In addition, no gun was retrieved from Chambers at the scene, and no evidence was ever offered that Chambers owned a weapon of the caliber used in the shooting.⁸³

In his defense, Chambers sought to introduce the sworn confession of another man present at the shooting. Gable McDonald, one of the men who transported Chambers to a hospital following the shooting, confessed to the shooting two days later at the offices of Chambers's attorneys.⁸⁴ McDonald was subsequently arrested, but repudiated his confession at the pretrial hearing.⁸⁵ Additional testimony also implicated McDonald in the shooting—another witness testified that he saw McDonald shoot the police officer, and yet another witness testified that he saw McDonald holding a gun immediately after the shooting.⁸⁶ Finally, three of McDonald's other friends were ready to testify that he admitted to committing the murder in private conversations.⁸⁷ At trial, Chambers called McDonald to testify, who again repudiated his prior sworn confession.⁸⁸ However, the trial court prohibited Chambers from cross-examining McDonald⁸⁹ on

hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

Id. at 302–03.

81. *Id.* at 286.

82. *Id.*

83. *Id.*

84. *Id.* at 287–88.

85. *Id.* at 288.

86. *Id.* at 289.

87. *Id.*

88. At trial, Chambers requested that the trial court order McDonald to appear to testify, and also sought a ruling that, should the prosecution not call him, Chambers be allowed to call McDonald as an adverse witness—a motion upon which the court did not rule. When the State did not call McDonald, Chambers called him, and admitted his prior confession into evidence. On cross-examination by the prosecution, McDonald testified that he had repudiated this confession and that he did not shoot the officer. McDonald testified that he had confessed to the murder “only on the promise of [another person] that he would not go to jail and would share in a sizable tort recovery from the town.” *Id.* at 291.

89. In its decision, the Supreme Court suggested that barring Chambers from cross-examining McDonald also violated his rights under the Confrontation Clause. Rather than attempting to “defend the rule or explain its underlying rationale,” or argue that the rule should override Chambers's right of confrontation, Mississippi argued that the right of confrontation was not implicated by the voucher rule. According to the State, a right of confrontation exists only when the testifying witness is “adverse” to the accused. *Id.* at 297. However, according to the Court, the State's case at trial against Chambers proceeded on the theory that only one person had committed the shooting. *Id.* By necessary implication, therefore, any witness whose testimony incriminated himself or herself, rather than Chambers, would also tend to exculpate Chambers. *Id.* In sum, the determination of whether a witness is offered “against” a criminal defendant for Confrontation Clause purposes could not “depend on whether the witness was initially put on the stand by the accused or by the State.” *Id.* at 297–98. Ultimately, however, the Court did not reach the precise question of whether the defendant's confrontation rights had in fact been violated. *Id.* at 298.

the basis of a state common-law rule—the “voucher” rule—which prohibited a party from impeaching his own witness, and provided that the party who calls a witness is bound by whatever he says and may not seek to discredit him through the presentation of other testimony.⁹⁰ The trial court also barred as hearsay the testimony of Chambers’s three additional witnesses to whom McDonald had confessed. Although McDonald’s out-of-court statements would likely have qualified as statements against McDonald’s penal interest, Mississippi, like most states at that time, did not recognize the penal interest exception to the hearsay ban.⁹¹

The Court, invoking *Washington* and the Compulsory Process Clause, held that the combination of these exclusions of critical evidence rendered Chambers’s trial fundamentally unfair by violating his right to “present witnesses in his defense.”⁹² Rather than basing the decision squarely on the Compulsory Process Clause, however, the Court relied on a more general “right to present a defense,” of which the Compulsory Process Clause was, apparently, merely a component.⁹³ Although a defendant’s right to present witnesses must “comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence,” and despite the Court’s tacit acceptance that the *non*-recognition of the penal interest

90. The justification for this rule is the presumption that a party vouches for the credibility of his own witness by the very act of calling him. See *Clark v. Lansford*, 191 So. 2d 123, 125 (Miss. 1966). As the Court pointed out, this presumption applies “without regard to the circumstances of the particular case.” *Chambers*, 410 U.S. at 295. While seemingly accepting the general validity of this rule, however, the Court noted that its underlying rationale “has been the subject of considerable scholarly criticism.” *Id.* at 300.

91. The Court also acknowledged that, even in federal court, declarations against penal interest were not exempted from the hearsay ban. *Id.* at 299 (citing *Donnelly v. United States*, 228 U.S. 243, 272–73 (1913)). The Court noted that exclusion would not be required under the Federal Rules of Evidence, which at that time had been proposed but not yet ratified, because Rule 804(b)(3) provides for the admission of statements against penal interest *only* where the declarant is unavailable. See FED. R. EVID. 804(b)(3). Therefore, because McDonald was present at trial, even had the Federal Rules been adopted, they would not have permitted the admission of his out-of-court statements.

Since *Chambers*, and after the adoption of the statement against penal interest exception in the Federal Rules of Evidence, FED. R. EVID. 804(b)(3), about forty states now recognize the exception. Amy N. Loth, *The Confrontation Clause: Statements Against Penal Interest as a Firmly Rooted Hearsay Exception*, 48 CLEV. ST. L. REV. 321, 331 & n.77 (2000); see also *Lee v. Illinois*, 476 U.S. 530, 551 n.4 (1985) (Blackmun, J., dissenting) (noting that most states “now allow the introduction, in appropriate circumstances, of out-of-court declarations against penal interest”).

92. *Chambers*, 410 U.S. at 302 (“We conclude that the exclusion of this critical evidence, coupled with the State’s refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process.”) (emphasis added).

93. See *id.* (citing *Webb v. Texas*, 409 U.S. 95 (1972)); *Washington v. Texas*, 388 U.S. 14 (1967); *In re Oliver*, 333 U.S. 257 (1948)). Neither *Webb* nor *Oliver* involved exclusionary rules of evidence. In *Webb*, the Court relied on *Washington* to hold that a trial judge’s threatening remarks to the sole witness for the defense, which “effectively drove that witness off the stand,” violated due process. *Webb*, 409 U.S. at 98. The Court’s citation to *Oliver* is even more curious—*Oliver* held that a secret grand jury witness’s due process rights were violated when he was charged with and detained for contempt of court. See *Oliver*, 333 U.S. at 272–73.

exception is one such well-established rule of evidence,⁹⁴ the Court held that the operation of the hearsay rule, in this case, violated Chambers's right to present a defense.⁹⁵ In so holding, the Court suggested a sweeping new standard for the right to compulsory process: where evidence bears "persuasive assurances of trustworthiness" and is "critical" to an accused's defense, it must be admitted notwithstanding a state rule of evidence to the contrary.⁹⁶ In a case-specific analysis, it determined that McDonald's out-of-court statements bore such assurances for four reasons: (1) they were made spontaneously to close acquaintances shortly after the murder; (2) each statement was corroborated by other evidence presented at trial; (3) each statement was "unquestionably against interest"; and (4) even were there questions regarding the reliability of the statements, McDonald actually *was* available to be cross-examined by the State as to their truthfulness.⁹⁷

2. The *Crane* Decision

Chambers sat undeveloped by the Court until *Crane v. Kentucky*⁹⁸ in 1986. *Crane* involved a challenge to a Kentucky Supreme Court decision restricting evidence of coercion to the issue of the voluntariness of the defendant's confession, and not the defendant's innocence or guilt.⁹⁹ The minor defendant in *Crane* alleged that he had been detained in an interrogation room without windows for an excessive period of time, denied permission to call his mother, and had been "badgered" into making a false confession.¹⁰⁰ After considering this testimony by the defendant and the contrary testimony of several police officers, the trial court found that the confession—upon which the prosecution's case "rested almost entirely"—was voluntary and not coerced.¹⁰¹ Following this determination, the trial court denied introduction of evidence regarding the coerciveness of the confession, holding that such evidence is *only* relevant to the issue of voluntariness.¹⁰²

A unanimous Supreme Court first rejected the Kentucky Supreme Court's

94. See *Chambers*, 410 U.S. at 299–300 ("It is believed that confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest.").

95. *Id.* at 302 ("The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest."). The Court seemed to imply, however, that the "established rule of evidence" entitled to respect was the general rule excluding hearsay, rather than the recognition or non-recognition of any one exception to the hearsay ban. Because exceptions to the hearsay rule for "evidence which in fact is likely to be trustworthy have long existed," the Court cleverly seemed to suggest it was doing no more than compelling Mississippi to properly apply its own hearsay law. *Id.* at 302.

96. *Id.*

97. *Id.* at 300–01.

98. 476 U.S. 683 (1986).

99. *Id.* at 684.

100. *Id.* at 685.

101. *Id.*

102. *Id.* at 685–86.

determination that such evidence was relevant to the legal issue of voluntariness, and not reliability, a factual issue for the jury.¹⁰³ The Court appeared most distressed that, as a result of the trial court's exclusion of the testimony, the defendant was "effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?"¹⁰⁴ Because the defendant's "entire defense" was based on his contention that his confession was coerced and false, the Court thought it "plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of its succeeding."¹⁰⁵

Again limiting its holding to "the rather peculiar circumstances of this case," as it had in *Chambers*, the Court held that exclusion of such evidence in the defendant's case violated his right to present a defense.¹⁰⁶ In addition, the Court took *Chambers* a step further and defined the right to present a defense as a sweeping right with no one constitutional source: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'"¹⁰⁷ This right "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is *central* to the defendant's claim of innocence."¹⁰⁸ As it had in *Washington*, however, the Court reiterated that it did not "question[] the power of states to exclude evidence through the application of evidentiary rules that *themselves* serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted."¹⁰⁹

3. *Chambers* and *Crane*—Unnecessary Departures from the *Washington* Standard

Chambers, as well as *Crane*, at first blush seems to announce an expansion of

103. *Id.* at 691. This issue was critical to the case because, had the Court determined that the evidence the defendant sought to introduce was relevant only to the confession's voluntariness, there would have been no constitutional infirmity with preventing its introduction, as there is no constitutional requirement that voluntariness be decided by a jury. See *Sims v. Georgia*, 385 U.S. 538, 543–44 (1967) (due process requires "that a jury [not] hear a confession unless and until the trial judge . . . has determined that it was freely and voluntarily given"). Because the *credibility* of a confession must be decided by a jury, however, see *Jackson v. Denno* 378 U.S. 368, 386 & n.13 (1964), establishing that the relevance of evidence of the circumstances surrounding the confession was necessary to reverse the Kentucky Supreme Court's decision. *But see* Nagareda, *supra* note 25, at 1085 & n.83 (noting that the *Chambers* rationale was left "essentially untouched for two decades," and incorrectly construing *Crane* as holding that the trial court in the case had "violated earlier Court precedents allocating to the jury the ultimate determination of whether a given confession is *voluntary*") (emphasis added).

104. *Crane*, 476 U.S. at 689.

105. *Id.* at 691.

106. *Id.*

107. *Id.* at 690 (emphasis added) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

108. *Id.* at 690 (emphasis added).

109. *Id.* (emphasis added).

the compulsory process right incorporated in *Washington*. At the time, *Chambers* was thought to be potentially “the most important constitutional law case in the field of criminal evidence that has come down in the last few years.”¹¹⁰ *Chambers*, while purporting to apply *Washington*, introduced two new factors into the compulsory process calculus under the guise of a right to present a defense that was not necessarily coextensive with the right to compulsory process: the *actual* reliability of the evidence, and the *need* of the defendant to admit the evidence.¹¹¹ By independently assessing the reliability of the particular hearsay statement at issue *without* invalidating the state’s authority to categorically determine reliability through the non-recognition of hearsay exceptions, the Court suggested that, when critical to the defense, it possessed the constitutional authority to determine reliability on its own. The implications of such a newly-seized power, however, could not have been lost on the Court, and likely motivated it to expressly limit its holdings in *Chambers* and *Crane* to the facts of those cases.¹¹²

Alternatively, both *Chambers* and *Crane* can be interpreted as consistent with *Washington*, although this consistency is shrouded by the broad principles seemingly announced. As in *Washington*, the Court in *Chambers* did not hold that the purpose behind the rule was irrational; the Court specifically declined to decide whether the rejection of the statement against penal-interest exception served a valid purpose by excluding untrustworthy evidence.¹¹³ Under the peculiar circumstances of the case, however, the Court emphasized that the jury actually *could* evaluate McDonald’s credibility because, unlike the typical hearsay declarant, he *was* present in court and “could have been cross-examined by the State, and his demeanor and responses weighed by the jury.”¹¹⁴ Accordingly, rather than holding that the category of statements against penal interest arbitrarily excluded actually reliable evidence as a general matter, and thus

110. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 151 (1974) (quoting Proceedings of the 1973 Sentencing Institute for Superior Court Judges, 112 Cal. Rptr. app. 97 (1973) (remarks of Judge Otto M. Kaus)).

111. See *supra* notes 95–96 and accompanying text.

112. In a letter assigning the *Chambers* opinion to Justice Powell, Chief Justice Burger emphasized the need for a narrow holding:

Dear Lewis,

I am assigning [*Chambers v. Mississippi*] to you and I agree with you that it must be written very narrowly.

... [T]here is much in what Bill Rehnquist said about intruding in state procedures and “constitutionalizing everything.” Nonetheless, this can be reversed on no grounds except the Federal Constitution, and were I doing it, I would rest it on the unique factors of this case and even call them unique

FISHER, *supra* note 59, at 583; see also *Montana v. Egelhoff*, 518 U.S. 37, 52 (1996) (Scalia, J., plurality opinion) (“*Chambers* was an exercise in highly case-specific error correction.”).

113. *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973).

114. *Id.* at 301. Given the frequency with which hearsay declarants are not available at trial, however, the decision cannot be read as holding that the jury is able to perform this role as to all excluded hearsay statements.

violated the Compulsory Process Clause, the Court simply determined that its reliability could be assessed by the jury given the peculiar circumstances of the case. The central requirement of the Compulsory Process Clause, therefore—preserving evaluation of the reliability of testimony through the adversary process—appears to be what really animated the decision.

Similarly, in *Crane*, despite the Court's emphasis on the defendant's need for the evidence and its re-characterization of the right to present a defense as one emanating from both the Compulsory Process Clause and the Due Process Clause, the lower court's refusal to allow the jury to evaluate the credibility of the confession was the fundamental error requiring reversal.¹¹⁵ The voluntariness requirement is a legal determination that a judge must make in order to prevent a violation of a defendant's due process rights.¹¹⁶ As a right of due process, the voluntariness requirement serves the interests of criminal defendants, not the prosecution. While its purpose may be to exclude unreliable evidence, it is not a reliability-based evidentiary rule of general applicability. The Kentucky Supreme Court seemed, however, to treat it precisely as such—a constitutional rule of evidence that required exclusion of unreliable confessions. Its error was assuming that, by entrusting this determination to the court, the evidence relevant to this determination, by implication, could *only* be considered by the court. Because the Compulsory Process Clause mandates that the credibility of such evidence be assessed and weighed by the factfinder through the adversary system, its exclusion violated the Compulsory Process Clause.

In sum, *Washington*, *Chambers*, and *Crane* each involved situations where the reliability of the excluded evidence could have been evaluated by the jury in its role as factfinder.¹¹⁷ The reliance in *Chambers* and *Crane* on an independent

115. See *Crane v. Kentucky*, 476 U.S. 683, 689 (1986).

116. See, e.g., *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (“[C]ertain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.”); *Sims v. Georgia*, 385 U.S. 538, 543–44 (1967) (holding that due process requires “that a jury [not] hear a confession unless and until the trial judge . . . has determined that it was freely and voluntarily given”).

117. Although a holding that the reliability of McDonald's out-of-court statements could have been evaluated by the jury would have rested on more principled grounds under the Compulsory Process Clause, such a holding could also suggest that *all* categories of hearsay must be admitted at trial where the declarant is present. Such a holding would accordingly limit the authority of state legislatures and courts to establish categorical reliability-based rules excluding evidence when, in certain instances and under certain circumstances, the justification for the rule is not implicated by admission because the factfinder can properly assess its reliability. An assessment of such a result is outside of the scope of this Note; however, it is worth noting that there are good grounds for arguing that the hearsay rule should *not* apply to a present witness's own out-of-court statements because the declarant's perception, memory, narrative powers, and sincerity *can* be evaluated by the factfinder. See, e.g., FISHER, *supra* note 59, at 350 (“[H]earsay is banned because of our inability to test the *out-of-court* declarant's perception, memory, narrative powers, and sincerity.”) (emphasis added).

In any event, to the extent the *Chambers* Court rejected such a holding in order to avoid calling all ordinary operations of the hearsay rule into question, its “persuasive assurances of trustworthiness” standard does no better. Whereas a holding in line with *Washington* would only call the constitutionality of the hearsay rule into question when the declarant was present at trial, the much broader standard

analysis of reliability by the Court, and its emphasis on the need presented by the defendant, however, implicitly employed a balancing test that subsequent cases had to rationalize, and perhaps more perniciously, could be used very differently by later Courts with different priorities.

B. BALANCING IN FAVOR OF THE DEFENDANT: A SPECIAL STANDARD FOR THE DEFENDANT'S OWN TESTIMONY IN *ROCK V. ARKANSAS*

Chambers's slide from the Compulsory Process Clause to a due-process balancing test continued in *Rock v. Arkansas*.¹¹⁸ In *Rock*, the Court invalidated an Arkansas prohibition on testimony that had been previously "refreshed" through hypnosis.¹¹⁹ The defendant, charged with the murder of her husband, had stated at the scene that her husband had beat her but that she could "not remember the precise details of the shooting."¹²⁰ After undergoing hypnosis, however, the defendant was able to recall that the gun had discharged accidentally during the struggle with her husband.¹²¹ Although the defendant was able to introduce expert testimony suggesting that the gun that killed her husband was "defective and prone to fire, when hit or dropped, without the trigger's being pulled," she was prevented from testifying about any facts of the shooting that she was able to recall only after undergoing hypnosis.¹²²

The Supreme Court held that the Arkansas hypnosis rule was an unconstitutional restriction on the defendant's right to present witnesses in his defense—a right that would be "incomplete if [the defendant] may not present *himself* as a witness."¹²³ The Court again reiterated that the right to present evidence in one's defense is not unlimited, and will, "in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."¹²⁴ Such restrictions, however, when burdening a defendant's right to testify himself, "may not be arbitrary or *disproportionate* to the purposes they are designed to serve."¹²⁵ The Court found the hypnosis rule "arbitrary and disproportionate," primarily be-

announced in *Chambers* invites criminal defendants to challenge application of the hearsay rule on the grounds of all sorts of other circumstances—for example, the extent to which an out-of-court statement is independently corroborated by other hearsay statements of unavailable witnesses—and not only those based on the quintessential role of the factfinder. Cf. *infra* text accompanying note 132 (discussing the argument made by the *Rock* Court that the defendant's testimony was reliable because her version of events was possibly consistent with other forensic evidence introduced at trial). Finally, given the pains the Court took to limit its holding to the particular facts of the case, a conclusion that the hearsay must be admitted because its credibility could be determined by the jury in this particular case, even if the reliability of such out-of-court statements is generally out of the purview of the jury because the declarant is not in court to be cross-examined, is no more open to criticism on such grounds than the Court's actual holding.

118. 483 U.S. 44 (1987).

119. *Id.* at 62.

120. *Id.* at 46.

121. *Id.* at 47.

122. *Id.*

123. *Id.* at 52 (emphasis added).

124. *Id.* at 55 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

125. *Id.* at 56 (emphasis added).

cause it was a per se ban¹²⁶ foreclosing any inquiry into the specific circumstances of a particular defendant's hypnosis session¹²⁷ or an assessment of the reliability of a particular defendant's recollection post-hypnosis.¹²⁸

The Court made little attempt to address the purposes behind the hypnosis rule under its new "arbitrary or disproportionate" standard.¹²⁹ Instead of explicitly questioning the justification for the Arkansas rule, the Court proposed that undue suggestiveness—the potential effect that makes the reliability of hypnosis-enhanced testimony questionable—could have been reduced by less restrictive procedures, including requiring specially-trained psychiatrists independent of the criminal investigation itself to perform the hypnosis.¹³⁰ In effect, this was a "least restrictive alternative"¹³¹ that the state should have utilized instead of categorically excluding such testimony. In addition, in a *Chambers*-like analysis, the Court suggested that the defendant's hypnosis-refreshed testimony in *Rock* was sufficiently reliable, notwithstanding the justification for Arkansas's rule categorically excluding it. The defective condition of the gun, for example, corroborated the defendant's assertion that the gun had gone off accidentally.¹³²

Rock's new standard for when evidence rules violate a defendant's right to present a defense—where they are "arbitrary or disproportionate to the purposes they are designed to serve"—seemed akin to a rational basis test, but the Court's application of this standard seemed to impose a standard of strict scrutiny only for the defendant's *own* testimony.¹³³ This limited holding allowed the Court to avoid the more difficult underlying question, more relevant to the Compulsory Process Clause, of whether a state can constitutionally deem a category of

126. *Id.* at 56. The Court likened the per se ban on the testimony of a defendant who has undergone hypnosis to the common law rule rejected in *Washington v. Texas*: "Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Id.* at 55.

127. *Id.* ("This rule operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced.").

128. *Id.* at 62.

129. Indeed, the Court admitted that such a rule had been adopted by seventeen other states on the grounds that such evidence *should* be considered categorically unreliable. *Id.* at 57. Although hypnosis was considered a valid therapeutic practice, its use in criminal investigations was "controversial, and the current medical and legal view of its appropriate role . . . unsettled." *Id.* at 59. The Court attempted to distinguish these rules on the ground that Arkansas was alone in applying the rule to criminal *defendants*, as opposed to witnesses for the defense, who sought to testify after having their memory refreshed by hypnosis. *Id.* at 58.

130. *Id.* at 60 ("The inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards.").

131. *Cf.* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 416 (1997) (explaining that under the Supreme Court's "strict scrutiny" standard of review, in order to establish that a statute or rule is necessary to further a compelling state interest, the government must show that the statute is the least restrictive alternative available).

132. *Rock*, 483 U.S. at 62.

133. The Supreme Court has subsequently limited the precedential value of *Rock* on this very ground. *See United States v. Scheffer*, 523 U.S. 303, 316–17 (1998).

evidence unreliable when its reliability *cannot* be determined by the traditional tools of the factfinder—even when the evidence is the defendant’s own testimony. To the extent that the Sixth Amendment grants special protections for the defendant’s ability to testify at his own trial, this factor in the Court’s balancing test may make the right to compulsory process hollow for many defendants. Often, as *Chambers* illustrates, the evidence most important to the accused’s defense will depend on the particular facts of the case, and in most cases will consist of testimony by witnesses *other* than the defendant. Leon Chambers’s testimony that he had not committed the murder was simply ineffective without the opportunity to introduce the testimony of third parties who had heard another individual confess to the crime. That the defendant’s own testimony is most crucial to his defense will often occur by mere happenstance, and the language of the Clause itself suggests no distinction between the introduction of the defendant’s own testimony and that of other witnesses.¹³⁴

C. BALANCING IN FAVOR OF THE STATE: SCIENTIFIC EVIDENCE AND THE COMPULSORY PROCESS CLAUSE

The transformation of the right to compulsory process continued in *United States v. Scheffer*,¹³⁵ the Court’s first opportunity to consider the extent to which reliability-based rules of evidence excluding *scientific* evidence implicates a defendant’s right to present a defense. In *Scheffer*, the Court upheld a Military Rule of Evidence which made polygraph evidence inadmissible in all court-martial proceedings.¹³⁶ Justice Thomas, writing for the majority, held that the rule was valid in service of, and not “arbitrary or disproportionate” to the purposes of, any of three legitimate state goals: (1) ensuring that unreliable evidence is excluded from trial;¹³⁷ (2) preserving the function of the factfinder in making credibility determinations in criminal trials;¹³⁸ and (3) avoiding litigation over “issues other than the guilt or innocence of the accused.”¹³⁹

134. See Hoefel, *supra* note 29, at 1305–06 (“The Compulsory Process Clause . . . makes no distinction among ‘witnesses in his behalf.’ Indeed, it would make little sense if the Clause created a hierarchy of witnesses, with the defendant as the most important, since at the time of its adoption, defendants were still disqualified from testifying.”).

135. 523 U.S. 303 (1998). Edward Scheffer, a member of the Air Force, was subjected to drug testing and a polygraph test by the Air Force Office of Special Investigations. *Id.* at 305–06. Scheffer’s urinalysis was positive for methamphetamine, and he was tried by general court-martial. *Id.* at 306. In his defense, and in support of his claim that he had not knowingly used drugs, he sought to introduce the evidence of the polygraph test, which “indicated no deception” when Scheffer denied that he had used drugs since becoming a member of the Air Force. *Id.*

136. *Id.* at 305.

137. *Id.* at 309.

138. *Id.* at 312–14. The proposition that the role of the jury is harmed by the introduction of polygraph evidence is more complicated than the Court was willing to admit. Under no circumstance would polygraph evidence have been *substituted* for the jury’s credibility determination. Rather, such evidence is one factor that the jury could consider in coming to a determination—and, in connection with this inquiry, the jury could be presented with and consider conflicting evidence as to the reliability of polygraph machines themselves.

139. *Id.* at 314.

Justice Thomas distinguished *Washington*, *Rock*, and *Chambers* on the basis of the “weight of the right to the accused” implicated by exclusion of the evidence; evidence of a successful polygraph test, according to the Court, merely bars a criminal defendant from “introducing expert testimony to *bolster* his own credibility.”¹⁴⁰ Specifically, unlike the situation in *Rock*, the defendant was not precluded from testifying as to his own version of the events, and thus the jury was presented with sufficient means of assessing the credibility of his version of events.¹⁴¹

Rather than making an independent determination of the reliability of the particular polygraph evidence at issue in *Scheffer*, as the Court did in *Chambers*, *Crane*, and *Rock*, Justice Thomas spent most of his opinion examining the extent to which the various states had adopted a rule allowing polygraph evidence. Finding a significant “lack of scientific consensus” about the reliability of polygraph tests—reflected in significant disagreement among state and federal courts as to their admissibility—Justice Thomas concluded that “[i]ndividual jurisdictions . . . may reasonably reach differing conclusions” as to their admissibility.¹⁴² In the presence of such uncertainty, the categorical ban did not violate the defendant’s compulsory process right. Thus, as recast in *Scheffer*, the measure of any constitutional right to introduce *scientific* evidence at one’s trial becomes little more than an exercise in counting the number of states that have adopted an exclusionary evidentiary rule in order to determine the extent to which a contrary rule rises to the level of a “consensus.”¹⁴³

The Court took a further step toward substituting a general due process test for the requirements of the compulsory process clause in *Montana v. Egelhoff*.¹⁴⁴ *Egelhoff* presented the question of whether the defendant’s right to present a defense was violated by a state rule prohibiting the introduction of evidence of voluntary intoxication in order to prove that the defendant did not have the mental state required under Montana’s murder statute.¹⁴⁵ The Supreme Court of

140. *Id.* at 316–17 (emphasis added).

141. *Id.*

142. *Id.* at 312.

143. *Id.* at 311–12. This reality is not necessarily dictated by the Due Process Clause itself, but results from the majority of the Court’s views on the permissible scope of constitutional interpretation. Justice Scalia, for example, has argued that, in defining the right involved under the Due Process Clause, the Court must “refer to the most specific level at which a relevant *tradition* protecting, or denying protection to, the asserted right can be identified.” *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (emphasis added). An analysis at a more general level of specificity—for example, an analysis of whether a broadly conceived right to present a defense has been violated—“permit[s] judges to dictate rather than discern . . . society’s views.” *Id.*

144. 518 U.S. 37 (1996).

145. *See id.* *Egelhoff*, the defendant, was found “alive and yelling obscenities” in the back seat of a car in which two passengers each sat dead from a single gunshot wound to the head. *Id.* at 40. He was found with gunshot residue on his hands and a blood alcohol level of .36. *Id.* His principal defense was that, given his extreme intoxication, it would have been “physically” impossible for him to have committed the two murders, and that an unidentified other person must have committed them. *Id.* at 41. *Egelhoff* was prevented by the trial court, however, from making use of evidence of his intoxication to also rebut the element of *mens rea*, by virtue of a Montana evidence rule preventing the consideration

Montana reversed, holding that Egelhoff had a “due process right to present and have considered by the jury *all relevant evidence* to rebut the State’s evidence on all elements of the offense charged.”¹⁴⁶

Justice Scalia’s opinion in *Egelhoff* reversed the Supreme Court of Montana’s decision through a “tradition”-centric due process analysis in the fashion of *Scheffer*.¹⁴⁷ Rather than considering the extent to which such evidence was critical to Egelhoff’s defense, or examining the reliability of breathalyzer evidence—for example, the extent to which a high blood alcohol level can adequately measure the physical and mental capabilities of an intoxicated individual—Justice Scalia focused on whether there exists a “fundamental” right “to have a jury consider evidence of his voluntary intoxication in determining whether he possesses the requisite mental state.”¹⁴⁸

Unsurprisingly, Justice Scalia found no such fundamental right. Although by the end of the nineteenth century most states allowed intoxication to be considered in determining whether a defendant was capable of forming the requisite mens rea,¹⁴⁹ one-fifth of the states had never adopted such a rule, or had abandoned it by the time of the decision.¹⁵⁰ Justice Scalia found this “not surprising”¹⁵¹: given the large number of violent crimes that are committed by individuals while intoxicated, disallowing evidence of voluntary intoxication functioned as a deterrent to such crimes.¹⁵² By focusing on the extent to which a rule permitting consideration of intoxication in connection with the mens rea was a “fundamental” one, Justice Scalia was able to restrict the analysis to whether such a rule had universal or near-universal acceptance at common law and among the states.¹⁵³

D. THE COURT’S EVOLVING COMPULSORY PROCESS STANDARD

Considered together, these different standards for the right to present evidence in one’s defense—preservation of the role of the factfinder (*Washington*), “persuasive assurances” of reliability and criticalness of the evidence (*Chambers*), “arbitrary and disproportionate” restrictions on the right to present witnesses (*Rock*), and “fundamental rights” to introduce evidence under the Due

of a defendant’s “intoxicated condition . . . in determining the existence of a mental state which is an element of the offense.” *Id.*; see also MONT. CODE ANN. § 45-2-203 (1995).

146. *State v. Egelhoff*, 900 P.2d 260, 266 (Mont. 1995) (emphasis added).

147. See Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, 1206 (1999) (noting that the plurality decision “shifted the traditional locus of protection from the specific clauses of the Sixth Amendment to the more amorphous Due Process Clause”).

148. *Egelhoff*, 518 U.S. at 43.

149. *Id.* at 46.

150. *Id.* at 48.

151. *Id.* at 49.

152. *Id.* at 49–50.

153. *Id.* at 48 (“Instead of the uniform and continuing acceptance we would expect for a rule that enjoys ‘fundamental principle’ status, we find that fully one-fifth of the States either never adopted the . . . rule at issue here or have recently abandoned it.”).

Process Clause (*Egelhoff*)—are difficult to reconcile with one another. *Scheffer* and *Egelhoff*, in particular, embody a significant departure from the *Washington* arbitrariness standard, and a complete abandonment of *Chambers*.¹⁵⁴ The *Scheffer* and *Egelhoff* Courts considered the exclusion of evidence not with regard to whether it was of a type whose reliability was amenable to evaluation by a jury, but by the extent to which the permissibility of admission was widely recognized by states such that a requirement of admission could be considered a fundamental principle of due process.¹⁵⁵ If these cases now represent the controlling standard, a defendant's interest in introducing evidence that is otherwise excluded by state law will only be victorious when that state law is contrary to the common law, or the law of a substantial majority of other jurisdictions.

This result is due, in part, to the Court's shifting and unprincipled identification of the *source* of the right to present a defense itself. In an apparent misreading of *Washington*, in subsequent cases the Court has operated under the impression that it was enforcing due process in cases where critical defense evidence was excluded.¹⁵⁶ To be sure, the Due Process Clause affords procedural protections to a criminal defendant that are essential to the "right to present a defense."¹⁵⁷ The Compulsory Process Clause, however, was incorporated in *Washington* as one "*specific guarantee*[]" of the Sixth Amendment required by this right.¹⁵⁸ As a specific guarantee of the general "right to present a defense," the Court was not announcing an independent constitutional guarantee. Neither did the Court suggest that its requirements were altered by incorporation.

By recasting the right to compulsory process as a general "right to present a defense," however, the Court has seemed content in post-*Washington* cases to abandon any analysis of the specific requirements of the Clause. Freed of the task of explicating a specific constitutional amendment, there was seemingly no barrier to introducing the need of the defendant into the analysis, or performing its own evaluation of the reliability of excluded evidence in a given case, as it did in *Chambers*. This interpretive move also allowed the Court to elevate the demands of the right in situations it viewed as especially "fundamental"—for example, *Rock*'s application of strict-scrutiny-like analysis to a rule barring testimony at trial by the defendant himself.¹⁵⁹ The emphasis on the need of the

154. *See id.* at 52 (suggesting that *Chambers* was such a fact-specific holding that a standard cannot be discerned from it).

155. *See supra* notes 142–43, 149–53, and accompanying text.

156. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a '*meaningful* opportunity to present a *complete* defense.'" (emphasis added) (citations omitted) (quoting *California v. Trombetta*, 476 U.S. 479, 485 (1984))).

157. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

158. *Id.* at 18 (emphasis added).

159. *See supra* notes 123–28, 131 and accompanying text.

criminal defendant to introduce evidence critical to her defense allowed the Court to avoid the contentious issue of the authority of states to make a priori categorizations of unreliable evidence. If the requirements of the right to compulsory process are heightened when the evidence is especially critical, an *independent* assessment of its reliability is arguably warranted, in spite of the state's classification. In such an instance, the Court need not invalidate a state rule of evidence completely, but may rather hold it unconstitutional as applied to the exclusion of unusually important evidence.¹⁶⁰

The Court's shift from the right to compulsory process to the broader right to present a defense also opened the door for a Court less sympathetic to the interests of criminal defendants to swing the pendulum in the opposite direction. By basing its decisions on the Due Process Clause, rather than the specific procedural guarantee of the Compulsory Process Clause,¹⁶¹ the Court was more free in subsequent cases to undertake an analysis incorporating concerns other than the criticalness of the excluded evidence to the defendant's case, and affording more weight to state interests. Whereas *Chambers* and its progeny utilized a balancing analysis to introduce the relevancy of the criminal defendant's need for the evidence, however, *Scheffer* shifted this emphasis to the state's interest in applying categorical, reliability-based rules excluding certain kinds of evidence¹⁶²—an interest, and authority, that the Court routinely takes for granted.¹⁶³

The significant shift in the Court's Sixth Amendment jurisprudence also potentially lays the groundwork for a complete roll-back of the protections

160. The *Chambers* Court relied on precisely such a rationale. Although it avoided compelling the State to recognize the statement against penal interest exception to the hearsay rule, it nonetheless held that the hearsay rule violated the defendant's right to present a defense under the peculiar facts of the case. See *supra* notes 93–95 and accompanying text. In the Court's opinion, by excluding the testimony of the witnesses to whom McDonald had confessed, the trial court "effectively prevented [Chambers] from exploring the circumstances of McDonald's three prior oral confessions and from challenging the renunciation of the written confession." *Chambers v. Mississippi*, 410 U.S. 284, 297 (1973). And in *Crane v. Kentucky*, 476 U.S. 683, 689 (1986), the Court was especially concerned that, as a result of the trial court's exclusion of evidence of the voluntariness of the defendant's prior confession, the defendant was "effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Crane*, 476 U.S. at 689; see also *id.* at 690 (noting that the defendant's "entire case" was based on his contention that his confession was coerced and false and that it was "plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of its succeeding").

161. The Court has in the past acknowledged its intentional avoidance of the opportunity to interpret the specific requirements of the Compulsory Process Clause in favor of a due process analysis. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) ("Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case.")

162. See Hoeffel, *supra* note 29, at 1304 (noting that *Scheffer* "virtually ignored the defendant's side of the balance—his interest in introducing exculpatory evidence").

163. *E.g.*, *United States v. Scheffer*, 523 U.S. 303, 309 (1998) ("State and federal governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial.")

granted in *Chambers*, *Crane*, and *Rock*. Because these cases did not base their holdings on the specific procedural guarantee of the Compulsory Process Clause, there is no clear reason why, under the Due Process Clause, a state's interest in categorically excluding evidence is less weighty just because the evidence is of a type whose reliability could be evaluated by a jury. Rather, *Scheffer* and *Egelhoff* suggest that where a firm consensus as to the reliability of a category of evidence is lacking among the states, there is no due process right to its admission.¹⁶⁴ Under this analysis, *Chambers* could have conceivably come out the opposite way, despite the Court's later suggestion that the decision could be distinguished based on the importance of the evidence to the defendant's case,¹⁶⁵ because a majority of states did not then recognize the statement against penal interest exception to the hearsay rule.¹⁶⁶

The substitution of the amorphous right to present a defense under the Due Process Clause for the more specific right to compulsory process was particularly unnecessary in *Rock*, *Scheffer*, and *Egelhoff* because the evidence excluded in those cases did not implicate either of the *Washington* rationales for compulsory process violations. Expert scientific testimony is, by definition, not amenable to evaluation through the traditional strengths of juries because it does "not derive its credibility from the demeanor of the expert, but from the validity of its underlying scientific principles."¹⁶⁷ The hypnosis rule in *Rock* arguably did not implicate the *Washington* arbitrariness standard because the reliability of the defendant's testimony could not be assessed by the jury using its traditional credibility-assessing tools. The danger posed by suggestive hypnosis is that the patient may come to *sincerely* believe a false version of the past, but the Court failed to address the extent to which the existence of subconscious suggestiveness could be successfully assessed by the jury. The *Scheffer* Court was obviously concerned with the ability of juries to competently assess the reliability of polygraph evidence. Indeed, Justice Thomas argued that the mere introduction of such evidence could harm the jury's traditional role of assessing the credibility of a defendant's in-court testimony.¹⁶⁸ Finally, the reliability of the breathalyzer reading of the defendant's blood-alcohol level in *Egelhoff* was not within the traditional competence of a jury; in any event, Montana never purported to justify its rule excluding such evidence on the ground that blood-alcohol readings are inherently unreliable. Rather, the rule was based on a

164. See Hoeffel, *supra* note 29, at 1352 ("According to *Scheffer*, because there was no consensus on the reliability of polygraphs—it did not have proven reliability—a per se rule excluding polygraphs was not arbitrary or disproportionate. . . . Hence, since a juror may find polygraph expertise unreliable, even if a juror may not, it would not be disproportionate for a judge to exclude evidence on this basis."); *supra* note 153 and accompanying text.

165. See *Scheffer*, 523 U.S. at 315 (distinguishing *Rock*, *Washington*, and *Chambers* on the ground that each involved a "significant interest of the accused," whereas the exclusion of polygraph evidence only prevents the defendant from bolstering his own credibility).

166. See *supra* note 91 and accompanying text.

167. Graver, *supra* note 30, at 889.

168. See *supra* notes 137–39 and accompanying text.

policy, as articulated by Justice Scalia, of deterring intoxication-related crimes by “ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison.”¹⁶⁹

Although these cases could have ended in results consistent with *Washington*, the failure to consider the specific requirements of the Compulsory Process Clause also allowed the Court to foreclose the applicability of another important constitutional protection under the Due Process Clause—the requirement that guilt be proven beyond a reasonable doubt. In *Egelhoff*, for example, the Montana Supreme Court had also invalidated the rule excluding evidence of intoxication on the grounds that it reduced the prosecution’s burden to prove the mental state for murder beyond a reasonable doubt.¹⁷⁰ Justice Scalia rejected this argument, however, reasoning that “any evidentiary rule can have [the] effect” of “making the burden easier to bear”¹⁷¹:

“Reducing” the State’s burden in this manner is not unconstitutional, *unless the rule of evidence itself violates a fundamental principle of fairness* (which, as discussed, this one does not). We have “reject[ed] the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions.”¹⁷²

This reasoning suggests that the constitutionality of exclusionary rules of evidence *must* be considered in connection with the right to present a defense through a due process analysis, thus shifting the analysis to a determination of whether admission of the evidence is a “traditional” right of criminal defendants. Justice Scalia’s reasoning in *Egelhoff* thus precludes the reasonable doubt requirement from application in this context by restricting the due process analysis of exclusionary rules of evidence to the “traditional rights” inquiry.¹⁷³

169. *Montana v. Egelhoff*, 518 U.S. 37, 49–50 (1996).

170. *Id.* at 54–55.

171. *Id.* at 55.

172. *Id.* (emphasis added) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 89 n.5 (1986)).

173. Although unclearly elaborated, Justice Scalia probably based this reasoning on the assumption that rules of evidence, which determine what kinds of evidence may be considered by juries when applying the reasonable doubt standard of proof, have developed *in light of* the reasonable doubt requirement, and thus the question of whether a reliability-based rule of evidence appropriately furthers the reasonable doubt requirement is best answered by assessing the traditional extent to which it has been adopted by the states. *See Brinegar v. United States*, 338 U.S. 160, 175 (1949). *Brinegar* states:

Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has *crystallized into rules of evidence consistent with that standard*. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

Id. (emphasis added).

The end result of Scalia’s reasoning, however, is that this tradition-centric inquiry is the *only* relevant method of determining whether a rule of evidence impermissibly frustrates the goal of proving guilt

If a rule of evidence never violates the reasonable doubt requirement when it makes the state's burden easier to meet, *regardless* of the degree, however, an unjust chasm between the right to compulsory process and the reasonable doubt requirement is created. By assuming that the constitutionality of all rules of evidence must be considered under the Due Process Clause (rather than the specific procedural guarantee of the Compulsory Process Clause), two conclusions follow: (1) that testimony whose credibility should be determined by the factfinder must be admitted under the Compulsory Process Clause, but (2) exclusion of evidence whose reliability is *not* amenable to evaluation by the factfinder, or evidence excluded in service of other policies, *never* implicates other due process standards, such as the reasonable doubt standard of proof, unless the rule excluding it has been almost universally rejected by the states.¹⁷⁴

In sum, the evolution from *Chambers* to *Egelhoff* arguably lays the groundwork for the complete evisceration of the effectiveness of the right to compulsory process and effectively denies the relevance of other constitutional protections for reliability-based rules of evidence. If a rule of evidence is unconstitutional only when it is contrary to an opposite rule traditionally followed by a majority of other states, the extent to which its reliability may properly be evaluated by a jury—the *Washington* standard—is irrelevant. Also irrelevant is the extent to which an exclusionary rule of evidence has the practical effect of making the prosecution's burden to prove guilt beyond a reasonable doubt easier to bear. Under the *Scheffer/Egelhoff* tradition test, the defendant's interest in admitting evidence crucial to his case seems effectively powerless against all but the most uncommon exclusionary rules of evidence.

III. RE-CONCEIVING THE RIGHT TO PRESENT A DEFENSE AND THE COMPULSORY PROCESS CLAUSE AFTER *CRAWFORD V. WASHINGTON*

The final Part of this Note argues that the Court's recent Confrontation

beyond a reasonable doubt.

174. A case the Court decided in a recent Term evinces this problem. In *Clark v. Arizona*, 126 S. Ct. 2709 (2006), the Court rejected a challenge to an Arizona rule prohibiting the consideration of psychiatric testimony concerning the defendant's mental illness in connection with the element of mens rea. *Id.* at 2717–18. Eric Clark, the defendant, was convicted of killing a police officer following a traffic stop. Clark was initially found incompetent to stand trial but was tried two years later after treatment in a state hospital. Clark did not dispute the facts of the shooting—rather, he argued that he was insane at the time of the murder. *Id.* at 2716.

Despite acknowledging that a state may not exclude psychiatric testimony relevant to mens rea by restricting its consideration to the insanity defense—for which the defendant has the burden of persuasion—without violating the reasonable doubt requirement, the Court found valid “characteristics of mental-disease and capacity evidence [that give] rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue” *Id.* at 2734. Given these valid state justifications for the rule, there was no reason to conclude that barring such evidence from consideration as to mens rea “offends any principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Id.* at 2737 (citations omitted). Thus, regardless of the effect that exclusion of the evidence had on the prosecution's burden of proof, the more general standard under the right to present a defense was used to justify any seeming reasonable doubt problem with the rule.

Clause jurisprudence under *Crawford v. Washington* has implications for the Compulsory Process Clause that, if utilized, could help cure the doctrinal confusion and conflicting standards detailed in Part II. In addition, this Part suggests that while abandoning the current standard of the right to present a defense for the more specific standard of the right to compulsory process forecloses any special protections for excluded evidence that is particularly critical to a criminal defendant's case, limiting the Compulsory Process Clause to its appropriate scope opens the possibility that this consideration may be constitutionally relevant in another manner.

Section A explores the *Crawford* opinion and the reasoning behind Justice Scalia's abandonment of the Court's previous Confrontation Clause jurisprudence. Section B argues that *Crawford's* new standard for when the right of confrontation requires the *exclusion* of evidence is relevant to the complementary question of when the right to compulsory process requires the *admission* of evidence. Consistent with *Crawford*, section B proposes that the Compulsory Process Clause only requires the admission of "testimonial" evidence and responds to potential conceptual and textual problems with such a standard. Finally, section C suggests that a test for the Compulsory Process Clause that is consistent with *Crawford* frees the issue of when an exclusionary rule of evidence impermissibly implicates the reasonable doubt rule from the tradition-based analysis of *Egelhoff* and *Scheffer* and briefly explores the premises of such an argument.

A. CRAWFORD V. WASHINGTON AND "TESTIMONIAL" STATEMENTS

The Confrontation Clause of the Sixth Amendment—the so-called "fraternal twin" of the Compulsory Process Clause¹⁷⁵—provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹⁷⁶ The right of confrontation includes the defendant's right to cross-examine witnesses called against him¹⁷⁷ and the right to be physically present during such cross examination.¹⁷⁸ The most difficult question, and the one that has dominated the Court's confrontation jurisprudence, is when the Clause prohibits the introduction of a hearsay statement where the declarant is unavailable to testify. As the Court has noted throughout its

175. Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1047 (1998). On a general level, the Compulsory Process Clause guarantees a defendant's right to *present* witnesses on his behalf, while the Confrontation Clause guarantees a right to *challenge* witnesses against him; see also Randolph N. Jonakait, "Witnesses" in the *Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 157 (2006) (describing the Compulsory Process Clause as the "companion provision to the right of confrontation"); Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1197 (1979) (arguing that the two clauses are "conceptual twins").

176. U.S. CONST. amend. VI. The Confrontation Clause was incorporated and applied to the states in *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

177. See *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam).

178. See *Maryland v. Craig*, 497 U.S. 836, 847 (1990).

evolving jurisprudence, ensuring the reliability of all criminal trials is the principal purpose of the right.¹⁷⁹

Until recently, this goal was pursued utilizing a test similar to that which has plagued the Compulsory Process Clause. Under the framework of *Ohio v. Roberts*,¹⁸⁰ admission of out-of-court statements that qualified as exceptions to the general ban on hearsay would not violate the Confrontation Clause when they had persuasive “indicia of reliability,” a test that could be met if the exception permitting admission of the statement was “firmly rooted” in the traditional evidence laws of the states.¹⁸¹ In practice, however, the *Roberts* test did little more than constitutionalize the law of hearsay: when an exception to the hearsay rule was long and widely recognized, the hearsay statements introduced were considered per se sufficiently reliable to protect the purpose of the right, making the protections of the Constitution in this regard coextensive only with those provided by state evidence law.¹⁸²

Following resounding scholarly criticism of *Roberts* and its progeny, the Court reexamined and wholly replaced its Confrontation Clause jurisprudence in *Crawford v. Washington*.¹⁸³ Interpreting the Clause in light of the “principal evil” at which it was directed—the use of notoriously unreliable ex parte examinations as evidence against criminal defendants—the Court concluded that the Clause requires exclusion of all “testimonial” hearsay statements where the declarant is unavailable and has not previously been cross-examined by the defendant.¹⁸⁴ *Crawford* rejected the judicial “indicia of reliability” inquiry that had permitted courts to override the right to confront in deference to traditionally recognized hearsay exceptions under *Roberts* because that standard imposed a “general reliability exception” on the right that was “so unpredictable that it fail[ed] to provide meaningful protection from even core confrontational violations.”¹⁸⁵

Thus, under *Crawford*, the Confrontation Clause is not *unconcerned* with the

179. See, e.g., *id.* at 846 (“[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person.”); *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) (“The right to cross-examination, protected by the Confrontation Clause, thus is essentially a ‘functional’ right designed to promote reliability in the truth-finding functions of a criminal trial.”); see also *United States v. Hamilton*, 107 F.3d 499, 503 (7th Cir. 1997) (“[F]ace-to-face confrontation ensures the reliability of the evidence by allowing the trier of fact to observe the demeanor, nervousness, expressions, and other body language of the witness.”); *United States v. Watson*, 76 F.3d 4, 8–9 (1st Cir. 1996) (“The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities [such as witness’s forgetfulness, confusion or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’[s] testimony.”).

180. 448 U.S. 56 (1980).

181. *Id.* at 66.

182. See, e.g., Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1030 (1998).

183. 541 U.S. 36 (2004).

184. *Id.* at 50–51, 53–54.

185. *Id.* at 62–63; see also *id.* at 63 (“Reliability is an amorphous, if not entirely subjective, concept.”).

reliability of evidence—it simply provides a specific method for determining the reliability of a certain category of evidence.¹⁸⁶ The principle virtues of the *Crawford* framework are not only that it constrains judicial discretion to make independent assessments of the reliability of evidence by interpreting the Clause to require the procedure of cross-examination,¹⁸⁷ but also that it defines the *kinds* of evidence for which this constitutionally-required procedure must be deployed. In the wake of *Crawford*, the most contentiously litigated issue has been the precise definition of “testimonial” out-of-court statements,¹⁸⁸ rather than the extent to which a particular hearsay exception is recognized by the majority of states and “deeply rooted” or the extent to which the exception encompasses out-of-court statements that are inherently reliable.

B. THE IMPLICATIONS OF *CRAWFORD* FOR THE COMPULSORY PROCESS CLAUSE

With due acknowledgement to the scholarly criticism of *Crawford*,¹⁸⁹ it is nonetheless prudent to consider what influence it will, and should, have on the Court’s Compulsory Process Clause jurisprudence. The clauses are importantly connected, both in terms of their purposes, and in terms of the text of the Sixth Amendment. Both clauses embody the general goal of ensuring reliability in criminal trials,¹⁹⁰ and this goal has been invoked in both contexts to justify

186. *See id.* at 68–69 (“[W]e decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

187. *See id.* at 67–68. In this respect, the *Crawford* Court stated:

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.

Id.

188. *See Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006) (noting that, while the Court chose not to define “testimonial” in a “technical legal[] sense” in *Crawford*, subsequent cases “require us to determine [its definition] more precisely”). In *Davis*, the Court further clarified the definition of “testimonial,” holding that statements made to police officers by witnesses at the scene of a crime are “testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 2273–74. *See also* Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 526–77 (2005) (analyzing the potential scope of the definition of “testimonial” evidence in various contexts).

189. *See, e.g.*, Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It?: Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005); Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 219–20, 229–32 (2005); Jonakait, *supra* note 175; Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 38–39 (2005).

190. *See Faretta v. California*, 422 U.S. 806, 818 (1975):

The Sixth Amendment includes a compact statement of the rights necessary to a full defense [T]hese rights are basic to our adversary system of criminal justice The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair

balancing tests and near-absolute deference to state evidence law as opposed to bright-line rules. A close reading of *Crawford* further suggests that the Court may be as willing to abandon the *Chambers* balancing test for the Compulsory Process Clause as it was the *Roberts* test for the Confrontation Clause. As this Part explains, both clauses apply primarily to “testimonial” evidence and embody a bright-line rule that the reliability of such evidence must be determined by the factfinder. More specifically, the Compulsory Process Clause requires the admission of evidence that is otherwise excluded by a rule of evidence only where that evidence is “testimonial.”

The most important aspect of the new confrontation test announced in *Crawford* is the prominence given to the role of the jury in the adversary process. The fatal flaw of the *Roberts* regime was that it exempted evidence from the cross-examination requirement whenever a “deeply rooted” hearsay exception applied. In essence, *Roberts* had announced a balancing test that completely deferred to the collective states’ conclusion that their hearsay exceptions always ensure reliability.¹⁹¹ *Crawford* rejected this balance in favor of the factfinder’s traditional authority in the adversary system. Regardless of how objectively successful “deeply rooted” hearsay exceptions are at ensuring that only reliable statements are introduced at trial, neither the states nor the courts may substitute their judgment on that issue for that of the factfinder:

To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), *but about how reliability can best be determined.*¹⁹²

This reasoning is identical to the justification for the *Washington* arbitrariness standard. It involves no balancing test that can be swayed by the particular importance of the evidence to the defendant’s case, or by the state’s interest in preventing the admission of evidence it is convinced is unreliable. Rather, the

administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

See also Amar, *supra* note 65, at 698 (“This defense can begin with vigorous questioning of government witnesses and evidence under the letter and spirit of the Confrontation Clause; but it reaches full bloom in the Compulsory Process Clause right to present witnesses and evidence of his own.”).

191. See Friedman, *supra* note 182, at 1030 (arguing that, contrary to the *Roberts* rule, “the Confrontation Clause should be viewed as creating a bright-line rule, not merely a presumptive rule subject to defeasance by proof that the importance of the evidence to the factfinding process outweighs the value of the confrontation right”).

192. *Crawford*, 541 U.S. at 61 (emphasis added).

Compulsory Process and Confrontation Clauses both require that where the reliability of evidence depends on an assessment of the declarant's *credibility*, a state rule of evidence may not preempt the jury's determination. The Court in *Washington v. Texas* identified this same purpose in striking down the Texas laws preventing codefendants from testifying against each other:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.¹⁹³

Furthermore, a relationship between the two clauses is obviously contemplated by the text of the Sixth Amendment. Both the Confrontation and Compulsory Process Clauses apply to "witnesses"—confrontation is guaranteed for "witnesses against" the accused, while compulsory process is guaranteed for "witnesses in . . . favor" of the accused.¹⁹⁴ Although *Crawford* did not consider the Compulsory Process Clause when interpreting the meaning of "witnesses" in the Confrontation Clause, commentators have persuasively argued that the meaning should be the same for both clauses.¹⁹⁵ This textual connection further justifies a consistent test among the two clauses.

The analogy is not without interpretive hurdles, however. Professor Randolph Jonakait suggests that defining "witness" in both clauses consistently with *Crawford* unduly restricts the scope of compulsory process.¹⁹⁶ As Professor Jonakait points out, the Court has never interpreted the Compulsory Process Clause in a way consistent with *Crawford*.¹⁹⁷ If the clauses must have identical definitions of "witness," however, and *Crawford*'s definition of the Confrontation Clause is correct, the Compulsory Process Clause must also only apply to

193. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

194. U.S. CONST. amend. VI.

195. See Randolph N. Jonakait, *Foreword: Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. CRIM. L. & CRIMINOLOGY 713, 737 (1992) ("If compulsory process and confrontation are read as part of one Sixth Amendment, it can hardly make sense for 'witnesses' to have one meaning for confrontation and a different one for compulsory process."); Jonakait, *supra* note 175.

196. See generally Jonakait, *supra* note 175.

197. Professor Jonakait attributes this result to the Court's inconsistent interpretive approaches to the two clauses—while *Crawford* exhibits a textualist approach, the Court has used a more functional approach to interpret the scope of the Compulsory Process Clause. *Id.* at 194–97. It is outside the scope of this Note, however, to resolve the historical debate surrounding the Framers' intent behind the dual use of the word "witness"—if resolution on this subject is even possible. *Id.* at 197 ("We cannot really say what the connection among hearsay, cross-examination, and the Confrontation Clause was because nothing in the historical record of the framing or ratification of the Sixth Amendment indicates what it was.").

“testimonial” evidence.¹⁹⁸ Thus, criminal defendants should have no compulsory process right to compel the introduction of evidence that does not contain an assertion that qualifies as “testimonial,” such as documents or forensic evidence. In addition, Professor Jonakait argues that such a reading calls into question decisions where the Court *has* compelled the introduction of hearsay that is not testimonial under the compulsory process clause—situations where a declarant would not be considered a “witness” for confrontation purposes because his statement is not testimonial, but should the *defendant* seek to admit the evidence, he would have a compulsory process right to have the statement admitted.¹⁹⁹ For example, an out-of-court statement by a co-conspirator is generally not testimonial,²⁰⁰ and thus the Confrontation Clause does not require that it be excluded—but the Supreme Court has in the past suggested that a defendant could compel introduction of a statement by a co-conspirator under the Compulsory Process Clause.²⁰¹

A consistent interpretation of “witnesses” in both clauses will not, however, lead to such inconsistent results. The reliability of statements that are “testimonial” in nature requires evaluation by the jury, more so than others because it is more likely that a speaker who is aware that his statement will later be used in court is biased or had reason to lie.²⁰² For this category of statements, there is no state interest sufficient to remove this decision from the jury because an evaluation of the *sincerity* of the declarant, under the Sixth Amendment, is one solely granted to the jury. Under *Crawford*, the Confrontation Clause forbids the introduction of such evidence where the declarant is unavailable to testify because the jury simply never gets an opportunity to make this determination. The Confrontation Clause thus protects the role of the juror as the evaluator of a witness’s sincerity by prohibiting the introduction of statements of a declarant whose sincerity is questionable but is unavailable to be examined.

The Compulsory Process Clause, however—the *Chambers* aberration aside²⁰³—will generally never require the admission of hearsay, testimonial or not, that does not qualify under an exception.²⁰⁴ The requirement that the sincerity of an out-of-court assertion be evaluated by a jury and not determined a priori by the laws of evidence is a basis for *excluding* evidence even where it would otherwise be admissible, as in *Crawford*, because the jury has not had the opportunity to do so. It is not a basis for *admitting* evidence that would

198. *See id.* at 174 (“But after *Crawford* it must be asked, if the accused has no right to confront a declarant because he is not a ‘witness’ within the meaning of the Confrontation Clause, why does he have a constitutional right to produce him as a ‘witness?’”).

199. *See id.* at 173.

200. *See id.* at 173 & n.105 (citing *Crawford v. Washington*, 541 U.S. 36, 56 (2004)).

201. *See id.* at 173–74 (discussing *United States v. Inadi*, 475 U.S. 387 (1986)).

202. *See supra* note 59 and accompanying text.

203. *See supra* note 117 and accompanying text.

204. *See Amar, supra* note 65, at 693 (arguing that the term “witnesses” under the Compulsory Process Clause includes only persons testifying in court, and “videotapes, transcripts, depositions, and affidavits when prepared for court use and introduced as testimony”).

otherwise be inadmissible. The Sixth Amendment does not grant criminal defendants an exemption from this requirement—it simply denies one to the prosecution.

Introduction of hearsay such as a statement by a co-conspirator, in Professor Jonakait's example, is nonetheless compelled by the Constitution—not because it must be considered “testimonial” for purposes of compulsory process, but by virtue of *Washington v. Texas*'s requirement of parity between evidence introduced by the prosecution and evidence introduced by the defense.²⁰⁵ The same hearsay exception that permits the government to introduce such statements must apply equally to allow a defendant to introduce the same. This result does not rest on disparate definitions of who is or is not a “witness”; it follows from the *Washington* non-discrimination principle that an exclusionary rule of evidence based on reliability cannot arbitrarily discriminate against the defendant.²⁰⁶

Accordingly, restricting the right to compulsory process to in-court testimony and other testimonial evidence neither forces textual inconsistency, nor eviscerates the defendant's constitutional right to introduce types of evidence other than in-court testimony on the same basis as the prosecution. A new test for the Compulsory Process Clause that resembles the test for the Confrontation Clause in *Crawford* would add predictability and consistency to an area of constitutional law plagued by disparate standards. Both clauses are concerned with ensuring that evaluations of the credibility of a witness's testimony—both in-court and out-of-court—are determined by juries, and not determined a priori by courts and legislatures through categorical rules of evidence.

C. THE REASONABLE DOUBT REQUIREMENT AND RELIABILITY-BASED RULES OF EVIDENCE

Admittedly, the interpretation of the Compulsory Process Clause proposed in section B—that the right of compulsory process only preempts a rule of evidence where it excludes “testimonial” evidence that may properly be evaluated by the jury—significantly restricts the scope of the Clause, making it inapplicable to scientific evidence or other novel methods of proof that a defendant may wish to introduce in his defense. This interpretation, while restrictive in one sense, however, may also bring down the wall erected in *Scheffer* and *Egelhoff* preventing the application of the reasonable doubt rule to state rules that exclude evidence critical to the defense.²⁰⁷ While the criticalness of excluded evidence, emphasized in cases like *Chambers* and *Crane*,²⁰⁸ is

205. See *supra* notes 45–52 and accompanying text.

206. See Amar, *supra* note 65, at 699 (“A defendant should be given compulsion parity with the government. Whatever compulsion the government could use against a given recalcitrant witness, a defendant can use.”). Furthermore, even if this principle does not fit neatly into the right to compulsory process, it is equally compelled by the Due Process Clause. See *supra* note 53 and accompanying text.

207. See *supra* Part II.D.

208. See *supra* Part II.A.

irrelevant under the Compulsory Process Clause, it may be an appropriate constitutional concern under the reasonable doubt requirement. Although this Note does not attempt an exhaustive analysis of this possibility, it does attempt a description of the basic issues involved.

Under the Due Process Clause, each element of the crime with which a criminal defendant is charged must be proven “beyond a reasonable doubt” by the factfinder.²⁰⁹ The Supreme Court’s reasonable doubt jurisprudence largely centers on the means by which the requirement is effectively conveyed to the factfinder through jury instructions.²¹⁰ The policy underlying this requirement, in Justice Harlan’s famous words, is “bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”²¹¹

Unlike the protections afforded under the Sixth Amendment, the reasonable doubt standard is logically at odds with the truth-finding function of a criminal trial. While truth is the goal of a criminal trial, truth is “an ideal more than an attainable end.”²¹² Accepting that a risk of mistake exists in any criminal trial, the reasonable doubt rule “deliberately tip[s] the scales in favor of one kind of mistake over another.”²¹³ If one conceived of a verdict being “correct” only insofar as it is more likely to be true than its converse (that is, a finding that the defendant is more likely to be innocent than guilty—a preponderance standard), then the reasonable doubt standard may actually result in more “incorrect” verdicts than correct ones.²¹⁴

Accordingly, as a specific constitutional standard of proof, the requirement may have implications beyond the instructions given to a jury charged with applying it. Judge Jon O. Newman, former Chief Judge of the United States Court of Appeals for the Second Circuit, has suggested that the requirement

209. See *In re Winship*, 397 U.S. 358, 364 (1970).

210. See Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. REV. 979, 983–84 (1993).

211. *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

212. See, e.g., *id.* at 370 (Harlan, J., concurring) (“[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened.”).

213. Katherine Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 GEO. L.J. 621, 634 (1998) (“[The reasonable doubt rule] says, in effect, that we are willing to accept more mistaken acquittals in order to reduce the number of mistaken convictions to an absolute minimum.”).

214. *Id.* at 634–35. As Professor Goldwasser explains:

[T]he reasonable doubt standard is thought to produce fewer mistaken convictions than would occur under the preponderance standard (by weeding out those instances in which the factfinder assesses the likelihood of a defendant’s guilt as somewhere between “probably guilty” and “guilty beyond a reasonable doubt,” even though the defendant is actually innocent), but at the cost of also producing a greater number of mistaken results (by also weeding out those instances, presumably greater in number, in which the factfinder makes the same assessment, but the defendant is actually guilty).

Id. (citations and emphases omitted).

should also be resurrected as a “rule of law” when determining the sufficiency of evidence on appeal from a criminal conviction.²¹⁵ Judge Newman suggests several proposals for achieving this result, such as redefining the appellate standard of review to reflect the force of the requirement,²¹⁶ re-examining the credibility of witnesses on appeal,²¹⁷ and employing “heightened scrutiny” of the standard in special categories of cases, such as convictions resting entirely on the uncorroborated testimony of an accomplice.²¹⁸

Irrespective of the practicality of these suggestions, the reasonable doubt requirement as a “rule of law” should implicate other matters at trial that bear on ensuring the standard of proof is actually met. For a jury to make a determination of reasonable doubt, it must be afforded an opportunity to hear and evaluate evidence significantly bearing on that inquiry, even if, in some situations, that evidence is barred by a state reliability-based rule of evidence.²¹⁹ Although the Court has never applied the requirement to admissibility issues, it has previously suggested in dicta that rules excluding evidence relevant to an element of the crime may violate the reasonable doubt requirement.

In *Martin v. Ohio*,²²⁰ the Court upheld a state statute that required defendants asserting self-defense to a charge of homicide to prove the defense by a “preponderance of the evidence.”²²¹ Although the defendant failed to convince the Court that this explicit burden-shifting violated the reasonable doubt requirement, the defendant also alleged that restricting consideration of evidence that he acted in self-defense to an affirmative defense prevented him from using that

215. See Newman, *supra* note 210, at 990 (“[C]ourts must do more than verbalize the ‘reasonable doubt’ standard in jury instructions; they must make that standard an enforceable rule of law.”).

216. Appellate courts currently utilize a standard for assessing the sufficiency of evidence in a criminal trial whereby they merely ask whether “any rational trier” of fact—presumably, any juror—could have found the fact beyond a reasonable doubt. *Id.* at 991; see also *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (“After *Winship* the critical inquiry . . . must be . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.”). Judge Newman argues that *Jackson v. Virginia* did not purport to announce a standard of appellate review that is satisfied whenever “any” juror could have found that the evidence established guilt beyond a reasonable doubt and proposes a more demanding standard that asks whether “a reasonable jury” could have found guilt beyond a reasonable doubt on the basis of the evidence presented. See Newman, *supra* note 210, at 991–93. Newman states:

I recognize that the distinction between “any rational trier” and the “reasonable jury” might be largely semantic. But words guide action, especially words uttered repeatedly in appellate opinions. The repetition of the “any rational trier” formulation in countless appellate opinions persuades me that it has influenced appellate courts to regard a successful claim of insufficiency as an occurrence to be encountered only a bit more frequently than the seventeen-year locusts.

Id. at 993.

217. See Newman, *supra* note 210, at 997–98.

218. See *id.* at 998–99.

219. See Edward J. Imwinkelried, *The Reach of Winship: Invalidating Evidentiary Admissibility Standards That Undermine the Prosecution’s Obligation to Prove the Defendant’s Guilt Beyond a Reasonable Doubt*, 70 UMKC L. REV. 865, 881–88 (2002).

220. 480 U.S. 228 (1987).

221. *Id.* at 233.

evidence to raise a reasonable doubt as to whether he possessed the requisite mens rea under the state homicide statute, which required the accused commit the killing with “purpose” and “with prior design.”²²² Although the Court determined that the instructions given to the jury had not actually directed them to ignore evidence of self-defense in connection with mens rea, the Court opined in dicta that if they had, the instructions would have violated the reasonable doubt requirement:

It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State’s case, *i.e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and *plainly run afoul* of *Winship*’s [reasonable doubt requirement].²²³

This caveat from *Martin v. Ohio* appears to acknowledge the fundamental connection between a standard of proof and rules governing the admissibility of evidence relevant to applying that standard. In this passage, the Court considers the effect of prohibiting the consideration of evidence in connection with the defendant’s mental state, and suggests that such a result violates the reasonable doubt requirement by preventing the jury from being presented with evidence particularly critical to rebutting a required element of the crime. Whereas the standard governing the admissibility of evidence of self-defense in connection with proving an *affirmative* defense may not implicate *Winship*, the admissibility of evidence in connection with an element of the crime the prosecution must affirmatively prove does have a *Winship* dimension.

In this way, the reasonable doubt requirement provides a more firm doctrinal basis for the relevancy of the criticalness of excluded evidence—the concern animating cases like *Chambers* and *Crane*. Criticalness is not defined by the defendant’s subjective view of the importance of the evidence, but its actual and logical tendency to prove, disprove, or explain a fact critical to establishing the government’s case. The greater the importance of the evidence to evaluating the elements of the crime, the more important its introduction becomes to securing the jury’s opportunity to determine whether a reasonable doubt exists.²²⁴ In

222. *Id.*

223. *Id.* at 233–34 (emphasis added). *But see* *Lego v. Twomey*, 404 U.S. 477, 486 (1972) (“Our decision in *Winship* was not concerned with standards for determining the admissibility of evidence . . .”).

224. The Court has previously seemed to implicitly accept the idea that exclusion of defense evidence tending to negate an *element* of the crime with which the defendant is charged, as opposed to an affirmative defense that excuses (without negating) the crime, implicates *Winship* and the reasonable doubt standard. *See Twomey*, 404 U.S. at 487 (noting that a guilty verdict does not violate *Winship* simply because the voluntariness of a confession is determined by a lesser standard of proof, but also noting that the voluntariness of a confession is not an “element of the crime with which he was charged”).

addition, certain types of defense evidence will be more critical than others and thus more important to ensuring that the jury is given a meaningful opportunity to evaluate the prosecution's case and whether it has met its burden of proof. Examples of this type of critical evidence include evidence of third-party guilt, as in *Chambers*, or evidence that a defendant's prior confession was coerced, as in *Crane*.²²⁵

Analyzing the admissibility of evidence under the reasonable doubt requirement would provide a more flexible constitutional standard for determining when critical defense evidence is or is not sufficiently reliable so as to require its admission. Although the Compulsory Process Clause guarantees the introduction of evidence only where its reliability can be determined by the factfinder,²²⁶ it does not embody a corresponding rejection of any other constitutional dimension to the interest in admitting evidence whose reliability can be evaluated through other means. For example, courts have long employed standards for determining the reliability of scientific evidence that do not involve or rely on the special abilities of the factfinder²²⁷—where evidence particularly critical to a defendant's attempt to rebut the prosecution's proof of guilt can be evaluated under such methods, the case for requiring its admission under *Winship* is especially strong.

Applying the reasonable doubt requirement to the admission of evidence by criminal defendants would admittedly not be without significant problems. Applied to evidence law, the reasonable doubt rule could call into question, in particular cases, the validity of *non*-reliability-based rules of evidence, such as testimonial privileges, which are normally justified in the service of policy goals other than reliability.²²⁸ Good grounds exist for concluding that both the Compulsory Process Clause and the reasonable doubt rule should only apply to reliability-based rules of evidence, however. Such rules are not animated by an attempt to shift the burden of proof, or to prevent the factfinder from hearing unreliable evidence, but by other legitimate societal goals.²²⁹ They are unrelated

225. See Imwinkelried, *supra* note 219, at 888 (arguing that *Winship* is implicated when there is an "overlap between the ultimate fact the prosecution is obliged to establish and the foundational fact the defense is endeavoring to prove"—such as where the defendant introduces evidence that a third party committed the actus reus of the crime with which defendant is charged).

226. See *supra* section III.B.

227. Although the reliability of scientific evidence is normally not amenable to the jury's evaluation of demeanor or the truth-telling character of the expert testifying, Federal Rule of Evidence 702, as interpreted in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593–94 (1993), requires that judges permit the introduction of expert scientific evidence and/or testimony if found by the judge to be reliable—a determination guided by four factors: (1) "general acceptance" of the science in the scientific community; (2) whether the theory or technique can be and has been tested; (3) whether the theory or technique has gone through peer review; and (4) its known or potential rate of error. The *Daubert* rule stands for the uncontroversial proposition that scientific evidence, although outside the jury's traditional purview to judge, should nonetheless be admitted when it meets a minimum threshold of reliability (as assessed through other means) and can assist the trier of fact. Such a result may not be compelled by the Compulsory Process Clause, but may be compelled by the reasonable doubt rule.

228. Cf. *supra* notes 61–62 and accompanying text.

229. See Goldwasser, *supra* note 213, at 635–36. Goldwasser argues:

to the truth-finding function of a criminal trial; for this reason, they may be properly balanced against a criminal defendant's interests under a due process analysis. At the very least, however, it may help rationalize and possibly resurrect the constitutional relevance of the criticalness of evidence to a defendant's case that has been abandoned since *Chambers*, *Crane*, and *Rock*.

CONCLUSION

The right to compulsory process is necessarily connected to the right of confrontation. Both rights ensure that evaluations of the credibility of a witness's testimony—both in-court and out-of-court—are determined by juries, not by courts or legislatures. Although the more flexible balancing tests previously utilized for both rights—*Roberts* for the Confrontation Clause, and *Chambers* for the Compulsory Process Clause—were justified on the basis of ensuring reliable criminal trials in individual cases, both tests ultimately failed to produce consistent results or ensure reliable protections to criminal defendants. Just as the Court abandoned this regime for the right of confrontation in *Crawford v. Washington*, it should also do so for the right to present witnesses under the Compulsory Process Clause.

[I]f we take seriously our commitment to the values embodied in the proof beyond a reasonable doubt requirement, the reasons for exclusion cannot be ignored. Many such reasons pose no threat to reasonable doubt values. This is so, for example, with respect to the various social policy and trial efficiency rationales that underlie many rules. In contrast, when viewed through the lens of the reasonable doubt rule, to exclude defense evidence (and thereby increase the risk of an erroneous conviction) solely out of concern about the risk of an erroneous acquittal is flatly unacceptable.

Id. (citations omitted). Whereas the purpose of the evidentiary rule is irrelevant under the "tradition" inquiry utilized in cases like *Egelhoff* and *Scheffer*, purpose should always be relevant when analyzing evidentiary rules under the reasonable doubt requirement. *Cf.* *United States v. Egelhoff*, 518 U.S. 37, 68 (1996) (O'Connor, J., dissenting) ("Unlike *Chambers* and *Washington*, where the State at least claimed that the evidence at issue was unreliable, Montana does not justify its rule on grounds such as that intoxication is unreliable, cumulative, privileged, or irrelevant. The sole purpose for this disallowance is to keep from the jury's consideration a category of evidence that helps the defendant's case and weakens the government's case.").