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NOTES ON THE CONFRONTATION CLAUSE AND *OHIO V. ROBERTS*

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I. THE PROBLEM

An intractable problem in criminal trials is to reconcile the accused's constitutional right "to be confronted with the witnesses against him"[1] with the government's invocation of various exceptions to the rule against hearsay.[2] When applicable, these exceptions permit evidence detailing a hearsay declarant's out-of-court statement, enabling the trier of fact to consider this declaration for the truth of its content. In theory, hearsay that falls within an exception is attended by surrounding circumstances that make it more reliable than ordinary extra-judicial statements. This enhanced trustworthiness supposedly justifies admission of the excepted statements even though the declarant is not subjected to the usual requirement of cross-examination.[3]

Under one construction of the confrontation clause the state's introduction of hearsay evidence sanctioned by an exception would be

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1. U.S. CONST. amend. VI.

2. *See, e.g.*, FED. R. EVID. 803-04; CAL. EVID. CODE §§ 1220-1340 (West 1966). As of this writing, 23 states have adopted evidence codes which are either identical or substantially similar to the Federal Rules of Evidence. Of course, the common law developed a catalogue of exceptions which served as the basis of the modern codes. For a general description and analysis of the various hearsay exceptions, see C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 614-756 (1972).

3. Cross-examination is useful for testing defects in perception, memory, sincerity, and narration—the latter denoting mistakes that occur because of ambiguities or unintended omissions in the declarant's statements. *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 159 (1978).

unconstitutional. The "witness against" the accused would be the hearsay declarant, and to ensure confrontation, the declarant's presence at trial would be constitutionally compelled. Without this confrontation, the hearsay declaration would be inadmissible. Under another construction the Constitution would be satisfied if evidence against the accused were presented through a witness subject to confrontation, as for example, a witness who testifies to the statement of the hearsay declarant. It would be of no constitutional concern that the accused could not test the basis and accuracy of the declarant's statement.[4] Under this construction, the Constitution would require only that the accused be permitted to confront and examine those persons who actually testify against him at trial. Between these extremes lie variant possibilities,[5] some of which will be sketched below. Preliminarily, however, a brief recourse to history will suggest the ambiguities that cloud the Framers' intentions.

II. THE HISTORICAL PUZZLE

"[T]he Confrontation Clause," remarked Justice Harlan, "comes to us on faded parchment."[6] Harlan's own search for historical explication of the clause yielded no convincing evidence of its intended meaning.[7] Commentators have associated the passage of the clause with the notorious abuses at the trial of Sir Walter Raleigh in 1603.[8] There the Crown's principal evidence to support its charge of conspiracy of treason consisted of highly suspect hearsay declarations. Raleigh repeatedly was denied the right to confront and examine his principal accuser. The trial concluded in a conviction, and Raleigh was eventually executed.[9]

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4. *Id.* Presumably, the accused adequately could examine the in-court witness with respect to whether the declarant had made a statement and, if so, precisely what words were spoken. The accused, however, would be unable to test whether the declaration in question was credible because he could not test the accuracy of the declarant's perception, probe the strength of his recollection, or attempt to reveal his desire to be truthful. *Id.* at 158-59.

5. The literature, replete with proposed constructions, is extensive. Ample bibliographies may be found in Ohio v. Roberts, 448 U.S. 56, 66 n.9 and 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 800-08 (1981).

6. California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring).

7. *Id.* at 176 n.8 (1970).

8. The connection seems first to have been made in Hadley, *The Reform of Criminal Procedure*, 10 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 396, 400-01 (1924). *See also* F. HELLER, THE SIXTH AMENDMENT 104 (1951) (stating simply that confrontation was a common law right which "had gained recognition as a result of the abuses in the trial of Sir Walter Raleigh."); R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 551 (2d ed. 1982) (noting that most scholars believe the "framers drafted the confrontation clause to curb abuses associated with such celebrated English trials as the trial of Sir Walter Raleigh.").

9. A description of the trial is given in Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100-01 (1972). This

No doubt this trial and perhaps others of similar notoriety largely account for the rule forbidding hearsay evidence.[10] Wigmore declared that the hearsay rule secured the right of cross-examination, which in his view was essentially the same as the common law right of confrontation.[11] He noted, however, that these two common law protections were sometimes referred to as if they were distinct.[12] In any event, the hearsay rule, perhaps the single most important evidentiary rule in American common law, originated in seventeenth century English practice.[13] The recognition and maturation of that rule, even if accurately attributable to the 1603 trial of Raleigh, nonetheless fails to explain why the Americans adopted a constitutional right of confrontation in 1791. One would at least expect a more immediate cause or, perhaps, some indication that over the long term the hearsay rule had failed to provide the accused adequate protection.

Even if Raleigh's trial was the major influence in the adoption of the confrontation clause, the meaning and reach of that clause is still doubtful. The assumption that the confrontation clause was designed to forbid the kind of flagrant abuses practiced in Raleigh's trial does not eliminate doubts about its intended reach. The evidence used against Raleigh apparently fits no hearsay exception, early or modern.[14] One could thus conclude that the confrontation clause was in-

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account relies upon 2 T. HOWELL, STATE TRIALS 1 (1816). Other descriptions: 1 D.JARDINE, HISTORICAL CRIMINAL TRIALS 389-511 (1832); H. Stephen, "The Trial of Sir Walter Raleigh," Trans. Royal Hist. Soc'y 172 (4th series 1919); *see also* Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388-89 (1959).

10. 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 22-28 (Chadbourn Rev. 1974).

11. *Id.* §§ 1365 at 28, 1397 at 58.

12. *Id.* § 1365.

13. *Id.* § 1364.

14. The principal hearsay statements were those of Lord Cobham declaring, for example, that Raleigh had conspired with Cobham to commit treason and dethrone the Queen of England. Pollit, *supra* note 9, at 388. Cobham's statements implicating Raleigh would not be against Cobham's penal interest; therefore, under a strict construction of the exception for declarations against interest his statement would not be admissible. *See* C. MCCORMICK, *supra* note 2, § 279 at 675. Furthermore, the exception for such declarations requires that the declarant be unavailable. *See id.* at 678-79; Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451, 475 (1952) (noting that "the English courts have been especially strict and have refused to recognize any cause [for admissibility of a declaration against interest] except death of the declarant. The American cases put insanity in the same category as death but are generally hesitant about going further."). *See also* Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 2-3 (1944) (noting that authorities established death as the test of unavailability). For a modern view of what constitutes unavailability, see FED. R. EVID. 804(a).

Possibly, Cobham's statement would be admissible under the co-conspirator exception. It does not appear, however, that Cobham's statements were made during and in furtherance of the conspiracy as required by most authorities. *See* C. MCCORMICK, *supra* note 2, at 645-46 (the requirement that the statement must be made in furtherance of the conspiracy calls for the exclusion of admissions and confessions made "after the termination of the conspiracy."); FED.

tended only to forbid hearsay evidence that falls outside a recognized exception;[15] so construed the clause would protect the accused from the type of gross transgression which led to Raleigh's conviction. This construction would not bar evidence that came within an established hearsay exception. Wigmore, because he equated the rights of confrontation and cross-examination, would apparently agree with this interpretation.[16] The obvious difficulty with this construction is that it permits the law of evidence to dictate the reach of a parallel constitutional provision. The resulting anomaly is that the scope of constitutional protection is placed in the hands of judges and legislators who fashion the hearsay exception.

Another reading of the history of the confrontation provision suggests a more plausible reason for its adoption. The language of the confrontation clause apparently originated in a like provision contained in Article 8 of the Virginia Declaration of Rights[17] as drafted by George Mason.[18] Although Mason failed to detail the intent and

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R. EVID. 801(d)(2)(E). At least one state has broadened admissibility so as to embrace a co-conspirator's statement made during the period when the conspirators are trying to conceal their crime. *See* GA. CODE § 24-3-52 (1982); Chatterton v. State, 221 Ga. 424, 144 S.E.2d 726, *cert. denied*, 384 U.S. 1015 (1966). *See* C. MCCORMICK, *supra* note 2, at 646 ("attempts to expand the so-called 'concealment phase' to include all efforts to avoid detection have generally failed."). A few cases, criticized by McCormick, take a broad view of the "concealment phase" of the conspiracy. *See, e.g.*, Evans v. State, 222 Ga. 392, 150 S.E.2d 240 (1966), *aff'd*, Dutton v. Evans, 400 U.S. 74 (1970). It remains difficult, however, to fit Cobham's assertions within even an expansive version of the conspiracy exception.

There is also evidence that Cobham was tortured in an effort to gain incriminatory statements about Raleigh. *See* Pollitt, *supra* note 9, at 388-89. Of course, this would made the statements inadmissible quite aside from the hearsay rule.

15. This is essentially Wigmore's position. Often debated is his principal assertion that the mission of the confrontation clause is to assure that trials are conducted in the adversarial mode, notably including cross-examination of the in-court witness. If this proposition is accepted, and evidence of an out-of-court declaration is admitted under a hearsay exception sanctioned by the adversary system, the Constitution would not be offended. 5 J. WIGMORE, *supra* note 10, at 158. Note that Wigmore did not go so far as to urge that examination of the live witness always satisfied the constitutional requirement. For constitutional compliance, the in-court witness must be giving evidence that falls within a recognized hearsay exception. *Id.*

16. *Id.*

17. The Virginia provision stated "[t]hat in all capital or criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses." 6 AMERICAN ARCHIVES, 1561 (P. Force, ed. 4th series 1846).

18. James Madison prepared and introduced into the First Congress proposed amendments designed to satisfy political disagreements so that the Constitution would be ratified. While campaigning for Congress, Madison had pledged himself to support a Bill of Rights to be added to the Constitution. Using the language of the Virginia Declaration of Rights, Madison drafted language for a national Bill of Rights and proposed this to the "committee of eleven" for consideration. *See* F. HELLER, *supra* note 8, at 28-30. The Virginia Bill of Rights seems clearly to have been the chosen framework for the sixth amendment. As one researcher concludes: "[I]n its basic structure, compactness of arrangement, and enumeration of rights the [sixth] Amendment follows the recommendation of the ratifying Convention of Virginia, which in turn was but an amplification of the corresponding section of the Bill of Rights drawn up by

scope of the Virginia clause, there are clues to his underlying concerns.

Mason shared with many other colonists a deep abhorrence for the vice-admiralty courts. Established by the British, these tribunals gained jurisdiction to punish violators of acts that restricted the colonists' rights of international trade.[19] Initially, the colonial common law courts had jurisdiction over these offenders. The earlier prosecutions were conducted in the traditional adversarial mode, which included examination of witnesses in open court and trial by jury. The significance of the latter, coupled with British apprehension that colonial juries were unwilling to convict fellow colonists, led Parliament to enlarge the jurisdiction of the vice-admiralty courts.[20] These courts sat without a jury and their procedure was based upon civil law.[21] The colonists strenuously objected to this mode of trial which in England was carefully restricted.

In a letter written in 1766, Mason voiced grave concern about this "odious distinction" between the American colonists and their English brethren. He complained that such a distinction "depriv[es] us of the ancient trial by a jury of our equals and substitut[es] in its place an arbitrary civil-law court. . . ."[22]

Mason's explicit condemnation of the vice-admiralty courts as well as the colonists' hostile reaction to them suggest a plausible hypothesis.[23] The confrontation provisions of the Virginia Declaration of Rights and, subsequently, of the sixth amendment were intended to prevent the perceived abuses of the civil law procedure. The accused's constitutional right to confront adverse witnesses provided security against the inquisitional practice of examining witnesses in

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George Mason." *Id.* at 34.

19. Regarding the vice-admiralty courts, one commentator noted, "[c]rown officials come later to regard these courts as suitable for enforcement of all Parliamental acts which regulated trade in the colonies." Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America*, 1764-1776, 16 WM. & MARY Q. 459, 461-62 (1959). The final significant legislative development in admiralty jurisdiction was the Sugar Act in 1764, 4 Geo. III, ch. 15, § 41, in 26 Stat. (PICKERING) 32, 49 (London 1761); a similar provision of such jurisdiction is found in the Stamp Act, 5 Geo. III, ch. 12, §§ 57-58, 49 Stat. (PICKERING) 179, 202-03 (London 1761).

20. Pollitt, *supra* note 9, at 396.

21. *Id.* at 397. *See also* D. TOWLE, RECORDS OF THE VICE-ADMIRALTY COURT OF RHODE ISLAND 1716-1752, 91-93 (1936) ("The English Government set up in the American colonies a civil law court . . . a court the practices of which were very different from those of the common law."). *Id.* at 91.

22. K. ROWLAND, 1 THE LIFE OF GEORGE MASON 1725-1792, at 383 (1892).

23. Two prosecutions, one against Henry Laurens, the other against John Hancock, stiffened resistance to these tribunals. These cases were notorious among the Colonists. *See* 2 LEGAL PAPERS OF JOHN ADAMS 173-210 (L. Wroth & H. Zobel eds. 1965). Adams, who defended Hancock, recorded in his own papers the widespread "aversion . . . if not abhorrence" to "[e]xamination of witnesses upon interrogatories." *Id.* at 207. For an account of Laurens' trial, see D. WALLACE, THE LIFE OF HENRY LAURENS 137-49 (1915).

closed chambers. It is thus possible that the confrontation clause was intended to address only the general mode of trial by securing the common law procedures enjoyed by Englishmen but denied to Americans in the courts of vice-admiralty. The drafters of the sixth amendment may not have had any intention of negating recognized exceptions to the hearsay rule. They simply wanted to insure adherence to the common law adversarial system.

Even if this thesis is accurate, it does not inevitably follow that the confrontation clause is entirely neutral with regard to hearsay exceptions. After all, the Americans rejected the civil law procedure in favor of the common law system as it was known to them in the latter part of the eighteenth century. Perhaps, then, the clause was intended to render immutable one or more essential features of the recognized exceptions by constitutionalizing one or more of their characteristics. When the sixth amendment was submitted for ratification in 1789, exceptions to the hearsay rule were narrowly restricted.[24] Basically, the American common law rule against hearsay was that extant in England during the same period.[25] At that time, English courts admitted hearsay evidence only in very limited circumstances: namely, when the declarant was unavailable.[26] If the declarant could be produced, the proffered hearsay was rejected. This same pattern appears in American law. Almost all of the eighteenth century American and English cases collected by Wigmore imposed on the government a stringent obligation to produce the declarant.[27] Although these Anglo-American decisions are not totally harmonious,

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24. *See, e.g.*, 5 J. WIGMORE, *supra* note 10, at 25 n.49. *See also* Borgy v. Commonwealth, 51 Va. (10 Gratt.) 722 (1853) (the witnesses who had testified at the former trial were out of state, not dead, and the testimony was held inadmissible by the Court of Appeals of Virginia); Kendrick v. State, 29 Tenn. (10 Hum.) 479 (1850) (admitting testimony of deceased witness taken before a community magistrate). These cases were cited with approval in Mattox v. United States, 156 U.S. 237, 241-42 (1895).

25. The Crown of England intended that the English common law would be followed in the colonies. F. HELLER, *supra* note 8, at 13-14. At first the colonists attempted their own "period of rude, untechnical popular law." *Id.* at 15 (quoting Reinsch, *The English Common Law in the Early American Colonies*, 2 BULLETIN OF THE UNIV. OF WIS. (1899). Later, they sought to apply the law of England to improve colonial conditions and secure fundamental rights, such as the right of confrontation. *See* Pollitt, *supra* note 9, at 390-91. Pollitt asserts that the commissioners of the courts were "charged to do equal right to poor and to rich . . . as near as may be after the laws of the realm of England." *Id.* (quoting Reinsch, *The English Common Law in the Early American Colonies*, 1 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 367, 404-05 (1970)). Specifically, concerning common law rights at trial, including the accused's right to confront witnesses against him, trial proceedings had to be consistent with the "heretofore . . . constant practice;" in short, the practices and privileges enjoyed in England. Pollitt, *supra* note 9, at 391. In support of his thesis, Pollitt cites Lightfoot, *The Maladministration of Governor Nicholson of Virginia*, 9 ENGLISH HISTORICAL DOCUMENTS 253, 257 (1955).

26. *See infra* notes 27-34 and accompanying text.

27. 5 J. WIGMORE, *supra* note 10, at 23 n.47.

a prevailing principle threads throughout them: if the declarant was living and could be produced, he must appear at trial.[28] Hearsay exceptions generally were limited to declarations made by deceased persons.[29] Besides death, courts found few acceptable excuses for nonproduction. It was no excuse that the declarant was overseas,[30] ill,[31] or, under some authorities, could not be found,[32] even after a diligent search.[33] As Thayer remarked in his Preliminary Treatise on Evidence, hearsay in England was generally admitted only upon "the original speaker's death, or, in some cases, his other disability."[34]

This restrictive attitude toward hearsay exceptions suggests a tentative hypothesis. The adoption of the confrontation clause, although largely a reaction to the vice-admiralty courts, was not necessarily directed simply at insuring an adversarial trial. The clause may have done more. It may have given constitutional status to the common law right of confrontation recognized in England and America.[35] This was the right of the accused to confront any witness against him whom the prosecutor could reasonably produce.[36] Arguably, this confrontation right was not, contrary to Wigmore's thesis, simply an embodiment of the hearsay rule, so that a permissible exception to the ban against hearsay was also an exception to the right of confrontation. Rather, the common law right of confrontation diverged from the hearsay rule in this particular: the declarant's presence was always preferred even though his statement may be sufficiently trustworthy to fall within a hearsay exception and thus be admissible in his absence. Further support for this position is found in Thayer's conclusion that the best evidence rule, which favors the original of a

28. *See, e.g.*, Tomlinson v. Croke, 2 Rolle's Abv. 687, pl. 3 (1612) (deposition receivable if the deponent is dead, not if he is living); Fortescue & Coake's Case, 78 Eng. Rep. 117 (Godb. 193) (1613) (depositions of witnesses read at law only if "affidavit be made that the witnesses who deposed were dead.").

29. *See* C. McCORMICK, *supra* note 2, at 678, and n.61.

30. Stephen v. Gwenap, 1 M. & Rob. 120, 174 Eng. Rep. 41 (Ex. 1831) (although witness is "abroad . . . and altogether out of the power of a party to produce him as a witness," if still living he must be produced at trial).

31. Harrison v. Blades, 3 Camp. 457, 170 Eng. Rep. 1444 (N.P. 1813) (illness insufficient, witness who is "still alive and within the jurisdiction of the Court" must appear at trial for testimony to be admitted). *Id.*

32. *See, e.g.*, Lord Morley's Case, Kel 55, 6 How. St. Tr. (Eng.) 770 (1666) (deposition may be not be read simply because deponent can not be found).

33. Oates' Trial, 10 How. St. Tr. (Eng.) 1227, 1285 (1685) (excluded deposition of a witness not found after a search); Lord Morley's Case, Kel. 55, 6 How. St. Tr. (Eng.) 770 (1666) (although party makes all endeavors to find witness and yet cannot, that is not sufficient to authorize admittance of testimony).

34. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 501 (1898).

35. It was widely acknowledged that such a common law right existed. *See* 5 J. WIGMORE, *supra* note 10, §§ 1365, 1397.

36. *Id.* at §§ 1395-1396.

document over a copy or verbal account of its contents, was applied during the eighteenth century to hearsay declarations.[37] It is thus plausible that the confrontation clause is silent regarding a hearsay exception when the declarant is unavailable and, obviously, has no impact upon a hearsay exception invoked in a civil trial. The confrontation clause speaks with a single voice, commanding production of available witnesses against the accused in a criminal trial.

This thesis is consistent with the early leading case of *Mattox v. United States*.[38] There the Court approved the use of prior testimony when the former witnesses were dead. Justice Brown explained:

> [T]he primary object of the constitutional provision was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross examination of a witness in which the accused has the opportunity . . . of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony and whether he is worthy of belief.[39]

The Court observed that the constitutional right guaranteed to each citizen is that which "he already possessed as a British subject. . . ."[40] The right of confrontation, though expressed in absolute terms, is "subject to exceptions, recognized long before the adoption of the Constitution. . . ."[41]

Also revealing is the *Mattox* Court's discussion of prior English and American cases. A decisive factor controlling the admissibility of the proffered hearsay in those cases was whether the declarant was dead;[42] if not, the hearsay was rejected. If unavailability due to death

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37. The original of a document is favored only if it is available. If not, other evidence, such as a copy, of the content is admissible. The early construction of the Best Evidence Rule is developed in detail in J. THAYER, *supra* note 34, 484-501. The author notes, however, when the Rule applied to hearsay the disability of the declarant did not alone permit the admission of his hearsay; in only special cases was the hearsay statement allowed and these were marked by both necessity and "the highly probative character of the circumstances under which . . . [the declarant] spoke. . . ." *Id.* at 501. It will thus be seen that the hearsay rule and its developing exceptions intersected with the best evidence rule as it applied to hearsay, but were not likely coextensive with it. Even where the "best evidence," in the person of the declarant, could not be produced (thus satisfying the preference rule) the proffered evidence might fail to satisfy a hearsay exception.

38. 156 U.S. 237 (1895).

39. *Id.* at 242-43.

40. *Id.* at 243.

41. *Id.* The Court recognized one such exception was for dying declarations, made by reason of "the necessities of the case, and to prevent a manifest failure of justice." *Id.* at 244.

42. *Id.* at 240-42.

was substantiated, most cases would receive prior testimony or depositions as exceptions to the hearsay rule and to the right of confrontation. These cited cases, consistent with the early cases collected by Wigmore, support the view that the confrontation clause functions as a rule of preference requiring the presence of the declarant, if available.

If this interpretation is correct, the drafters of the sixth amendment had no intention of arresting the development of exceptions to the hearsay rule. Rather, they sought to secure the common law practice of requiring that witnesses against the accused should, if possible, give their testimony personally in open court, there to be confronted. Hearsay exceptions could be developed free from constraints of the confrontation clause, except that in criminal cases the state must secure the presence of available adverse witnesses.[43]

III. Competing Interpretations

Omissions and ambiguities in the historical record have fueled the wide-ranging debate about the meaning of the confrontation clause. As noted earlier, Wigmore, the first modern commentator to give sustained attention to its construction, apparently concluded[44] that the clause simply secured a mode of procedure, that of cross-examination. Two points underlie his argument: first, that there is no essential difference between "confrontation" and "cross-examination" and, second, that the common law right of cross-examination was never absolute—that is, the rule against hearsay was never without exceptions.[45] Thus, the constitutional right of confrontation, like that of other guarantees such as freedom of speech and religion, was qualified by acknowledged exclusions.[46] Generally, this construction leaves the law of evidence to determine what hearsay exceptions will be sanctioned. The confrontation clause, however, still condemns secret

43. Of course, this reading of history is not definitive, but it offers a construction that is both plausible and supportive of the Supreme Court's most recent interpretation of the confrontation clause.

44. Wigmore's basic position is set out in J. Wigmore, *supra* note 10, §§ 1365, 1397. Other sections of his treatise, however, can be read as suggesting that the constitutional right of confrontation does not give way unless the declarant's production is excused by his practical unavailability. *Id.* §§ 1399-1404. *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 575 n.21 (1978). The discussion in these latter sections focuses upon prior recorded testimony and depositions and may not have implications for other exceptions—at least not for those exceptions which are not premised on a showing of unavailability. *E.g.*, Fed. R. Evid. 803.

45. 5 J. Wigmore, *supra* note 10, § 1397, at 158.

46. "The rule sanctioned by the Constitution," said Wigmore, "is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein." *Id.*

or ex parte testimony taken outside the accused's presence and in violation of the evidentiary rules of the adversarial system.

In recent years, Wigmore's view has lost favor,[47] despite the fact that one interpretation of the scant historical evidence can be read as supportive of his theory.[48] Wigmore's construction is perhaps most vulnerable because it fails to afford the desired level of constitutional protection and leaves the scope of the constitutional guarantee to the vicissitudes of the rules of evidence. However, the rejection of Wigmore's thesis creates a vacuum which is not readily filled; some of the possible interpretations raise severe practical difficulties. For instance, a broad construction of the confrontation clause, one that prohibited absolutely the use of hearsay evidence, would severely and unjustifiably restrict the government's ability to prove its charges. Even statements made in circumstances suggesting a high degree of reliability and falling within a well-recognized exception would be rejected. Thus, it is not surprising that commentators have sought a middle course—one that neither subordinates the confrontation clause to the common law's hearsay exceptions, nor absolutely prohibits the use of hearsay evidence.

The various proposals have focused upon unavailability of the declarant or reliability of the hearsay evidence or, most frequently, upon both of these determinants. Under one theory,[49] for example, the confrontation clause is assigned a role approximating that of due process. The right of confrontation becomes, in essence, a safeguard against convictions based upon unreliable evidence. Either the accused must be afforded a full opportunity to discredit the evidence against him or, when that opportunity is restricted, there must be an adequate justification such as the probable reliability of the evidence. This theory considers such factors as the degree of untrustworthiness, the ease of producing the hearsay declarant, and the importance of the evidence in question. Another reading of the confrontation clause construes its command as a rule of preference.[50] The state

47. *See, e.g.*, Graham, *supra* note 9, at 104. Professor Graham labels Wigmore's view as "highly partisan and probably inaccurate," *id.* at n.24, and implies that Wigmore's construction was influenced by his desire to advance hearsay reform and, perhaps, his lack of sympathy for the criminal defendant.

48. *See supra* note 15 and accompanying text.

49. *See, e.g.*, Graham, *supra* note 9, at 101-02; Martin, *Former Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547 (1972); G. LILLY, *supra* note 3, at 277.

50. At one time, Justice Harlan favored this approach. *See* California v. Green, 399 U.S. 149 (1970). Upon further reflection, however, he recanted. *See* Dutton v. Evans, 400 U.S. 74 (1970). Professor Peter Westen has been an articulate and persuasive advocate of the "rule of preference" construction. *See, e.g.*, Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979).

must produce any "witness against" the accused if production is reasonably possible. If the prosecution demonstrates that the witness is unavailable, his excepted hearsay statement is admissible provided it meets a minimum standard of reliability. The reliability standard imposed by the due process clause or, under some theories, the confrontation clause itself, requires only some rational basis for concluding that the excepted evidence is trustworthy.

IV. The Judicial Record

Since 1965,[51] when the Supreme Court held the confrontation clause applicable to the states,[52] the Court has applied the clause in a variety of contexts. The resulting interpretations are not easily reconciled. The initial series of opinions, rendered prior to 1970, indicated that the right of confrontation was a significant barrier to the use of hearsay in criminal trials. Two of these cases[53] involved trials in which the extra-judicial confession of one co-felon also implicated the other. Because the confessing felon could not be cross-examined by the implicated accused,[54] the Court held that the latter's right to confront an adverse witness was denied. A third case[55] addressed the

51. An early leading case, Mattox v. United States, 156 U.S. 237 (1895), held that prior reported testimony of a witness who had since died was admissible over a confrontation objection and approved, in dictum, the admission of dying declarations. *Id.* at 243-44. *See also* Kirby v. United States, 174 U.S. 47 (1899) which involved a prosecution for receipt of stolen goods. The Court held that the judgment against those convicted of stealing the property could not be used to establish that the goods received by the accused had in fact been stolen. *Id.* at 63-64.

52. Pointer v. Texas, 380 U.S. 400 (1965) (use by state of transcript of witness' testimony given during preliminary hearing at which the accused was not represented by counsel violated the confrontation clause).

53. Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965).

54. In Douglas v. Alabama, 380 U.S. 415 (1965), the previously convicted co-felon was called as a witness for the state. He refused to give testimony. Under the guise of refreshing recollection, the prosecutor read aloud the witness' earlier confession which implicated the accused. This procedure was condemned on confrontation grounds.

Bruton v. United States, 391 U.S. 123 (1968), was a joint trial in which a confession of one co-defendant was introduced and implicated the other co-defendant. The confessing defendant did not take the stand. Despite the trial court's instruction that the confession could be used only with respect to the guilt of the confessor, the Supreme Court held that the implicated defendant was denied the right to confront a witness against him. *Id.* at 137.

Subsequent decisions have emasculated the *Bruton* holding. *See* Nelson v. O'Neil, 402 U.S. 622 (1971) (*Bruton* is not controlling when co-defendant takes stand, denies inculpatory admission, and testifies favorably to accused); Harrington v. California, 395 U.S. 250 (1969) (*Bruton* violation can be harmless error; further, *Bruton* may be inapplicable when co-defendant takes the stand and admits making the earlier statements). In Parker v. Randolph, 442 U.S. 62 (1979), a plurality of the Court took the position that where co-defendants each confess, and the confession of a non-testifying defendant "interlocks" with and implicates the other accused, a *Bruton* violation will nearly always be reduced to harmless error if the trial court gave a proper limiting instruction. *Id.* at 64.

55. Barber v. Page, 390 U.S. 719 (1968).

state's constitutional obligation to produce at trial a declarant, incarcerated in a federal prison, whose statements were used against the accused. The evidence in question was the transcript of the declarant's testimony given at the accused's preliminary hearing. The Supreme Court found that the state's use of the transcript denied the accused's right of confrontation: "[a] witness is not 'unavailable' for purpose of the [prior testimony] exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."[56] These cases indicated that the confrontation clause placed strict but uncertain limits upon the state's ability to introduce "uncross-examined" testimony; further, the clause also obligated the state, at least in some circumstances, to rely upon live testimony instead of hearsay declarations.

Finally, in an opinion that applied the confrontation clause to the scope of cross-examination, the Supreme Court reversed a conviction because the accused was prohibited from asking the state's witness (an informer) his name and address.[57] It thus seemed clear that the confrontation clause also protected the accused against evidentiary rules that significantly undermine the effectiveness of cross-examination even though the witness against him had been questioned in open court.

Although these early opinions did not condemn the use of all hearsay, they seemed destined to circumscribe closely the allowable use of hearsay declarations.[58] Those hearsay exceptions that traditionally applied without reference to the declarant's availability might be constitutionally inoperative unless the state could demonstrate its inability to produce the speaker. Those that applied only

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56. *Id.* at 724-25. The Court also held that the accused's failure to cross-examine the witness at the preliminary hearing did not result in a waiver of the right to cross-examine the witness at trial. The Court observed that even when the right to cross-examine at a preliminary hearing is exercised, this examination is not the equivalent of a cross-examination at trial:

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Id. at 725. In California v. Green, 399 U.S. 149 (1970), the Court discounted this observation and held that, at least in the circumstances of *Green*, cross-examination at the preliminary hearing satisfied the confrontation clause. *See infra* notes 61-63 and accompanying text.

57. Smith v. Illinois, 390 U.S. 129 (1968). *See also* Davis v. Alaska, 415 U.S. 308 (1974) (right of confrontation dictates that accused is entitled to show that prosecution witness was on probation for juvenile offense).

58. As to the retroactive application of confrontation requirements, see Berger v. California, 393 U.S. 314 (1969) (*Barber* applied retroactively); Roberts v. Russell, 392 U.S. 293 (1968) (*Bruton* applied retroactively). All of the major confrontation cases are collected and closely scrutinized in R. LEMPERT & S. SALTZBURG, *supra* note 8, at 550-601.

upon a showing of unavailability might sometimes be suspended: the state's constitutional obligation to produce the declarant could be more demanding than that required by a common law or statutory hearsay exception. Finally, even if unavailability were substantiated, the proffered evidence nonetheless might be inadmissible because it lacked sufficient reliability to meet the constitutional standard.[59]

The 1970s brought on an apparent shift in the high Court's approach. During this period, its reading of the confrontation clause emphasized moderation. In particular, the resolution of two leading cases[60] marked a break in the vigorous application of constitutional standards, and a retreat from the strident language which characterized some of the earlier opinions. In the first decision,[61] the Court found no constitutional objection to a state rule of evidence that permitted a prosecution witness' prior out-of-court statement to be used for its truth. The fact that the witness was on the stand and testifying would, under most circumstances, allow adequate confrontation of his earlier declarations. In the same case, contrary to strong disapproving language in an earlier decision,[62] the Court allowed the use of a witness' prior testimony taken at a preliminary hearing. It rejected the accused's claim that because a preliminary hearing was for the limited purpose of inquiring into probable cause, there was diminished incentive to cross-examine fully and hence inadequate confrontation.[63]

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59. Despite these specific apprehensions, the precise reach of the confrontation clause was in doubt and its analytical framework remained opaque. The uncertain landscape caused some lower courts to limit the scope of the recent decisions. *See, e.g.*, Tomlin v. Beto, 377 F.2d 276, 277 (5th Cir. 1967) (citing Pointer v. Texas, 380 U.S. 400 (1965) where the court states that the right of confrontation is inapplicable to an exception to the hearsay rule); State v. Nordstrom, 244 A.2d 837 (R.I. 1968) (*Pointer* found not to exclude admissible evidence under any well-established hearsay exception). Other courts, however, saw sweeping implications in the revitalized confrontation clause and responded accordingly. *See, e.g.*, State v. Tims, 9 Ohio St. 2d 136, 224 N.E.2d 348 (1967) (hospital records not admissible unless examining and recording physician was present and subject to cross examination); Rubey v. Fairbanks, 456 P.2d 470 (Alaska 1969) (admission of non-hearsay statement violates confrontation clause); *In re* Montgomery, 2 Cal. 3d 863, 471 P.2d 15, 87 Cal. Rptr. 695 (1970) (only upon showing of unavailability may right of confrontation be dismissed); State v. Adrian, 453 P.2d 221 (Hawaii 1969) (confrontation of witnesses must mean confrontation of hearsay declarant; otherwise the clause would be emasculated).

60. California v. Green, 399 U.S. 149 (1970); Dutton v. Evans, 400 U.S. 74 (1970). In addition to taking a more tolerant approach in the two cases the Court also emasculated its holding in Bruton v. United States, 391 U.S. 123 (1968). *See supra* note 54.

61. California v. Green, 399 U.S. 149 (1970). For an analysis of this case and the unanswered questions that survive it, see J. WEINSTEIN & M. BERGER, *supra* note 5, at ¶ 800[04], at 800-21 to 800-23; ¶ 801(d)(1)(A)[02]-[08], at 801-90 to 801-111.

62. Barber v. Page, 390 U.S. 719, 725 (1968).

63. However, the Court refrained from broadly approving all testimony given at a preliminary hearing that fell within a hearsay exception such as former testimony. It concluded simply that on the facts before it, testimony at the preliminary hearing was given "under circum-

In the second case,[64] a bare majority[65] permitted the state to introduce a co-conspirator's declarations under an exception to the hearsay rule even though they were not made "in furtherance" of the conspiracy.[66] Although the decision did not discuss whether there was normally an obligation to produce the declarant,[67] the excepted testimony in the case was not constitutionally objectionable even though the state failed to produce him. In approving the use of the co-conspirator's statement against the accused, the plurality emphasized that the confrontation clause allowed the states considerable latitude to fashion and enlarge hearsay exceptions. Those Justices voting to affirm the conviction were influenced by the relatively inconsequential nature of the admitted declarations and the abundant evidence supporting the accused's guilt. One might conclude that a majority of the Justices were now prepared to give a flexible interpretation to the confrontation clause, taking full account of the context of each case.[68] Perhaps, in the broadest sense, the confrontation clause imposed minimum standards of trustworthiness and adversarial fairness. Application of these standards would require an inquiry into the likely trustworthiness of the challenged hearsay evidence, its importance, and the ease with which the declarant could be produced. Arguably,

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stances closely approximating those that surround the typical trial" and that defense counsel had been afforded "every opportunity to cross-examine" the adverse witness. California v. Green, 399 U.S. 149, 165 (1970).

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

65. A plurality of four Justices was joined by Justice Harlan in affirming the rejection of the accused's confrontation arguments.

66. The state rule in issue extended the co-conspirators exception to include statements made during the period when the conspirators were concealing the crime or their involvement in it. Dutton v. Evans, 400 U.S. 74, 78 (1970). Most jurisdictions confine the exception to statements made in furtherance of the conspiracy. *See* C. McCormick, *supra* note 2, at 646 & n.30. Federal law, then and now, is in accord with the majority view. Dutton v. Evans, 400 U.S. 74, 81; Fed. R. Evid. 801(d)(2)(E).

67. A subsequent case, Mancusi v. Stubbs, 408 U.S. 204 (1972), casts further light upon the state's obligation to produce the declarant. In *Mancusi*, the requirement established in Barber v. Page, 390 U.S. 719 (1968), *see supra* notes 55-56 and accompanying text, that the state make a good faith effort to achieve the presence of a witness, was satisfied even though the prosecutor did not make an exhaustive attempt to produce a live declarant. The declarant, who had testified at the accused's earlier trial, had since moved to Sweden. The state's only effort to secure his presence was to send a subpoena to his last known address in the United States. The majority may have concluded that no bona fide attempt was required if it appeared that there would be little chance of such efforts succeeding. However, the Court expressly relied upon the inability of the state to compel a foreign resident to appear. There was, in short, no procedural mechanism for securing the witness' presence. Beyond this, the Court examined the prior testimony and concluded that the accused's opportunity to confront the adverse witness and his actual cross-examination of that witness was adequate to satisfy the Constitution. The earlier testimony "bore sufficient 'indicia of reliability' and afforded the 'trier of fact a satisfactory basis for evaluating the truth of the prior statement[s].' " 408 U.S. at 216 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).

68. *See* J. Wigmore, *supra* note 10, § 1397 at 184-85.

these criteria were interlocking and the existence of one affected the others. For example, if reliability of the evidence were high, as might be the case where a well-established hearsay exception applied, the ease of producing the witness and centrality of the evidence might be given little or no consideration.

For more than a decade after these two decisions, the Court did not attempt to clarify further the meaning and scope of the confrontation clause. The later decisions, however, set the tone for assessing the constitutional restraints on the use of hearsay.[69] The hearsay exceptions were generally sanctioned, although the confrontation clause precluded the use of hearsay where there was a serious risk that uncross-examined statements would mislead the trier or where the hearsay was critical evidence.[70]

V. OHIO V. ROBERTS

Ohio v. Roberts,[71] decided in 1980, is the Court's most recent effort to define the right of confrontation. Roberts, the accused, was charged with forging a check in the name of Bernard Isaacs and stealing the latter's credit cards. At the preliminary hearing, defense counsel called as his only witness Isaac's daughter, Anita. She testified during a lengthy direct examination that she knew Roberts and that, with her permission, he had temporarily used her apartment while she was away. She denied, however, that she gave Roberts her father's checks and credit cards. Despite this unfavorable testimony, defense counsel did not seek the court's permission to declare Anita a hostile witness and formally cross-examine her; the prosecutor asked

69. *See, e.g.*, United States v. Nick, 604 F.2d 1199, 1203 (9th Cir. 1979) (admission of youth's out-of-court statement identifying the man who sodomized him did not deny the defendant his right to confrontation even though boy was available but did not take stand; test for admissibility under *Dutton* is whether under all of the circumstances the evidence has a very high degree of reliability and trustworthiness and there is a demonstrated need for the evidence); United States v. Puco, 476 F.2d 1099, 1103 (2d Cir. 1973) (co-conspirator's out-of-court identification of defendant allowed even though co-conspirator did not testify; hearsay evidence does not violate confrontation provided it is "clearly trustworthy and is not 'crucial' to the prosecution or 'devastating' to the defendant"); State v. Walker, 53 Ohio St. 2d 192, 195, 374 N.E.2d 132, 136 (1978) (introduction of log books to establish proper working condition of breathalyzer is not violative of confrontation clause even though neither custodian nor maker of record testified; admissibility determined in light of purpose of confrontation clause to assure that the trier has a sufficient basis for evaluating the truth of statement); State v. Finkley, 6 Wash. App. 278, 492 P.2d 222 (1972) (medical record disclosing sperm in victim admitted over confrontation objection because record fell within business entry exception to hearsay rule).

70. *See, e.g.*, Phillips v. Neil, 452 F.2d 337, 348 (6th Cir. 1971) (opinion evidence in a psychiatric record violates confrontation clause because such use jeopardizes the "truth-determining process"); State v. Henderson, 554 S.W.2d 117, 122 (Tenn. 1977) (laboratory reports establishing substances purchased from defendant as marijuana are inadmissible; lack of cross-examination regarding a critical element of crime violates confrontation).

71. 448 U.S. 56 (1980).

no questions of Anita.

At trial, Roberts took the stand and testified that Anita gave him the credit cards and checks bearing her father's name with the understanding that he could use them. Pursuant to the state's hearsay exception for prior testimony, the prosecutor in rebuttal offered Anita's testimony from the preliminary hearing. He established the "unavailability" predicate of the hearsay exception by showing that five unanswered subpoenas had been issued for Anita at her parents' residence; he also elicited testimony from Anita's mother that Anita had left home more than a year prior to trial, that she had not contacted her parents for about seven months, and that they did not know where she was presently living. The trial judge admitted the transcript, and Roberts was convicted. The question before the United States Supreme Court[72] was whether the use of the transcript violated the accused's right of confrontation.

Justice Blackmun's majority opinion began by declaring "that the confrontation clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.' "[73] Even though countervailing considerations such as a state's "interest in effective law enforcement and in the . . . precise formulation of . . . rules of evidence" could suspend this right in some circumstances, the clause nonetheless restricts the scope of admissible hearsay in two ways.[74] The provision is, first, a statement of "preference for face-to-face accusation;"[75] therefore, the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.[76] Once unavailability is shown,[77] the clause has a second effect: it allows only hearsay that is accompanied by

72. Ohio's intermediate appellate court reversed Roberts' conviction on the ground that the state had not exercised sufficient diligence in its attempts to produce Anita. In essence, the prosecutor's failure to pursue possible leads, and in particular to contact a social worker who previously had been in touch with Anita, fell short of the constitutional "good-faith standard" imposed by Barber v. Page, 390 U.S. 719 (1968). The Ohio Supreme Court affirmed, but on a different ground. The supreme court found that the prosecution had made sufficiently diligent efforts to present Anita's live testimony, but use of the transcript nonetheless violated the confrontation clause: because a preliminary hearing is only to determine the existence of probable cause, the mere opportunity to cross-examine a witness during such a hearing does not afford the accused his right of confrontation. State v. Roberts, 55 Ohio St. 2d 191, 378 N.E.2d 492 (1978).

73. Ohio v. Roberts, 448 U.S. 56, 63 (1980) (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

74. 448 U.S. at 64-65.

75. *Id.* at 65.

76. *Id.*

77. *Id.*

"indicia of reliability"[78] sufficient in the circumstances to justify dispensing with confrontation. The Court then noted that firmly rooted hearsay exceptions would presumptively bear such indicia, thus making it unnecessary to conduct a particularized search for their presence.[79]

Applying these criteria, the Court found that the prosecution's effort to produce Anita satisfied the good-faith standard imposed by the confrontation clause.[80] This requirement was met because the state took reasonable steps to locate the witness and there was a "great improbability"[81] that additional efforts would be fruitful. The state's satisfaction of the "unavailability" predicate did not, of course, end the constitutional inquiry. The Court also examined whether there was compliance with the reliability standard, and concluded that the contested hearsay bore sufficient indicia of reliability. Defense counsel's thorough interrogation of Anita, replete with leading questions, was in substance the equivalent of cross-examination. It served to test adequately the witness' credibility, including such components as accurate perception, sufficient memory, and sincerity.[82] Thus, the prior examination fit comfortably within the exception for former testimony and a further "particularized search for 'indicia of reliability' "[83] was unnecessary.

VI. *Roberts*: Meaning and Implications

At first blush, *Roberts* appears to be an unexceptional application of principles established in prior cases. On other occasions the Court had required a constitutional "good-faith effort" to produce the declarant before resorting to his hearsay declaration.[84] In prior decisions the Court also had established a constitutionally imposed standard of reliability and had indicated that well-founded hearsay exceptions conformed to the standard.[85] Reinforcing the apparently

78. *Id.* (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)). There may also be a closely related but distinct requirement that the admitted hearsay afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970) *quoted in* Ohio v. Roberts, 448 U.S. at 73. However, it is difficult to conceive of a case in which the admitted hearsay had the accouterments of reliability and yet was without a sufficient basis for evaluation by the trier.

79. 448 U.S. at 66.

80. From this conclusion, Justices Brennan, Marshall, and Stevens dissented. *Id.* at 77.

81. *Id.* at 76.

82. *See supra* note 3.

83. 448 U.S. at 72.

84. Barber v. Page, 390 U.S. 719 (1968).

85. Mancusi v. Stubbs, 408 U.S. 204, 213 (1972) ("even though the witness be unavailable his prior testimony must bear some indicia of reliability"); California v. Green, 399 U.S. 149, 161 (1970) (traditional exceptions usually possess indicia of reliability).

routine disposition of Roberts' appeal is the opinion's pragmatic tone, suggesting the Court's willingness to accommodate constitutional requirements to the practical realities of criminal prosecutions.

Beneath this apparently orthodox disposition, however, lies an interpretation of possibly far-reaching significance. In *Roberts*, a solid majority of the Court agreed that the confrontation clause was, first, a rule of preference, and second, a constitutional bulwark against unreliable hearsay evidence. This construction is essentially one that Justice Harlan embraced for a brief period.[86] Harlan's approach, which he rejected only six months later,[87] assigned to the confrontation clause the single purpose of compelling live testimony when it could be reasonably secured.[88] The clause was silent with respect to the reliability of evidence. Justice Harlan believed that protection against the use of unreliable evidence was secured not by the confrontation clause, but by the due process provision.[89] Although that protection was minimal, at least the state was prohibited from securing a conviction on an evidentiary record that would not support belief beyond a reasonable doubt.[90] Further, the state's use of an individual item of evidence could run afoul of the due process clause if there was "a very substantial likelihood" that the evidence was false.[91]

The *Roberts* opinion does not limit the role of the confrontation clause to its preferential function, as Harlan had suggested. In the Court's view, the clause also speaks to reliability, but with a voice that could easily be traced to the due process clause. If evidence lacks indicia of reliability, there is a high probability that it might be false. In other words, evidence lacking such indicia does not "afford the trier of fact a satisfactory basis for evaluating . . . [its] truth."[92] Thus, the confrontation clause's standard of reliability closely approximates that which is independently operative through the due process clause.[93] So viewed, the "reliability" requirement of the *Rob-*

86. *See supra* note 50.

87. Dutton v. Evans, 400 U.S. 74, 95 (1970).

88. California v. Green, 399 U.S. 149, 174 (1970).

89. *Id.* at 189.

90. In a line of cases decided under the due process clause, the Court has determined that a defendant may not be found guilty unless there is "sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307 (1979). *See also In re* Winship, 397 U.S. 358 (1970).

91. Neil v. Biggers, 409 U.S. 188, 198 (1972) (quoting, Simmons v. United States, 390 U.S. 377, 384 (1968)). The due process standard is explicated in Westen, *supra* note 44, at 598-601; Westen, *supra* note 50, at 1190.

92. California v. Green, 399 U.S. 149, 161 (1970).

93. Again, it is Professor Westen who, correctly in my view, so interprets the cases. Westen, *supra* note 50, at 1191. *See also supra* note 78.

erts' opinion makes little or no demand beyond that of existing law.

It is the sweeping ambit of the preferential role of the confrontation clause which raises the most significant issues. Here, the *Roberts* opinion speaks broadly, apparently addressing all hearsay: the declarant must be produced unless the proponent meets the constitutional test of unavailability; only if unavailability is established is there a need to assess reliability. Yet the vast majority of hearsay exceptions are not based upon the declarant's unavailability.[94] The Federal Rules of Evidence, illustrative of the common law and other evidence "codes," divide hearsay exceptions into two principal categories. The first (class 1) consists of exceptions (such as business and public records, learned treatises, excited statements, and statements of physical and mental condition)[95] which require that the excepted statement be made in circumstances that strongly suggest trustworthiness. Because attending circumstances indicate a similar degree of reliability as that of testimony given in court, it is not essential to cross-examine the declarant.[96] Conversely, the second category of exceptions (class 2) is generally thought to embrace less reliable declarations. These exceptions, partly the product of necessity, apply only if the declarant is unavailable.[97]

The *Roberts* Court does not in the course of its constitutional analysis differentiate between these classes of hearsay exceptions. The resulting inclusive application of the confrontation clause presumptively conditions all hearsay exceptions upon a predicate of unavailability. Nonetheless, with some class 1 exceptions, confrontation may be unnecessary simply because it clearly would be unavailing. The Constitution should not compel witness' presence in the courtroom when confrontation would not be helpful to the accused. Generally, however, the broad application of a constitutional rule of preference is likely to make profound changes in criminal trials. It remains to sketch some of the implications of *Roberts*.

Roberts leaves uncertain the scope of the government's duty to produce the declarant. There are, of course, explications of unavailability in various decisional and codified evidence rules.[98] For example,

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94. *See* C. McCormick, *supra* note 2, § 253 at 608. ("[T]he group of hearsay exceptions where unavailability is required are in a sense second class in comparison with the far larger number of exceptions where availability or unavailability is simply not a factor."). The Federal Rule of Evidence lists 24 exceptions which are not dependent on the absence of the declarant. Fed. R. Evid. 803; only five exceptions hinge upon unavailability. Fed. R. Evid. 804.

95. Fed. R. Evid. 803(6), (8), (18), (2), (3).

96. *See* G. Lilly, *supra* note 3, § 72; Fed. R. Evid. 803 advisory committee note.

97. *See* Fed. R. Evid. 804(b) advisory committee note.

98. *See, e.g.*, Fed. R. Evid. 804(a); Cal. Evid. Code § 240; J. Wigmore, *supra* note 10, §§ 1403-1413, at 205-37 (lists common law bases of unavailability).

a witness may be unavailable when he lacks memory, refuses to testify, cannot attend trial because of illness or infirmity, or is absent from trial and cannot be produced by reasonable means.[99] Definitions of "unavailability" traditionally are associated with those comparatively few hearsay exceptions (class 2) which are predicated on the inability to secure the declarant's live testimony.[100] Yet *Roberts* appears to impose an unavailability requirement for all hearsay that is within the compass of the confrontation clause. Further, because the requirement is of constitutional origin,[101] the meaning of unavailability is likewise of constitutional dimension. Thus the courts are left to define the precise boundaries of a prosecutor's "good faith" obligation to produce a witness against the accused. When the unavailability predicate for hearsay exceptions delineated in cases and statutes is not sufficient in criminal trials governed by the confrontation clause, the prosecutor must be guided by the constitutional standard.

Obvious questions are the extent of the government's duty when no procedural mechanism exists for requiring the declarant's presence,[102] the range of acceptable "excuses" for non-production,[103] and the extent to which the obligation to produce is affected by the significance of the evidence in question and/or its probable reliability.[104] These issues, arising in cases that frequently will be distinguishable on their facts, await constitutional resolution.

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99. FED. R. EVID. 804(a).

100. *See, e.g.*, FED. R. EVID. 804.

101. Prior cases support a constitutional standard. *See* Barber v. Page, 390 U.S. 719 (1968). *Cf.* Mancusi v. Stubbs, 408 U.S. 204 (1972).

102. In Mancusi v. Stubbs, 408 U.S. 204 (1972), the Court held that the state court was proper in finding the declarant unavailable when he was beyond the reach of the state's power, even though no attempt had been made to secure the declarant's voluntary appearance. *Id.* at 211-16. *But see infra* note 106 and accompanying text.

103. Haggins v. Warden, Ft. Pillow State Farm, 715 F.2d 1050, 1055 (6th Cir. 1983) (youthful declarant unavailable because incompetent to testify); United States v. Ammar, 714 F.2d 238, 255 (3d Cir.)(declarants had eluded apprehension and thus were unavailable), *cert. denied*, 104 S. Ct. 344 (1983); United States v. Chappell, 698 F.2d 308, 312 (7th Cir.)(declarant dead, thus unavailability requirement satisfied), *cert. denied*, 103 S. Ct. 2095 (1983); State v. Schad, 129 Ariz. 557, 569, 633 P.2d 366, 378 (1981) (declarant in serious accident, thus unavailable); Harrison v. United States, 435 A.2d 734, 736 (D.C. 1981) (unavailability satisfied because declarant was 83 years old, sick, and would have to travel from Louisiana to D.C.); People v. Arroyo, 54 N.Y.2d 567, 573, 431 N.E.2d 271, 275, 446 N.Y.S.2d 910, 914 (1982) (declarant unavailable because disappeared day of trial after giving no indication to prosecutor of an unwillingness to testify); State v. Farber, 295 Or. 199, 666 P.2d 821, 826-27 (1983) (declarant unavailable because if called to stand would have claimed fifth amendment privilege). *But see* Hutchins v. Wainwright, 715 F.2d 512, 516 (11th Cir. 1983) (that police would not reveal informant's name did not make him unavailable).

104. In *Roberts*, the Court noted that a showing of unavailability was not always required if, for example, the utility of trial confrontation was remote. 448 U.S. at 65 n.7. *See* People v. Dement, 661 P.2d 675, 682 (Colo. 1983) (unavailability requirement not satisfied because utility of confrontation was high).

In the lower courts, this process has already begun.[105] Under one view, for example, the state's effort to produce the declarant is to be measured by the supposed effort that the prosecutor would mount if he were without the hearsay evidence he proffers.[106] In a sense, this test is stringent, for it clearly contemplates prosecutorial efforts to secure a witness even though no compulsory mechanism is available. The test could be interpreted, but thus far has not, to contain a leavening feature: by taking account of centrality, the prosecutor's duty diminishes in proportion to the insignificance of the hearsay evidence.

Perhaps the most significant question associated with the preference rule is simply whether the obligation to produce encompasses all class 1 exceptions, as *Roberts* seems to indicate. A footnote in *Roberts* makes the laconic observation that "[a] demonstration of unavailability. . .is not always required"[107] and would not be where "the utility of trial confrontation"[108] is sufficiently remote. Whether the escape from the usual duty to produce is available for such hearsay exceptions as business entries,[109] public records,[110] ancient documents,[111] commercial publications,[112] or learned treatises[113] remains problematic. Much may depend upon the particular circumstances. A business record containing important test results about blood or narcotics[114] is likely to be treated quite differently from a business entry showing that an individual had a telephone installed and was assigned a certain number. The utility of confrontation cannot always

105. *See supra* notes 102-104.

106. State v. Edwards, 136 Ariz. 177, 182, 665 P.2d 59, 64 (1983).

107. 448 U.S. at 65 n.7.

108. *Id.* As an illustration the Court cites Dutton v. Evans, 400 U.S. 74 (1970) discussed *supra* note 64 and accompanying text. *See also supra* note 104 and accompanying text.

109. *See, e.g.*, FED. R. EVID. 803(6), 803(7). The reach of rule 803(6) is already curtailed by 803(8). United States v. Oates, 560 F.2d 45, 71 (2d Cir. 1977). Some courts even prior to *Roberts* took the position that, at least in some circumstances, the business entry exception fell within the command of the confrontation clause that the declarant be produced. *See also* State v. Tims, 9 Ohio St. 2d 136, 224 N.E.2d 348 (1967). United States v. Chappell, 698 F.2d 308, 312 (7th Cir. 1983), *cert. denied*, 103 S. Ct. 2095 (1983), a post-*Roberts* case reaches the same result. *Cf.* United States v. Wallulatum, 12 FED. R. EVID. SERV. (CALLAGHAN) 389 (9th Cir. 1982) (inability to cross-examine the technician who made blood test did not constitute denial of defendant's right to confrontation).

110. *See, e.g.*, FED. R. EVID. 803(8), 803(9), 803(10).

111. *See, e.g., id.* 803(16).

112. *See, e.g., id.* 803(17).

113. *See, e.g., id.* 803(18).

114. *See, e.g.*, United States v. Neff, 615 F.2d 1235, 1242 n.7 (9th Cir), *cert. denied*, 447 U.S. 925 (1980) (IRS document asserting that no return had been filed was admissible because such evidence was distinguishable from evaluative evidence like that offered in United States v. Oates, 560 F.2d 45 (2d Cir. 1977), which involved chemical analysis of a substance found on declarant). *See supra* note 109.

be determined from the particular hearsay exception in question, but will sometimes turn upon the circumstances in which the exception is applied.

Unresolved questions also attend the "reliability" prong of the *Roberts* test. Even if production of the declarant is excused, the state's proffered hearsay may still run afoul of the confrontation clause. Admission hinges upon whether the tendered evidence possesses sufficient "indicia of reliability."[115] These indicia include such factors or circumstances as an adequate chance to observe, spontaneity of speaking, likelihood of sufficient recollection, and absence of motive to falsify.[116] The *Roberts* Court reiterated a point made in earlier decisions that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[117] Whether "firm-rooting" is a function of the longevity of an exception, the number of jurisdictions recognizing it, or both is not certain. Are exceptions recognized by the Federal Rules of Evidence[118] firmly rooted? If so, acceptance at the federal level may suggest adequate constitutional reliability even though some states either do not acknowledge the federal exception or narrowly restrict its scope.[119] Certainly, recognition by the federal rulemakers bolsters the argument that indicia of reliability are contained within the exception itself and need not be further explored. But there is still much room for case-by-case development and thus the significant possibility of a solution by decisional accretion.

One point, however, emerges clearly, not so much from the language of *Roberts* as from its underlying logic. Generally, hearsay declarations are divided into two categories: inadmissible hearsay (out-of-court statements offered for their truth) and admissible excepted hearsay (out-of-court statements that may be received for their truth

115. 448 U.S. at 65-66 (1980). There must also exist a satisfactory basis for assessing the truth or falsity of the proffered hearsay declarations. *Id.* (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)). However, the ability of the trier to evaluate the credibility of the hearsay evidence should turn in large part, if not exclusively, upon the presence or absence of indicia of reliability. *See supra* note 78.

116. *See* Dutton v. Evans, 400 U.S. 74, 88-89 (1970).

117. 448 U.S. at 66 (1980).

118. Of course, the "residual" exceptions, set out in FED. R. EVID. 803(24) and 804(b)(5) only prescribe general criteria. *See* Comment, *The Confrontation Clause and the Catch-all Exception to the Hearsay Doctrine*: Hopkinson v. State, 17 LAND & WATER L. REV. 703-26 (1982).

119. Generally speaking, the common law's recognition of hearsay exceptions is more restrictive than that of the federal rules. *See, e.g.*, FED. R. EVID. 803(4), 803(18), 804(b)(2), 804(b)(3) advisory committee note. Many states, although generally adopting the federal rules, have refused to adopt certain hearsay exceptions. *See, e.g.*, FED. R. EVID. (CALLAGHAN) [Finding Aids; State Correlation Table] Alaska p. 1, Fla. p. 1, Maine p. 1, Mich. p. 1. Massachusetts considered but rejected adoption of the federal rules. *Id.* at Mass. p. 1.

because they fall within a hearsay exception). The Federal Rules of Evidence, however, reclassify certain common law exceptions, notably party admissions, as nonhearsay.[120] These nonhearsay declarations are admissible if relevant, provided they fit the definition set out in the Rules. Nonetheless, these statements are out-of-court assertions offered for their truth "and thus resting for . . . [their] value upon the credibility of the out-of-court asserter."[121] Vicarious admissions, including those of a co-conspirator, may constitute nonhearsay under the Federal Rules, but they surely come within the inner core of constitutional concern.[122] In short, *Roberts* applies full force.

A closer question is whether these common law exceptions, now transformed by the Rules into nonhearsay, are sufficiently reliable to be received in evidence without the case-by-case scrutiny necessary for exceptions that are not firmly rooted. A major reason for the reclassification of party admissions was the Advisory Committee's view that admission of these declarations is more accurately traceable to the adversary system than to the trustworthiness criteria for hearsay exceptions.[123] This conclusion suggests that party admissions made by another (such as a co-conspirator or employee) but imputed to the accused will be subjected to a particularized examination for indicia of reliability.[124]

A final point concerns the state's invocation of class 1 exceptions when the declarant is available and is in fact produced by the prosecution. The Constitution should not bar the government's use of excepted (class 1) hearsay; it requires only that the state present the declarant for confrontation by the accused. If the declarant becomes a witness and testifies as to earlier, excepted hearsay statements, the accused may confront and cross-examine the witness during the course of the trial.[125] Suppose, however, the excepted hearsay is described by a witness other than the declarant as, for example, where an observer gives testimony about the declarant's excited utterance. The declarant, if available, must be produced by the prosecution for cross-examination. The question is, when must he be tendered?

It may suffice if the prosecutor secured the declarant's courtroom

120. *See* FED. R. EVID. 801(d)(2) advisory committee note.

121. C. MCCORMICK, *supra* note 2, § 246 at 584.

122. *See* Dutton v. Evans, 400 U.S. 74 (1970); United States v. Ammar, 714 F.2d 238 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); United States v. Foster, 711 F.2d 871 (9th Cir. 1983).

123. FED. R. EVID. 801(d)(2) advisory committee note; 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1048, at (4) (Chadbourn rev. 1972).

124. *See, e.g.*, United States v. Ammar, 714 F.2d 238 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); United States v. Fleishman, 684 F.2d 1329 (9th Cir.), *cert. denied*, 103 S. Ct. 464 (1982). Both courts require a case-by-case analysis of the trustworthiness of an offered co-conspirator's statement.

125. *See* California v. Green, 399 U.S. 149 (1970).

presence and, during the accused's case in defense, either put the declarant on the stand when requested or insured that the declarant may be called by the defense as an adverse witness. This delayed confrontation, however, is likely to be less effective than one which is afforded earlier. The witness has had time to anticipate and prepare for cross-examination, the connection between the earlier hearsay and the declarant's cross-examination has been attenuated by time and intervening trial events, and the accused must disrupt the presentation of his case in defense to confront a state witness against him.[126] In effect, the accused is in the same position as if he had simply exercised his right of compulsory process, secured the declarant to testify in his favor, and called him as an adverse witness.[127]

Arguably, the right to confront an adverse witness includes a timely confrontation, one which at least is afforded during the state's case in chief.[128] Of course in the usual case, confrontation, implemented by cross-examination, immediately follows direct examination. The unresolved question is whether the accused's right of confrontation embraces a timeliness that is measured either by the phase of trial or by temporal considerations that ordinarily dictate immediate cross-examination. The Supreme Court has never directly addressed this issue, but one of its decisions implies that order of proof, at least in a criminal trial, may have constitutional significance.[129] Perhaps a sensible and constitutionally secure practice is one that routinely permits the accused to confront the declarant immediately after the testimony of the witness who discloses the excepted hearsay.[130] After all, the state is offering evidence which draws its probative strength from the credibility of the declarant who, in essence, is the real witness against the accused. It thus seems consonant with the traditional practice to allow an immediate cross-examination of the declarant.

The preceding discussion assumes that the confrontation clause compells the *prosecution* to secure the presence of the class 1 hearsay declarant. This interpretation is consistent both with the language of the clause and its underlying policy of producing available adverse witnesses to enhance accurate factfinding. Of course, a complemen-

126. R. LEMPERT & S. SALTZBURG, *supra* note 8, at 595-96.

127. Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CALIF. L. REV. 935, 984.

128. One view is that the state must present the declarant's live testimony before using his hearsay declaration. *See* Westen, *Confrontation and Compulsory Process*, *supra* note 44, at 577-79, 582.

129. A cogent and imaginative analysis of Brooks v. Tennessee, 406 U.S. 605 (1972), has been set out in Westen, *supra* note 127.

130. R. LEMPERT & S. SALTZBURG, *supra* note 8, at 595.

tary clause also benefits the accused: he has the "right to . . . compulsory process for obtaining witness in his favor."[131] It thus becomes necessary to allocate to the prosecution and defense the burden of initiating the steps required to produce an available witness. Professor Westen is probably correct when he observes:

> [W]hat distinguishes a witness "against" the accused from a witness "in his favor" is *not* the *content* of the witness's testimony but the *identity of the party relying* on his evidence. A person is a witness "against" the accused if he is one whose statements the prosecution relies upon in court in its effort to convict the accused. . . . Conversely, witnesses "in his favor" are all the remaining witnesses whom a defendant wishes to examine after the prosecution has confronted him with its witness.[132]

Thus, when the prosecutor relies upon a hearsay declaration, the confrontation clause requires him to produce the declarant, if available. It is uncertain whether this burden of production is altered when the declaration used in the prosecution's proof falls within a class 1 exception. As far *as the hearsay rule* is concerned, it is immaterial whether the speaker is produced. At least one court has held that where the declaration is within a well-established class 1 exception, the prosecution need not produce the declarant. If the accused wishes to cross-examine the speaker, he may secure the speaker's presence under the compulsory process clause.[133]

This decision is difficult to reconcile with *Roberts*, which appears to put the burden of production on the prosecutor when he uses hearsay as part of his proof.[134] Moreover, shifting the burden of production to the accused does not fit comfortably within the language of the sixth amendment; the hearsay declarant is, in reality, a witness against the accused rather than one in his favor. A more plausible position would obligate the prosecutor to produce all hearsay declarants except those whose presence is unnecessary because, in the language of *Roberts*, "the utility of trial confrontation" is "remote."[135]

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131. U.S. CONST. amend VI. The leading case interpreting the compulsory process clause is Washington v. Texas, 388 U.S. 14 (1967). A leading and frequently cited article that explores the relationship between the confrontation and compulsory process clause is Westen, *Confrontation and Compulsory Process*, *supra* note 44.

132. Westen, *supra* note 44, at 604-05.

133. United States v. Vietor, 10 M.J. 69 (C.M.A. 1980). Of course, there is no doubt that the accused can interrogate the witness-declarant under the rules (impeachment, leading questions and the like) applicable to cross-examination. *See* FED. R. EVID. 611; Chambers v. Mississippi, 410 U.S. 284 (1973).

134. United States v. Vietor, 16 M.J. 69, 78-82 (C.M.A. 1980) (Fletcher, J., concurring).

135. 448 U.S. at 65 n.7.

To secure the attendance of "unnecessary" declarants the accused must invoke his right of compulsory process,[136] just as he does to secure his own witnesses. Again, however, the need for more certain guidelines beckons frequent recourse to appellate disposition. Even if the prosecutor has the burden of producing his hearsay declarants except when cross-examination would not be useful, practical difficulties remain. It is not easy, for example, to predict whether persons who make entries in a business record should be produced by the prosecution for cross-examination; the utility of a confrontation by the accused will probably differ in each case.

VII. Conclusion

Notwithstanding express disavowals,[137] the Supreme Court in *Ohio v. Roberts* has recast the law of confrontation. Perhaps the latest interpretation of the enigmatic confrontation clause is a defensible compromise. At least it stays close to the historical evidence and suggests the values protected by the clause. The principal value surely must be factfinding accuracy, for *Roberts* imposes a constitutional preference for live testimony, given under oath, in the presence of the accused, within the observation of the trier, and subject to cross-examination. The assumption is that in most instances these attending conditions offer the best opportunity for discovering the truth.[138] When it is not feasible to secure these conditions, secondary evidence is admissible, provided it comports with a standard of trustworthiness.

At the practical level, however, the impact of *Roberts* has yet to be fully experienced. Many lower courts have not realized its significance. If the decision has been accurately interpreted in this article, *Roberts* will be a continuing source of practical and theoretical concern. Traditional practices in criminal trials will have to be modified, and the dark corners of the preference-reliability approach will have to be illuminated. Such processes will require the imprint of many decisions. Another significant concern is the likely prospect that *Roberts* will be retroactively applied.[139] One can only surmise how many

136. *See* Westen, *supra* note 44, at 615-24.

137. 448 U.S. at 64-65.

138. 4 J. Weinstein & M. Berger, *supra* note 5, ¶ 800[01], at 800-10 to 800-11.

139. The controlling decision is probably Stovall v. Denno, 388 U.S. 293 (1967) which stresses, among other criteria, the need for retroactive application of a constitutional principle that helps insure the integrity and accuracy of the fact-finding process. *Id.* at 297-98. Other factors are reliance upon existing law by enforcement officers and the probable effect of retroactive application upon the administration of justice. The last criterion, and possibly the second, suggest that *Roberts* might not be retroactive. But the Court took great pain to present its *Roberts'* decision as quite consistent with prior decisions. *See supra* notes 73-85 and accompa-

trials prior to this 1980 decision did not conform to its requirements. Habeas corpus petitions based on a denial of confrontation, now only a trickle,[140] are likely to become a major testing ground for the new learning. Thus, despite the Court's desire to avoid case-by-case constitutional litigation which turns on factual differences, this incremental process seems inevitable. This is the price of interpreting the confrontation clause so that it significantly intrudes upon the normal operation of the hearsay rule and its exceptions.

nying text. Furthermore, the earlier confrontation decisions of Barber v. Page, 390 U.S. 719 (1968) and Bruton v. United States, 391 U.S. 123 (1968) were given retroactive application. *See* Berger v. California, 393 U.S. 314, 315 (1969) (*Barber* retroactive); Roberts v. Russell, 392 U.S. 293 (1968) (*Bruton* retroactive). The Court's latest pronouncements on retroactivity are found in United States v. Johnson, 457 U.S. 537 (1982), but the opinion acknowledges the continuing viability of Stovall v. Denno, 388 U.S. 293 (1967) with respect to constitutional rules "whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.'" United States v. Johnson, *supra* at 544 (quoting Williams v. United States, 401 U.S. 646, 653 (1971)). The lack of meaningful confrontation has been said to call into question the integrity of the factfinding process. 448 U.S. at 64.

140. A survey of recent cases reveals very few collateral attacks based on a denial of confrontation. For examples of collateral attack based on *Roberts*, see Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983); Haggins v. Warden, Ft. Pillow State Farm, 715 F.2d 1050 (6th Cir. 1983).