NOTE

Barker v. Morris and the Right? to Confrontation

I. Introduction

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] This short clause has been the subject of spirited debate over the interests it protects and the procedures it mandates.[2] A long line of Supreme Court decisions demonstrates that the Confrontation Clause guarantees a criminal defendant more than a showing that testimony sought to be used against him is "reliable." The Court has held repeatedly that cross-examination is the primary protection advanced by the Confrontation Clause, and is generally necessary to further a complete and fair development of the facts.[3] Interpreted literally, the Confrontation Clause would preclude any testimony by an out of court witness offered by the prosecution against a criminal defendant.

The Supreme Court, however, has never interpreted the Confrontation Clause as an absolute ban on the use of hearsay.[4] The Court has long recognized the admissibility of several types of extrajudicial state-

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

2. *See, e.g.*, F. HELLER, THE SIXTH AMENDMENT 106-07 (1951) (discussing the defendants right to present witnesses); 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1395 (Chadbourn rev. 1974) (The main purpose of confrontation is to secure for the opponent the opportunity of cross examination.); Ohio v. Roberts, 448 U.S. 56, 66 n.9 (1980) (setting forth the basic contours of the debate); California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) ("the Confrontation Clause . . . reaches no farther than to require the prosecution to *produce* any *available* witness" (emphasis in original)); *see also* Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring) (The historical analysis of the clause does not provide a useful guide to adjudication of current confrontation clause issues.).

3. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965). The Court, however, has permitted the admission of hearsay which qualifies as a dying declaration or former testimony. *See supra* note 5 and accompanying text.

4. Comment, *Constitutional Law-Confrontation Clause-Admission at Trial of Slain Informant's Prior Grand Jury Testimony Against Defendants Does Not Violate Confrontation Guarantee Despite Lack of Cross-Examination*, 31 VAND. L. REV. 682, 685 (1978) [hereinafter Comment, *Constitutional Law*].

ments that fall under exceptions to the hearsay rule.[5] With the recent development of state evidence codes, and the adoption of the Federal Rules of Evidence in 1975, the Court has altered its confrontation clause analysis to comport with the numerous exceptions to the hearsay rule.[6] In *Ohio v. Roberts*[7] the Court attempted to formulate a practical standard for deciding when the admission at trial of out of court testimony will not violate the confrontation guarantee.[8] However, the federal circuit courts have been unable to generate a consistent confrontation clause theory under the *Roberts* analysis.[9]

The case of *Barker v. Morris*[10] illustrates the difficulty the lower courts have experienced in adopting a consistent confrontation clause analysis.[11] In *Barker*, a unanimous court employed a case-by-case approach to alleged confrontation clause violations that ultimately hinges on a particular court's sense of fairness. This approach converts the Confrontation Clause into a mere rule of preference, nullifying its constitutional protections to criminal defendants.

This Note examines the Supreme Court's failure to set forth a standard to determine when the admission of hearsay will pass muster under the Confrontation Clause. Part I presents *Barker v. Morris* as an example of a confrontation problem that challenges a court to decide the question of admissibility without the benefit of precise guidelines. Part II summarizes the evolution and decline of the Confrontation Clause as a guarantor of a fair trial, and examines the landmark case of *Ohio v. Rob-*

5. *See, e.g.*, Mattox v. United States, 146 U.S. 140, 151 (1892) (recognizing dying declarations); Mattox v. United States, 156 U.S. 237, 240-44 (1895) (recognizing the admissibility of a witness' former trial testimony).

6. *See infra* notes 100-114 and accompanying text.

7. 448 U.S. 56 (1980).

8. The Court set forth a two-prong test for determining when the admission into evidence of hearsay will not violate the Confrontation Clause: (1) the prosecutor must show that the witness is unavailable, and (2) the evidence must possess sufficient indicia of reliability. *Id.* at 65. *See infra* notes 100-114 and accompanying text.

9. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 800-33, 800-34 nn.47-48 (M. Bender 1985) and cases cited therein. This inconsistency is demonstrated in cases involving the testimony of grand jury witnesses who are unavailable at time of trial. *See infra* notes 121-126 and accompanying text. *See generally* Note, *Admissibility of Unavailable Witness Grand Jury Testimony: Upholding The Purposes Behind the Confrontation Clause*, 18 VAL. U.L. REV. 965 (1984); Comment, *Constitutional Law, supra* note 4; Case Comment, *Evidence—Const. Law—The Confrontation Clause and the Catch-All Exception to the Hearsay Rule*, 17 LAND & WATER L. REV. 703 (1982). The inconsistency can also be seen in circuit court decisions applying the second prong of the *Roberts* test. The second prong concerns the reliability of out-of-court testimony. Some circuits hold that if an out-of-court statement falls within a firmly rooted hearsay exception, the Confrontation Clause is automatically satisfied. Other circuits analyze each statement on a case-by-case basis to determine whether the statement is sufficiently trustworthy. This split between the circuits is discussed *infra* notes 115-127 and accompanying text.

10. 761 F.2d 1396 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 814 (1986).

11. *See infra* notes 128-165 and accompanying text.

erts and its inconsistent application by the circuit courts. Part III focuses on the inadequacies of *Roberts*, including the strained, result-oriented decisions *Roberts* has generated. Part IV discusses various proposals for handling confrontation clause and hearsay rule clashes. This Note concludes that *Ohio v. Roberts* sanctioned a subjective approach to determining whether the admission of hearsay violates the Confrontation Clause, resulting in a series of inconsistent and arbitrary decisions. The Supreme Court needs to reexamine this area to insure that the protections guaranteed by the Confrontation Clause will not become an empty promise.

I. *Barker v. Morris*

A. The Facts

In 1971, after a meeting at the Hell's Angels' clubhouse in Richmond, California, two men died. A number of people were present at the time, including the defendant Richard Barker (a.k.a. "Rotten Richard"), the club president, and "Whispering Bill" Pifer, a Hell's Angels member who later became a government informant.[12] Also present were William Moran, Chester Green, "Junior" Carter, "Badger" Mumm, Rollin Crane and Pifer's sixteen year old son, Bill Pifer, Jr.[13]

In March 1972, Bill Pifer, who was suffering from throat cancer, approached the police and offered to help solve a double homicide in exchange for complete immunity from prosecution for a wide range of state and federal crimes, and for a guarantee that his son would not be charged in the homicides. Pifer then supplied information which resulted in the prosecution of Moran, Green, Carter, and Mumm in late 1972.[14] Barker and Crane, who were also indicted, had left the state prior to the indictments and were not present at the preliminary hearing for Moran and three other defendants.[15]

Pifer testified at the preliminary hearing regarding the homicides. The state trial court permitted Pifer's entire testimony to be videotaped because he was expected to live only a few weeks. Defense counsel's cross-examinations of Pifer was also videotaped. No attorney represented Barker at this hearing. Moran was bound over for trial; soon after Moran's trial began, Pifer died.[16]

Barker was arrested in Michigan two years after his indictment and was brought to trial almost two years after Pifer's death. At his trial, the prosecution introduced Pifer's videotaped testimony over strenuous ob-

12. *Barker*, 761 F.2d at 1398.
13. *Id.*
14. *See* People v. Moran, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974).
15. *See infra* note 147 and accompanying text.
16. 761 F.2d at 1398.

jections by Barker's counsel both before and at trial. The playing of the videotape occupied over two and one-half days of the eight day trial. Green, Moran, and Pifer Jr. also testified.[17] At the trial's conclusion, Barker was convicted of involuntary manslaughter and first degree murder.[18] His murder conviction was based on a jury finding that he ordered the killing.[19]

B. Procedural History

Barker appealed his conviction to the California Court of Appeal, which filed two unpublished opinions within a month of each other.[20] In the first opinion, the court found that although Pifer's videotape was inadmissible hearsay and should not have been allowed at Barker's trial, its admission constituted harmless error. The court held that the Confrontation Clause was not violated under either federal or state standards because Pifer's testimony was sufficiently reliable.[21] One month later, in response to a conflict within the district, the court revised the opinion in a second unpublished opinion.[22] This time the court held that the admission of the videotape did violate the Confrontation Clause because the defendant had no opportunity to cross-examine Pifer. The court again held that the admission of the tape constituted harmless error.[23]

Barker then sought *habeas corpus* relief in Federal District Court for the Northern District of California, alleging that the trial court's admission of the videotape violated the Confrontation Clause. The District Court denied the writ, claiming that there had been no violation of

17. Green was granted immunity and never tried. People v. Green, 1 Crim. 14,513 slip. op. at 735 (Cal. Super. Ct. 1972). The court in *Barker*, however, stated that Green was in fact tried. 761 F.2d. at 1398.

18. 761 F.2d at 1397.

19. This point is crucial in determining the effect on the jury of Pifer's videotaped testimony because much of the cross-examination conducted by Moran and his co-defendants focused on Barker's alleged power over other members of the gang. *See, e.g.*, Transcript of Preliminary Examination of William Joseph Pifer, People v. Green, Municipal Court of the West Judical District County of Contra Costa County, Nos. C 23691 to C 23694, at 228-30 (Nov. 27, 1972) [hereinafter Videotape Testimony of W. Pifer]. However, the Ninth Circuit avoided this question in its discussion on whether the cross-examination by Moran's attorney attempted to shift the blame to Barker. *See infra* notes 152-151 and accompanying text. While Pifer refused to say that Barker committed the actual killing, he constantly referred to Barker's authority and the fear he inspired in other group members. Videotape Testimony of W. Pifer, *supra*, at 228-30.

20. The Ninth Circuit described the California Court of Appeal decisions as "state habeas proceeding[s]." 761 F.2d at 1398. In fact, the case reached the Court of Appeal on a direct appeal. People v. Barker, 1 Crim. 14,513, slip op. (1st App. Dist. Cal. 1976).

21. People v. Barker, 1 Crim. 14,513, slip op. at 6 (1st App. Dist. Cal. 1976).

22. *Id.*

23. *Id.* The California Supreme Court declined to grant a hearing.

Barker's confrontation right.[24]

C. The Ninth Circuit

The Ninth Circuit, in a unanimous opinion by Judge Kennedy, affirmed the District Court's denial of Barker's writ. The court held that the need for the testimony, and the particular guarantees of trustworthiness attached to it, justified admission of the videotape and assured compliance with the Confrontation Clause.[25] The court *determined that Ohio v. Roberts* sanctioned admission of reliable prior testimony by an unavailable witness regardless of whether the prior testimony had been subject to cross-examination.[26]

The *Barker* court's analysis illustrates the confusion generated by the test articulated in *Roberts*. Because the *Roberts* Court failed to define "reliability," lower courts have been free to choose factors that will support the result they prefer. This failure has produced an inconsistent body of case law, and encourages "result-oriented" decisionmaking.[27] The question that remains unanswered, despite frequent consideration by the Supreme Court, concerns the boundary between confrontation as a constitutionally vindicated personal right, and the evidentiary rules and procedures—especially the hearsay rules—designed to assist in the court's factfinding task. Because improved factfinding serves the criminal defendant's interest by reducing the risk that damaging inaccuracies will be admitted into evidence, the goals of the Confrontation Clause and the evidence rules clearly overlap. A tendency to oversimplify this apparent alliance of interests between the defendant and the judiciary, how-

24. Barker v. Morris, No. C 801867 SW, slip op. (N.D. Cal. 1982). The court applied the *Roberts* test. *See infra* notes 131-138 and accompanying text. After finding that the witness, Pifer, was unavailable, the court determined that his testimony was reliable and did not violate Barker's right of confrontation. The court noted that while there is no single test for determining the reliability of hearsay testimony, the focus of the inquiry should be (1) whether there is any corroborating evidence, and (2) whether, in light of the circumstances, the jury is able to judge the declarant's credibility and veracity. *Barker, supra*, at 9. The court then applied factors elaborated upon by "other courts" and found that Pifer's testimony was sufficiently reliable. *Id.* at 14. The court failed to cite the "other courts;" however, the specific factors relating to reliability were almost identical to those the plurality used in Dutton v. Evans, 400 U.S. 74 (1970). *See infra* notes 66-89 and accompanying text. The court also found that videotaping the testimony further assured its reliability. *Barker, supra*, at 13.

In explaining its finding of reliability the court asserted that "the accused's interest in actual in-court confrontation must be balanced against competing public interests such as effective law enforcement and other similar policies." *Id.* at 6. The court did not address the question of how the public interest in effective law enforcement would bolster the reliability of Pifer's testimony. Furthermore, the court used this "public interest balancing" without support.

25. Barker v. Morris, 761 F.2d 1396 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 814 (1986).

26. *Id.* at 1399 (citing Ohio v. Roberts, 448 U.S. at 63 (1980); United States v. West, 574 F.2d 1131, 1136-37 (4th Cir. 1978).

27. *See infra* notes 115-127 and accompanying text.

ever, can mislead judges into concluding that the defendant's entire confrontation right interests are safeguarded simply by determining that the evidence is reliable.

The flaw in this reasoning is fundamental. In an adversary system, reliability is assured by confrontation. To determine reliability on grounds other than that of confrontation, and to then conclude that the benefits accruing from confrontation are present because of this reliability, is clearly a circular argument. The history of the confrontation right suggests that it allows the criminal defendant to participate directly in the process by which facially reliable evidence is exposed as unreliable. To replace the defendant's substantive role with the judge's subjective rule of law undermines the adversary system precisely at the point when the criminal defendant relies on it to preserve his own fair treatment at the hands of the law.

II. The Evolution of the Confrontation Clause

Commentators have long speculated on the origins of the confrontation guarantee.[28] While the concept dates back to biblical times,[29] at common-law the right to confrontation was rarely enforced. The trial of Sir Walter Raleigh typified the way in which confrontation was denied to criminal defendants.[30]

Raleigh was accused of treason for conspiring to unseat the King of England and to install Arabella Stuart in his place. The primary evidence supporting Raleigh's conviction was the confession of Lord Cobham, an alleged co-conspirator. His confession had been obtained by torture,[31] and was apparently recanted in a letter to Raleigh. At his trial, Raleigh protested bitterly that the reading of Cobham's confession into evidence was improper. He was unable to sway the court, however, and was convicted of high treason and executed.[32]

Raleigh's case, along with a series of similar seventeenth and eighteenth century English cases, motivated the Framers of the United States

28. *See, e.g.*, Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. OF PUB. L. 381 (1959).

29. *See* Pollitt, *supra* note 28, at 384.

30. *See* 2 T. HOWELL, STATE TRIALS 1 (1809).

31. Today, coercion to obtain a confession would violate the due process clause requirement of voluntariness. Blackburn v. Alabama, 361 U.S. 199 (1960). The Court's primary concern in *Blackburn* was that a compelled statement would be wholly unreliable. *See also* Payne v. Arkansas, 356 U.S. 560 (1958); Brown v. Mississippi, 297 U.S. 278 (1936).

32. Raleigh pleaded to the court in desperation, "If there be but a trial of 5 marks at Common Law, a witness must be deposed. Good my lords, let my Accuser come face to face, and be deposed." 2 T. HOWELL, *supra* note 30, at 19. He also stated, "The Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face, and I have done." *Id.* at 15-16.

Constitution to include the confrontation guarantee in the Bill of Rights. The Framers believed that this guarantee would prevent a criminal defendant from being convicted on the basis of hearsay.[33] Although they did not phrase the guarantee as a specific right of cross-examination, the use of the term "confrontation" encompasses cross-examination as a matter of course.[34]

A. Confrontation as a Right of Cross-Examination

Four cases exemplify the Supreme Court's determination that, except in limited circumstances, the Confrontation Clause guarantees a criminal defendant the opportunity to cross-examine the witnesses against him.[35] In *Pointer v. Texas*,[36] the first case to rule that the Confrontation Clause was obligatory upon the states,[37] the Court held that "it can not be seriously doubted . . . that the right of cross-examination is included in . . ." the sixth amendment right to confrontation, which is a fundamental right essential to fair trial.[38]

In *Pointer*'s companion case, *Douglas v. Alabama*,[39] the Court reiterated its holding in *Pointer*. The *Douglas* Court stressed that the right to confrontation required an "opportunity for thorough cross-examination."[40] The Court's opinion by Justice Brennan stressed that "a primary

33. *See, e.g.*, F. HELLER, *supra* note 2, at 104 (1961); *see also* 5 J. WIGMORE, *supra* note 2, § 1395.

34. When the Constitution was put before the states for ratification, Abraham Holmes, a delegate from Massachusetts, objected to its passage claiming that it failed to guarantee a fair trial:

> The mode of trial is altogether undetermined—whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.

2 J. ELLIOT, The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 110-11 (1881).

35. *See infra* notes 36-65 and accompanying text.

36. 380 U.S. 400 (1965).

37. By making the Confrontation Clause apply to the states, the Supreme Court opened the door to a greater number of appeals in federal court based upon the Confrontation Clause. Hearsay exceptions in state evidence codes were much broader than those recognized by the federal courts prior to the adoption of the Federal Rules of Evidence in 1975. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 800-23 (M. Bender 1985).

38. Pointer v. Texas, 380 U.S. at 404.

39. 380 U.S. 415 (1965).

40. Two defendants, Douglas and Loyd, were tried separately in state court on charges of assault with intent to murder. Loyd was tried first and found guilty. The prosecutor at Douglas' trial called Loyd as a witness. Loyd invoked the privilege against self-incrimination and refused to answer any questions. The trial judge granted a prosecution motion to have Loyd declared a hostile witness, thereby allowing the prosecutor to cross-examine Loyd. The prosecutor produced a document said to be a confession signed by Loyd. "Under the guise of cross-examination to refresh Loyd's recollection, the [prosecutor] purported to read from the document, pausing after every few sentences to ask Loyd, in the presence of the jury, 'Did you

interest secured by [the Confrontation Clause] is the *right of cross-examination*."[41] The Court further emphasized the importance of the confrontation right in allowing a defendant an opportunity to fully develop the facts by testing and challenging the reliability and veracity of the prosecution's witnesses.[42]

In 1968, the Supreme Court decided *Bruton v. United States*.[43] The Court reversed a federal conviction on confrontation grounds, noting that "the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."[44] All the justices on the Court agreed that a fair trial requires that the trial court permit the criminal defendant to fully develop the facts. Further, all the justices agreed that cross-examination is indispensable to this end.[45]

In 1970, the Supreme Court decided *California v. Green*.[46] The majority opinion focused on whether out-of-court testimony admitted under Section 1235 of the California Evidence Code[47] violated the defendant's right of confrontation. The testimony had been given by Porter, a sixteen-year old boy, at the defendant Green's preliminary hearing. At Green's trial, Porter attempted to recant his prior testimony, claiming he could not remember the events in question because he had been under the influence of drugs at the time.[48] The prosecutor then read excerpts

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make that statement?' " *Id.* at 416. Although Loyd continued to assert the privilege, the prosecutor continued until the whole statement was read. Douglas argued that this violated his confrontation rights. The trial judge refused to strike the statement and a jury found Douglas guilty. *Id.*

41. 380 U.S. at 418 (emphasis added). The "petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him *the right of cross-examination* secured by the Confrontation Clause." *Id.* at 419 (emphasis added). The Court also cited Mattox v. United States, 156 U.S. 237 (1895), noting the importance of cross-examination for testing the memory and conscience of the witness as well as compelling him 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 whether he is worthy of belief. *Id.* at 242-43.

42. In *Barker*, the defendant never had a chance to cross-examine the unavailable declarant to develop the facts as they applied to him. *See infra* notes 153-154 and accompanying text.

43. 391 U.S. 123 (1968). The facts of *Bruton* are analogous to those of *Douglas*; however, in *Bruton* there was a joint trial of Bruton and a co-defendant, Evans, for armed postal robbery. Evans did not take the stand, but a postal inspector testified that Evans orally confessed to committing the robbery with Bruton. The trial court instructed the jury that the confession was admissible against Evans but not Bruton, and that it should not be considered in judging Bruton. Bruton was convicted and appealed. The Eighth Circuit affirmed his conviction, stating that the trial judge's limiting instruction was sufficient protection for Bruton.

44. *Id.* at 126 (quoting *Pointer*, 380 U.S. at 404).

45. *Id.* at 138.

46. 399 U.S. 149 (1970).

47. CAL. EVID. CODE § 1235 (West 1982) provides in part: "[E]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Section 770 provides that a witness be given an opportunity to explain or deny the prior statement. CAL. EVID. CODE § 770 (West 1982).

48. 399 U.S. at 152.

from Porter's prior testimony. This testimony was admitted by the trial judge both for impeachment purposes and for "the truth of the matter contained therein" pursuant to Section 1235.[49]

The Supreme Court held that admitting a declarant's out-of-court statement does not violate the Confrontation Clause as long as the declarant testifies at trial and is subject to full cross-examination.[50] The Court noted that "neither evidence nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause."[51]

In *Green*, unlike its approach in *Porter*, *Douglas*, and *Bruton*, the Court attempted to define what satisfies the Confrontation Clause rather than what violates it. The *Green* Court stressed that the Confrontation Clause is satisfied if a defendant is given the opportunity to cross-examine a hearsay declarant at some point after the declarant has made the hearsay statement.[52]

The Court also attempted to distinguish between the objectives of the Confrontation Clause and of the rules of hearsay. The Confrontation Clause, the Court explained, protects criminal defendants from being convicted on evidence consisting of *ex parte* affidavits[53] or depositions secured by the prosecution.[54] The hearsay rules and exceptions serve to insure that out-of-court testimony will meet appropriate standards of reliability. The Court stated that reliability requirements of the hearsay rules are an evidentiary means of protecting the defendant from inaccu-

49. *Id.* at 154. On appeal, the California Supreme Court reversed Green's conviction, holding that allowing the prosecutor to use Porter's prior statements for the truth of their content violated Green's confrontation right. People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969). The California court reasoned that although Porter's statements had been subjected to cross examination by Green's counsel at a prior hearing, the defendant's cross examination at trial "is not an adequate substitute for the right to cross examination contemporaneous with the original testimony before a different tribunal." *Id.* at 659. The United States Supreme Court vacated the judgment of the California Supreme Court and remanded the issue. 399 U.S. 149, 170 (1970).

The use of prior testimony in *Green* must be distinguished from use of former testimony where the witness is unavailable. The latter is an acceptable hearsay exception. *See, e.g.*, FED. R. EVID. 804(b)(1) (1985); CAL. EVID. CODE §§ 1290-1292 (West 1982).

50. 399 U.S. at 161.

51. *Id.* The Court also noted that in *Green*, even in the absence of full cross-examination at trial, the admission into evidence of the preliminary hearing testimony would have been constitutional. Porter's prior statements were made under oath and subject to cross-examination at the time they were made; Porter's failure to testify at Green's trial was not due to any impropriety on the part of the state. Although the Court did not state the grounds for admitting Porter's prior statement, it appears that the testimony would be admissible under the "former testimony" exception contained in the Federal and California Evidence Codes. *See* FED. R. EVID. (804)(b)(1) (1985); CAL. EVID. CODE §§ 1290-1292 (West 1982).

52. 399 U.S. at 158.

53. *Id.* at 156.

54. *Id. See also* F. HELLER, *supra* note 2, at 104.

rate out of court statements.[55] The Confrontation Clause enables the defendant to expose prejudicial inaccuracies in statements made in and out of court. Although these interests are similar, they are not coextensive.[56]

In his concurrence, Justice Harlan illustrated that the Confrontation Clause has a broader reach than the hearsay rules and suggested a workable approach to confrontation clause issues.[57] His opinion began by examining why the Framers included the confrontation guarantee in the Sixth Amendment. His historical analysis, however, was ultimately inconclusive. "The Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause."[58] Consequently, Justice Harlan implied that the Court has considerable leeway to formulate a practical approach to deciding confrontation clause issues.[59]

According to Justice Harlan, the Confrontation Clause requires the prosecution to produce every "available" witness at trial.[60] If the witness is "available," then the use of hearsay is forbidden by the Confrontation Clause regardless of whether the statement falls within an exception to the hearsay rule.[61] If the witness is unavailable, then Justice Harlan would apply a "quasi due process" analysis[62] to determine the admissibility of the hearsay statement. That is, if the out-of-court statement is sufficiently reliable, then it would be admissible at trial.[63]

Justice Harlan's approach creates a preference for live testimony. When live testimony is presented, the Confrontation Clause mandates cross-examination of the witness. However, when the prosecution can show that a witness is unavailable,[64] hearsay falling within an exception

55. 399 U.S. at 154. *See also*, 5 J. WIGMORE, *supra* note 2, §§ 1420-1422.

56. 399 U.S. at 155. "Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." *Id.* at 155-56.

57. *Id.* at 172 (Harlan J., concurring).

58. *Id.* at 173-74 (Harlan J., concurring)

59. *Id.* at 173 (Harlan J., concurring).

60. *Id.* at 186-87 (Harlan J., concurring). Justice Harlan considers that the Confrontation Clause and the Due Process Clause dictate this requirement. *See id.* at 186 n.20. However, according to Justice Harlan, a witness who is present at trial but cannot recall prior testimony is "available," thereby making the hearsay evidence inadmissible. *Id.* at 188. "To the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts . . . I think confrontation is nonetheless satisfied." *Id.*

61. *Id.* at 186 (Harlan, J., concurring).

62. *Id.* at 186 n.20 (Harlan, J., concurring).

63. *Id.* at 189. This theory became the basis for the Court's opinion in Ohio v. Roberts, 448 U.S. 56 (1980). *See infra* notes 100-114 and accompanying text. Justice Harlan repudiated this approach six months later in Dutton v. Evans, 400 U.S. 74 (1970).

64. Federal Rule of Evidence 804 defines unavailability in the following manner:

> Unavailability as a witness includes situations in which the declarant (1) is exempted by a ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or (3) testifies

would be admissible, provided it is sufficiently reliable.[65] This approach, while not controlling at the time of the *Green* opinion, motivated the Court to reassess the right of confrontation in relation to the rules of hearsay.

B. *Dutton* and Beyond: The Weakening of the *Right* of Cross-Examination

Until *Dutton v. Evans*,[66] confrontation clause decisions relied on the premise that a defendant must have the opportunity to cross-examine witnesses at some point before or during his trial.[67] In *Dutton*, however, the Court moved away from this requirement. While *Dutton* appears to be an anomaly in confrontation clause analysis,[68] it is important because lower courts have relied on it extensively.[69]

In *Dutton*, Evans, Williams, and Truett were charged with murder in the shootings of three Georgia police officers.[70] Truett was granted immunity after agreeing to testify against Evans and Williams in separate trials. Williams was tried first, was found guilty of murder and refused to testify at Evans' trial. During Evans' trial, one of the twenty prosecution witnesses, a fellow prisoner of Williams named Shaw, testified that when Williams was brought back to the penitentiary after arraignment, he asked Williams what had happened in court. Williams, according to Shaw, responded: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."[71] Evans' counsel objected to the admission of Shaw's testimony on the ground that it was hearsay and thus violated Evans' confrontation right. The trial judge overruled the

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to a lack of memory of the subject matter of his statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying."

65. 399 U.S. at 189.

66. 400 U.S. 74 (1970).

67. *See supra* notes 35-65 and accompanying text.

68. As a plurality opinion, *Dutton*'s precedential value would appear limited. The plurality opinion by Justice Stewart was joined by Chief Justice Burger, and Justices White and Blackmun. Justice Harlan concurred with the result on different grounds. 400 U.S. at 93 (Harlan, J., concurring). Justice Marshall dissented and was joined by Justices Black, Douglas and Brennan. 400 U.S. at 100 (Marshall, J., dissenting).

69. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 800-27, 800-28 n.27 (M. Bender 1985) and discussion *infra* notes 115-127 and accompanying text. In many cases citing *Dutton*, the defendant had the opportunity to cross-examine the witness at some point. *See, e.g.*, Mancusi v. Stubbs, 408 U.S. 204 (1972).

70. 400 U.S. at 76.

71. *Id.* at 77.

objection and Evans' counsel cross-examined Shaw.[72]

The *Dutton* Court, in a plurality opinion, held that the reliability of the hearsay testimony was sufficient to satisfy the Confrontation Clause despite the fact that the defendant had no opportunity to cross-examine the declarant, Williams.[73] The Court indicated four factors to consider in determining when an out of court statement, not subject to cross-examination, can be admitted at trial without violating a defendant's right of confrontation: (1) whether the statement contains an assertion of past fact; (2) whether the declarant was speaking from personal knowledge; (3) whether the statement was founded on possibly faulty recollection; and (4) whether the circumstances under which the statement was made indicate its reliability.[74] Applying these factors, the Court first found that Shaw's testimony did not contain a statement about past fact. Second, the declarant's personal knowledge of the identity of the other participants in the murder was corroborated by Truett's testimony and by Williams' prior conviction.[75] Third, it was unlikely that Williams' statement was a product of Shaw's faulty recollection. Finally, the circumstances surrounding Williams' statement made it doubtful that Williams misrepresented Evans' involvement.

The plurality also stressed that the statements were against Williams' penal interest, further ensuring their reliability.[76] The Court, however, relied completely on the hearsay rules to construct a confrontation clause test:[77] the statement was sufficiently reliable to satisfy the Confrontation Clause because it was a spontaneous statement and also a declaration against interest, two exceptions to the hearsay rule adopted by the drafters of the Federal Rules of Evidence.[78] The plurality also relied on a "quasi-harmless error" approach:[79] the statement, taken together

72. The trial judge correctly overruled Evans' objection under Georgia's co-conspirator rule which allowed the admission of declarations made after the termination of the conspiracy, but while still in the concealment stage. GA. CODE ANN. § 38-306 (1954).

73. 400 U.S. at 88. The Court further stated that "the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal." *Id.* at 89.

74. *Id.* at 88-89.

75. Justice Stewart noted that cross-examination could not have shown that the hearsay declarant did not have personal knowledge of the event. *Id.* at 88. *But see* 400 U.S. at 100 (Marshall, J., dissenting) (rejecting Justice Stewart's findings).

76. Justice Stewart noted that "[The] statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89.

77. *See, e.g.*, FED. R. EVID. 804(b)(5) (1985).

78. FED. R. EVID. 803(2), 804(b)(3) (1985).

79. "Harmless error" refers to a trial court's erroneous ruling which, in the appellate court's view, had no bearing on the outcome of the trial. Harmless error does not constitute grounds for reversal.

with the testimony of the nineteen other witnesses,[80] was neither "crucial" nor "devastating."[81]

By affirming the admission of the hearsay declaration without any cross-examination, four justices abandoned the Court's long-established position that cross-examination is synonymous with the right of confrontation.[82] The Court, however, made no attempt to reconcile its opinion with those of *Pointer*, *Douglas* and *Bruton*. While some commentators contend that *Dutton* was primarily a harmless error case, the plurality's failure to rest the case on that basis has created a great deal of confusion.[83]

Justice Harlan concurred in the result but disagreed with the Court's reliance on the Confrontation Clause to determine the admissibility of hearsay evidence.[84] Expressly repudiating his position in *Green*,[85] Justice Harlan asserted that the Confrontation Clause merely prescribes the procedure to be followed once evidence has been admitted, but does not control what shall be admitted.[86]

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80. Professor Natali takes the view that the Court "permitted the harmless error tail to wag the sixth amendment dog." Natali, *Green, Dutton and Chambers: Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43, 50-51 (1975).

81. Dutton v. Evans, 400 U.S. at 87.

82. *See supra* notes 35-65 and accompanying text. The plurality, in fact, expressly rejected that proposition:

> "[T]he decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' "

Id. at 89 (quoting *Green*, 399 U.S. at 161). By sanctioning the admission of the uncross-examined hearsay, the plurality implied that cross-examination is not required to assure the reliability of the testimony.

83. Justice Blackmun concurred in the result, but believed that the testimony constituted harmless error and that the case should have been decided on that ground. 400 U.S. at 90 (Blackmun J., concurring).

84. 400 U.S. at 94 (Harlan, J., concurring).

85. *Id.*

86. *Id.* at 95. (Harlan, J., concurring). Justice Harlan cites Wigmore for this proposition:

> The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being—but only what mode of procedure shall be followed—i.e. a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially.

J. WIGMORE, EVIDENCE § 1397, at 131 (3d ed. 1940) (footnote omitted). In Justice Harlan's view, whether the admission of hearsay falling under an exception violates the Sixth Amendment should be determined "under the aegis of the Fifth and Fourteenth Amendments' commands that federal and state trials, respectively, must be conducted in accordance with due process of law. "*Id.* at 96-97. This view was the basis for Professor Baker's approach to confrontation and hearsay clashes. *See* Baker, *The Right to Confrontation, The Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974). *See infra* notes 166-172 and accompanying text. The Confrontation Clause was not intended to control the scope of the rules of evidence, nor were the rules of hearsay intended to be subservient to the Confrontation Clause. 400 U.S. at 95 (Harlan, J.,

In his dissent, Justice Marshall criticized the plurality for retreating from the long line of cases equating confrontation and cross-examination.[87] Justice Marshall attacked the plurality's premise that cross-examination would not have changed the picture presented by Shaw's hearsay testimony.[88] He also criticized the plurality's reliability analysis. According to Justice Marshall, the plurality's rationale, in effect, permits the hearsay rules and exceptions to subsume the Confrontation Clause.[89]

Although *Dutton* signaled the first significant retreat from the Court's insistence on cross-examination as the guarantee of confrontation, the Court clearly reasserted the importance of cross-examination in protecting the right of confrontation three years later in *Chambers v. Mississippi*.[90]

The Supreme Court reversed a state court conviction, finding that several evidentiary rulings by the trial court denied Chambers due process.[91] The Court held that the "voucher" rule—a common law rule which prohibits a party from impeaching his or her own witness[92]—as applied by the trial court, denied Chambers the opportunity to cross-examine an adverse witness, thereby violating the Confrontation

concurring). Justice Harlan's approach, while purporting to put the Confrontation Clause in its proper place, calls into question a criminal defendant's constitutional right to fully develop and present the facts of the case, because Justice Harlan viewed the Confrontation Clause as a guarantee of cross-examination only when the witness is present.

87. 400 U.S. at 100-03 (Marshall, J., dissenting). Justice Marshall was joined by Justices Black, Douglas and Brennan. "The teaching of this line of cases seems clear: absent the opportunity for cross-examination, testimony about the incriminating and implicating statement allegedly made by Williams was constitutionally inadmissible in the trial of Evans." *Id.*

88. *Id.* "A trial lawyer might well doubt, as an article of the skeptical faith of that profession, such a categorical prophecy about the likely results of careful cross-examination." *Id.* This same argument can be made on the part of the defendant in Barker v. Morris, 761 F.2d 1396 (9th Cir. 1985).

89. 400 U.S. at 110 (Marshall, J., dissenting): "I believe the Confrontation Clause has been sunk if any out-of-court statement bearing an indicium of a probative likelihood can come in, no matter how damaging the statement may be or how great the need for the truth-discovering test of cross-examination." *Id.*

90. 410 U.S. 284 (1973).

After Chambers' arrest for murder, a man named McDonald confessed to the crime in writing. McDonald later repudiated this confession. Chambers called McDonald as a witness in his state court trial after the prosecution refused to call McDonald. Although McDonald admitted making the confession, the court refused to allow Chambers to impeach his own witness regarding the repudiation. The court's action reflected Mississippi's adherence to the common law "voucher" rule, which prohibits a party from impeaching its own witness. The court also denied Chambers' request to have McDonald declared an adverse witness, which would have given Chambers the right to cross-examine McDonald. Chambers was convicted of murder. *Id.*

91. *Id.* at 302.

92. *See supra* note 90.

Clause.[93] The Court noted that "[t]he *right* of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation. . . . It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' "[94] *Chambers* thus casts doubt on the validity of *Dutton*.[95]

In 1974, the Supreme Court decided *Davis v. Alaska*.[96] *Davis* addressed the constitutionality of the trial court's restriction of the scope of cross-examination by the defendant.[97] In an opinion by Chief Justice Burger, the Court reversed the conviction, holding that the Confrontation Clause guarantees a defendant the fullest possible scope of cross-examination.[98] The Chief Justice noted that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[99] Thus despite *Dutton*, the *Davis* Court found that satisfaction of the Confrontation Clause requires cross-examination.

C. *Ohio v. Roberts*: Reliability—The New Confrontation Requirement

In 1980, the Court in *Ohio v. Roberts*[100] again considered the relationship between the Confrontation Clause and the rules of hearsay. The case involved an Ohio criminal prosecution. Roberts was charged with forging a check in the name of Bernard Isaacs and with possession of a stolen credit card belonging to Isaacs. At Roberts' preliminary hearing,

93. *Id.* at 298. The Court did not have to decide whether this error alone would have mandated reversal. Taken together, this and other errors of the trial court were held to constitute a denial of due process.

94. *Id.* at 295 (quoting Pointer v. Texas, 380 U.S. 400, 405 (1965)) (emphasis added).

95. However, *Dutton* has been cited frequently by the Courts of Appeals in deciding confrontation clause issues. *See infra* notes 115-127 and accompanying text. This is particularly true when hearsay not subject to cross-examination has been admitted. *See, e.g.*, United States v. Perez, 658 F.2d 654, 661 (9th Cir. 1981); United States v. Snow, 520 F.2d 730, 734-35 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976). Justice Stewart, the author of the plurality opinion in *Dutton*, joined the majority in *Chambers*. Justice Rehnquist dissented, arguing that the Court did not have jurisdiction to review the decision of the Mississippi state court. Justice Rehnquist also objected to "the Court's further constitutionalization of the intricacies of the common law of evidence." 410 U.S. at 308 (Rehnquist, J., dissenting).

96. 415 U.S. 308 (1974).

97. *Id.* at 318.

98. *Id.*

99. *Id.* at 316-17 (citing Greene v. McElroy, 360 U.S. 474, 496 (1959)). Justice Stewart, in a brief concurrence, took a narrower view of the cross-examination prescribed by the Constitution: "The Constitution [does not confer] a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." 415 U.S. at 321 (Stewart, J., concurring). Justice Stewart did not explain his position. Justice White, in a dissenting opinion joined by Justice Rehnquist, found no constitutional issue. *Id.* (White, J., dissenting). In Justice White's view, the trial court has discretion to limit the scope of cross-examination, and reviewing courts should not intervene unless there is an abuse of discretion.

100. 448 U.S. 56 (1980).

his counsel called only one witness, Isaacs' daughter Anita, who testified that she knew Roberts and had allowed him to use her apartment on occasion. Roberts' attorney questioned Anita at some length in an attempt to show that she had given Roberts the check and credit card. Anita denied this. Roberts' counsel never requested that the court declare the witness hostile, nor did he seek permission to cross-examine her. Roberts was thereafter indicted for forgery, receiving stolen property and possession of heroin.[101]

The prosecutor was unable to locate Anita at trial. Relying on an Ohio statute which permits the use of preliminary hearing testimony from an unavailable witness, the trial court allowed the prosecution to offer Anita's earlier statements to rebut Roberts' claim that Anita had given him her parents' checkbook and credit card.[102] Roberts was convicted and appealed to the Supreme Court.

The Court held that the Confrontation Clause operates in two distinct ways to restrict the use of admissible hearsay. First, it establishes a rule of necessity:[103] the prosecution must either produce the hearsay declarant or demonstrate the declarant's unavailability. Second, if the witness is shown to be unavailable, the hearsay sought to be admitted must possess sufficient "indicia of reliability" to satisfy the Confrontation Clause;[104] "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[105] In instances where the evidence does not fall within a hearsay exception, it must be excluded "at least absent a showing of particularized guarantees of trustworthiness."[106]

Roberts raises serious questions which the circuit courts have been unable to resolve. First, the Court failed to define what constitutes a "firmly rooted hearsay exception."[107] Second, when statements do not fall within a firmly rooted exception, the Court would apply the same standard for determining admissibility under the Confrontation Clause

101. *Id.* at 58.

102. OHIO REV. CODE ANN. § 2945.49 (1975) permits the use of preliminary examination testimony of a witness who "cannot for any reason be produced at the trial . . . ."

103. 448 U.S. at 65.

104. *Id.* (quoting Mancusi v. Stubbs, 108 U.S. 204, 213 (1972)).

105. *Id.* at 66. The Court noted that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Id.* (citing Mattox v. United States, 156 U.S. 237, 244 (1895)). Because the Court failed to state which exceptions would satisfy the reliability prong of the test, lower courts have difficulty determining which hearsay exceptions are included. *See infra* notes 115-127 and accompanying text.

106. 448 U.S. at 66. The Courts of Appeals are split as to how this language should be interpreted. *See infra* notes 115-127 and accompanying text.

107. 448 U.S. at 66. *See infra* notes 116-120 and accompanying text.

as under the rules of hearsay.[108] Third, the Court failed to set forth precise guidelines for determining reliability under the second prong of *Roberts*.[109]

Numerous circuit court opinions have applied the *Dutton* factors when determining reliability in this context.[110] While this approach is questionable, the *Roberts* Court failed to specify circumstances, beyond that of actual cross-examination, which indicate "reliability."[111] Further, by relying on cross-examination as the sole assurance of reliability, the Court in *Roberts* created a presumption that when testimony does not fall within a preciously sanctioned hearsay exception, nothing other than cross-examination will suffice to assure reliability.[112]

No Supreme Court decision has sanctioned the use of an out-of-court statement which had a "devastating" impact on a defendant unless the statement was subject to the corrective test of cross-examination either at a preliminary hearing or at a previous trial in which the defendant took part.[113] Moreover, the Court has never permitted the admission of hearsay that was not subject to cross-examination and is of questionable reliability, based solely on the fact that the witness was unavailable.[114]

Although the *Roberts* decision sanctions a more flexible cross-examination standard than prior Supreme Court cases, the Court still prohibited admission of a witness' testimony when the defendant had no opportunity to conduct a meaningful cross-examination or its equivalent and the testimony was crucial or devastating. However, as a result of the uncertain standard promulgated by the *Roberts* Court, the circuit courts

108. *See* FED. R. EVID. 803(24) and 804(b)(5) (1985). In requiring "particularized guarantees of trustworthiness" under the Confrontation Clause, the Court left unclear whether this standard should parallel the "circumstantial guarantees of trustworthiness" standard required by the "catch-all" exceptions to the hearsay rules in the Federal Rules of Evidence. *Id.* The circuit courts have been unable to distinguish between these standards. See e.g., United States v. Barlow, 693 F.2d 954, 965 n.10 (6th Cir. 1982), where the court, after searching for a distinction, noted "the need for a comprehensive confrontation clause analysis which the Supreme Court has been unable to articulate." *Id.*

109. The Court found the preliminary hearing testimony reliable, primarily because the defendant "clearly partook of cross-examination as a matter of *form*." 448 U.S. at 70 (emphasis in original).

110. *See, e.g., infra* notes 118-127 and accompanying text.

111. Because the defendant in *Roberts* did have the opportunity to engage in the "equivalent" of cross examination, the *Roberts* holding may be read quite narrowly.

112. This premise is further enhanced when the case is lined up with the Court's long-standing equation of the Confrontation Clause and cross-examination.

113. *See supra* notes 31-99 and accompanying text.

114. *See* Ohio v. Roberts, 448 U.S. 56 (1980) (defendant partook in the equivalent of cross-examination); Dutton v. Evans, 400 U.S. 74 (1970) (uncross-examined testimony was not crucial or devastating); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

have begun to allow admission of testimony which has not been cross-examined and for which reliability is far from assured.

D. Inconsistent Circuit Court Applications of *Ohio v. Roberts*

The confusion generated by the *Roberts* decision is illustrated by circuit court decisions analyzing confrontation clause challenges to evidence admitted under the co-conspirator hearsay exception in the Federal Rules of Evidence,[115] and to admission of grand jury testimony at a criminal trial when the declarant is unavailable. In deciding cases arising under the co-conspirator exception, Rule 801(d)(2)(E), some circuits take the approach that when testimony not subject to cross-examination meets the criteria for admissibility under Rule 801(d)(2)(E), its admission never violates the Confrontation Clause.[116] These courts take the position that rule 801(d)(2)(E) is a "firmly rooted hearsay exception," thus creating a presumption of reliability under *Roberts*.[117]

Other circuits take the view that the admissibility requirements under the co-conspirator exception and the Confrontation Clause are not identical. These circuits examine each alleged confrontation clause

115. FED. R. EVID. 801(d)(2)(E) (1985) provides: "(d) A statement is not hearsay if . . . (2) The statement is offered against a party and is . . . (E) a statement by a co conspirator of a party during the course and in furtherance of the conspiracy."

116. *See* Sanson v. United States, 467 U.S. 1264, 1264-65 (1984) (White, J., dissenting) ("The question presented in this case is whether statements that satisfy Federal Rule of Evidence 801(d)(2)(E) . . . necessarily satisfy the requirements of the confrontation clause . . . . Because of the substantial confusion surrounding this frequently recurring issue I would grant certiorari to resolve the conflict.").

Justices Marshall and Brennan would also like to see the Court reevaluate the *Roberts* standard. However, since they would probably seek more protection for defendants under the Confrontation Clause, and are in the minority on this position, they may be reluctant to push for a review on the issue at this time. *See* Ohio v. Roberts, 448 U.S. 56 (1980) (Brennan, J., dissenting); Dutton v. Evans, 400 U.S. 74 (1970) (Marshall, J., dissenting); *see also* United States v. Xheka, 704 F.2d 974, 987 n.7 (7th Cir.), *cert. denied*, 464 U.S. 993 (1983); United States v. Peacock, 654 F.2d 339, 349-50 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983); United States v. Lurz, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied sub nom.* Lurz v. United States, 459 U.S. 843 (1983); Magill v. United States, 455 U.S. 1005 (1982); United States v. Papia, 560 F.2d 827, 836 n.3 (7th Cir. 1977); Ottomano v. United States, 468 F.2d. 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973).

117. This approach is problematic for two reasons. First, under Rule 801(d)(2)(E), a statement is not hearsay subject to an exception since it is defined as nonhearsay. FED. R. EVID 801(d) (1985). Second, admissibility of such statements is entirely discretionary and lends itself to a result-oriented approach. In a Fourth Circuit decision, U.S. v. Chinda Wongse, 771 F.2d 840 (4th Cir.), *cert. denied*, 106 S.Ct. 859 (1985), the court held that "evidence admitted under . . . [the] 801(d)(2)(E) standard bears sufficient 'indicia of reliability' and 'guarantees of trustworthiness' to satisfy the commands of the confrontation clause." *Id.* The court noted that "the requirements of admissibility for out-of-court statements by unavailable co-conspirators under Rule 801(d)(2)(E) are *identical* to the requirements for admissibility under the confrontation clause." *Id.* at 847 (emphasis added). *But see* United States v. Ammar, 714 F.2d 238, 254-56 (3d Cir.), *cert. denied sub nom.* Stillman v. United States, 464 U.S. 936 (1983) (Rule 801(d)(2)(E) is not encompassed in the "hearsay exceptions" referred to in *Roberts*).

violation on a case-by-case basis.[118] In most of these decisions, the courts use the *Dutton* factors to determine when the admission of hearsay will not violate the Confrontation Clause.[119] Because the evaluation of these factors is highly subjective, this approach again lends itself to result-oriented outcomes.[120]

In the grand jury context, courts have also consistently relied on the *Dutton* factors to uphold the admission at trial of grand jury testimony that had not been subject to cross-examination.[121] Only the Tenth Circuit bars the admission at trial of grand jury testimony by an unavailable witness:[122] because of the *ex parte* nature of testimony "secured through a procedure that has become the arm of the examining magistrate,' " the Tenth Circuit believes grand jury testimony is not reliable.[123]

Some circuits, when deciding the admissibility of prior grand jury

118. Sanson v. United States, 727 F.2d 1113 (7th Cir.), *cert. denied*, 467 U.S. 1264 (1984) (White, J., dissenting). *See also* United States v. Ammar, 714 F.2d 238, 254-57 (3d Cir. 1983), *cert. denied sub nom.* Stillman v. United States, 464 U.S. 936 (1983); United States v. Fahey, 769 F.2d 829, 839-40 (1st Cir. 1985); United States v. Perez, 658 F.2d 654, 660-61 (9th Cir. 1981); United States v. Wright, 588 F.2d 31, 37-38 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); United States v. Kelley, 526 F.2d 615, 620 (8th Cir.), *cert. denied*, 424 U.S. 971 (1976).

119. *See e.g.*, U.S. v. Perez, 658 F.2d at 661:

> (1) [W]hether the declaration contained assertions of past fact;
> (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime;
> (3) whether it was possible that the declarant was relying upon faulty recollection; and
> (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

Id. (citing *Dutton*, 400 U.S. at 88-89.)

120. *See supra* note 117.

121. *See, e.g.*, United States v. Barlow, 693 F.2d 954, 964-65 (6th Cir. 1982); United States v. Boulahanis, 677 F.2d 586 (7th Cir. 1982), *cert. denied*, 459 U.S. 1016 (1982); United States v. Thevis, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978) (Stewart, J., dissenting); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

122. *See* United States v. Balano, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980). The court determined that different standards must apply in determining the admissibility of grand jury testimony under rule 804(b)(5) and the Confrontation Clause. *Id.* at 627. The court stressed that the Confrontation Clause requires more than reliable evidence: the purpose of the Clause is to regulate trial procedure by various means including cross-examination. *Id.* While recognizing that the Supreme Court has upheld the admission of uncross-examined testimony in limited situations, the court referred to the long line of Supreme Court decisions emphasizing cross-examination as the primary protection of confrontation values. *Id.* at 628.

123. *Id.* at 627. The court was concerned that testimony of this type would favor the prosecution since the prosecutor could largely control the proceeding. *See* M. FRANKEL & G. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 99-102 (1977) (grand juries have largely lost their function as protectors of individual rights and have become agents of the prosecution).

testimony, have routinely applied the two step approach of *Roberts*[124] and found that the admission at trial of testimony not subject to cross-examination does not violate the Confrontation Clause.[125] These circuits, like those that follow the case-by-case approach for co-conspirator's statements, generally rely on the *Dutton* factors to determine the reliability of grand jury testimony.[126]

The inconsistent application of *Roberts* at the circuit court level has created tremendous uncertainty in the law. Trial court judges find little guidance when deciding whether to admit uncross-examined hearsay that falls within an exception. Appellate courts reviewing the trial court decisions also have no precise law to follow. While a "bright line" rule might encourage consistent confrontation clause rulings, the Supreme Court has been reluctant to adopt such a rule.[127]

III. The Confrontation Clause and *Barker v. Morris*

Barker v. Morris[128] further demonstrates the inconsistency generated by *Roberts*. Relying on *Roberts*, the *Barker* court concluded that hearsay for which no exception applies can be reliable and thus admissible consistently with the Confrontation Clause.[129]

The *Barker* court noted that the Confrontation Clause permits the introduction of hearsay when it is both necessary and reliable.[130] The

124. *See supra* notes 103-106 and accompanying text.

125. In *United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982), the Sixth Circuit applied the *Roberts* two-step approach in deciding whether the admission at defendant's trial of grand jury testimony violated the Confrontation Clause. The court did not consider cross examination a condition for admissibility under the Clause. *Id.* at 964 (citing United States v. West, 574 F.2d 1131 (4th Cir. 1978)). Assuming the unavailability requirement was met, the key question, in the court's view, concerned the reliability of the statement. The court applied the four *Dutton* factors and found the statement sufficiently reliable to satisfy the Confrontation Clause. *Id.* at 965. The court cited *Dutton* as "[t]he leading case in which the Supreme Court has permitted the use of hearsay which was not previously cross-examined." *Id.* at 964. This reading of *Dutton* is common among courts that apply *Dutton* factors as the sole determinant of reliability for confrontation clause purposes. *See supra* notes 115-127 and accompanying text. However, the holding in *Dutton* related ultimately to a harmless error question. The Seventh Circuit took a similar approach in United States v. Boulahanis, 677 F.2d 586 (7th Cir. 1982).

126. *See supra* note 125.

127. The unique factual situations underlying confrontation clause cases probably contribute to this reluctance. The Court may prefer to allow trial judges broad discretion in deciding what evidence should be admitted. A bright line rule would seriously limit this discretion. For a thorough discussion of cases admitting grand jury testimony, see 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804-178 to 804-187 (1985); Comment, *Constitutional Law*, *supra* note 4; Case Comment, *supra* note 9, at 703; Note, *Admissibility of an Unavailable Witness' Grand Jury Testimony: Upholding the Purposes Behind the Confrontation Clause*, 18 VAL. U.L. REV. 965 (1984).

128. 761 F.2d 1396 (9th Cir. 1985).

129. *See supra* notes 13-19 and accompanying text.

130. 761 F.2d at 1399.

court, proceeding under the two step approach in *Roberts*, first found that the videotaped testimony was "necessary."[131] While necessity is normally equated with unavailability of the witness,[132] the *Barker* court noted that the testimony was "necessary" because it was "qualitatively different" from the testimony of other eyewitnesses; thus, the prosecution "could have concluded that [it] was necessary to present the trier of fact with a more complete and somewhat better balanced view of the evidence . . . ."[133] This analysis reveals the court's misunderstanding of the first prong of *Roberts*, which merely requires that the witness whose testimony is sought to be admitted at trial be unavailable.[134] Moreover, this line of reasoning is logically inconsistent with the court's later reliability analysis, under which it found the testimony "reliable" in part because it had been corroborated by in-court testimony.[135] The court in essence said that Pifer's testimony was necessary because it was different from the other testimony presented at trial. However, the Court based the reliability of the testimony on the fact that it was corroborated by other testimony.

After finding that the testimony was necessary, the court concentrated on the second prong of *Roberts*—reliability. The court recognized that although the testimony was analogous to testimony admitted under several well-established hearsay exceptions—former testimony,[136] dying declarations,[137] and statements against interest[138]—it did not fall within

131. *Id.*

132. *Id.*

133. *Id.*

134. The *Roberts* Court observed that the Confrontation Clause establishes a rule of necessity: "the prosecution must either produce, or demonstrate the unavailability, of the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65. Nowhere in *Roberts* does the Court equate "necessity" with the notion that the testimony is required to "present the trier of fact with a more complete and somewhat better balanced view of the evidence . . . ." *Barker*, 761 F.2d at 1399.

135. 761 F.2d at 1401.

136. FED. R. EVID. 804(b)(1) (1985). This rule provides: "The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness: Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

137. FED. R. EVID. 804(b)(2) (1985). This rule provides: "In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death" will not be excluded by the hearsay rule where the declarent is "unavailable" to testify.

138. FED. R. EVID. 804(b)(3) (1985). This rule provides: "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he

a "firmly rooted hearsay exception."[139] The court then considered whether the testimony contained specific guarantees of trustworthiness.

The court observed that the statement probably would have been admitted in federal court as a co-conspirator's statement.[140] The testimony was offered as evidence of a material fact, and "because of the qualitative differences between [Pifer's] testimony and that of Green and Moran it was more probative on the points for which offered than was the other testimony."[141] This reasoning is quite similar to that underlying the *Dutton* approach, and illustrates the court's conclusory approach in determining reliability. The effect of this type of analysis is to relegate the Confrontation Clause to the status of an evidentiary rule, because no distinction is made between Rule 804(b)(5)'s "circumstantial guarantees of trustworthiness" standard and the *Roberts* "particular guarantees of trustworthiness" standard.[142]

The *Barker* court recognized that while both the Confrontation Clause and the hearsay rules are concerned with guaranteeing trustworthiness, they are not coextensive:[143]

> [E]vidence admissible under the evidentiary rules of a particular jurisdiction does not necessarily meet the requirements of the Confrontation Clause. Similarly, the admission of testimony in violation of [a state's evidence rules] does not of its own force constitute a violation of the Confrontation Clause.[144]

However, the court's reliability analysis proceeded as if the admissibility standards of the Confrontation Clause and Rule 804(b)(5) are the same. Based on the court's analysis, the court should have said that evidence admissible under the evidentiary rules of a particular jurisdiction *will almost always* meet the requirements of the Confrontation Clause, and testimony in violation of evidentiary rules does not of its own force violate the Confrontation Clause. Under *Barker*, a violation of the Confrontation Clause occurs only when the defendant shows that the testimony has *no* indicia of reliability. Moreover, the court will not consider the preju-

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believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement" will not be excluded by the hearsay rule where the declarent is "unavailable" to testify.

139. Whether these forms of hearsay exceptions are applicable to the situation in *Barker* is questionable; however, the court, by referring to them, intimates that the testimony is reliable. Not only does the hearsay fail to qualify as a "firmly rooted" hearsay exception, it does not come within any of the stated exceptions to the hearsay rule.

140. *See* FED. R. EVID. 804(b)(5) (1985).

141. 761 F.2d at 1400.

142. *See supra* note 108 and accompanying text.

143. 761 F.2d at 1400.

144. *Id.* (citing California v. Green, 399 U.S. 149, 155-56 (1970)).

dicial impact of the testimony.[145]

The *Barker* court found that the absence of cross-examination distinguished *Barker* from *Roberts* and *Green.*[146] However, the court stressed that "this [absence] is directly attributable to Barker's fugitive status."[147] Assuming Barker was a fugitive, the distinction makes little sense because the court found that the testimony was sufficiently "reliable" so as not to violate the Confrontation Clause. Thus, under the court's analysis, Barker's presence, or lack thereof, would actually be irrelevant. The court, however, implied that if Barker had been present, but had not been permitted to cross-examine Pifer, the use of Pifer's testimony at Barker's subsequent trial would have violated the Confrontation Clause.

The court then determined that the videotaped testimony was sufficiently reliable. The declarant had made the statement voluntarily while under oath, and was subject to penalty of perjury.[148] The court also analogized the statement to a dying declaration[149] and a statement against interest,[150] and considered the corroborating testimony of Moran and

145. The *Barker* court only considered factors that showed reliability. It failed to consider, in any depth, factors indicating that Pifer's testimony was seriously tainted, including the fact that Barker's co-defendants had ample opportunity to shape Pifer's testimony in favor of themselves and against the absent Barker. The court's failure to consider this demonstrates its result-oriented approach to the case. *See infra* notes 153-162 and accompanying text.

146. 761 F.2d at 1400.

147. *Id.* This is factually incorrect (People v. Barker, 1 Crim. 14,513, slip. op. at 1313 (Cal. Super. Ct. 1972)). Barker had left the state prior to the indictment and was never notified of the pending proceedings. The Court stated that its "analysis of the admissibility of such testimony against [Barker] might well be different from the analysis we offer below, 'if Barker had not been a fugitive.' " 761 F.2d at 1400. The reliability of the testimony should not be affected by the question of whether Barker was a fugitive. The fugitive issue only affects whether or not Barker had *the opportunity* to cross-examine Pifer.

148. 761 F.2d at 1401. It is questionable whether Pifer, who had a long history of serious criminal behavior, and who knew he only had a few weeks to live, would be concerned about a perjury prosecution.

149. *Id.* (quoting Mattox v. United States, 156 U.S. at 237, 244 (1895) ("the sense of impending death is presumed to remove all temptation to falsehood . . . .")). The idea that dying declarations are inherently reliable is not universally accepted. *See, e.g.,* Jaffee, *The Constitution and Proof by Dead or Unconfrontable Declarants,* 33 ARK. L. REV. 227 (1979) (refuting the inherent reliability of dying declarations); *see also* Barker v. Morris, 761 F.2d 1396 (9th Cir. 1985), *cert. denied,* 106 S.Ct. 814 (1986). The Federal Public Defender's petition for certiorari to the United States Supreme Court states that

> the concept that a convicted felon who is an admitted dealer in hard narcotics, seeking to avoid prosecution for accessory to murder, federal charges for blowing up a truck to punish a drug customer and seeking to protect his son from prosecution will tell the truth because his death is imminent and he fears the wrath of his creator is naive to say the least.

Petition for Writ of Certiorari, Barker v. Morris, (U.S. Sept. 23, 1985) (No. 85-5481).

150. It is questionable whether the statements were against Pifer's interest because Pifer and his son were both granted complete immunity. 761 F.2d at 1398.

Green as a further assurance of reliability.[151] However, the court based this part of the analysis only on corroboration of undisputed facts. The facts relevant to Barker's complicity—showing that he ordered the killing—were not sufficiently corroborated.[152]

Perhaps the most troubling aspect of the case is that the court found Pifer's statements reliable in part because it felt that Barker's interests were served by the cross-examination conducted by Moran and the other defendants.[153] In finding that the cross-examination by other defense counsel insured the reliability of the testimony, the court stated that "whether such cross-examination provides a sufficient indication of reliability turns upon whether the interests of those who were represented during cross-examination were advanced in a manner that was consistent with the interest of the defendant who lacked such representation."[154]

With this sweeping pronouncement, the Ninth Circuit both expanded the law of hearsay and took a major bite out of the Confrontation Clause. First, the court ignored the fact that, in criminal cases, both the Federal and California Rules of Evidence prohibit the use of former testimony when the defendant had no opportunity to cross-examine the declarant.[155] Second, the court overlooked the very real possibility that the cross-examination conducted by Moran and the other defendants might

151. As stated earlier, this is inconsistent with the court's finding that Pifer's testimony was "necessary." *See supra* notes 131-135 and accompanying text. Furthermore, accomplice testimony is of questionable reliability. *See, e.g.*, CAL. PENAL CODE § 1111 (West 1982) (a conviction cannot rest on the uncorroborated testimony of an accomplice). *See also* People v. Tewksbury, 15 Cal. 3d 953, 544 P.2d 135, 127 Cal. Rptr. 135 (1976). The *Barker* court acknowledged this as well, noting that "Green and Moran were accomplices and had a motive to shift blame to Barker." 761 F.2d at 1398.

152. The only parts of Pifer's testimony that were corroborated were claims that Barker was present the night of the killings and that the victims died. Neither Green nor Moran testified that Barker ordered the killing. 761 F.2d at 1402. This fact is relevant when considering the court's "similarity of interest" rationale concerning Moran's usefulness to Barker and the other defendants' cross-examination.

153. 761 F.2d at 1402. At the preliminary hearing for Moran and the other defendants, Pifer was challenged on numerous grounds including his ability to accurately perceive, recall, and communicate, as well as his motives and biases in testifying. The cross-examination brought out Pifer's grant of immunity, various discrepancies between his current testimony and prior statements, his failure to mention his son's presence on the night in question, his use of drugs, his prior acts of misconduct, and animosity between himself and the Hell's Angels, including Barker. *Id.*

154. *Id.*

155. FED. R. EVID. 804(b)(1) (1985). The hearsay exception for former testimony provides that:

> "Testimony given as a witness at a former hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Id. (emphasis added). *See also* CAL. EVID. CODE § 1291(a)(2) (West 1982). The advisory notes to that section state:

have been extremely damaging to Barker.[156] The court summarily concluded that the extensive cross-examination was aimed at discrediting Pifer and that Pifer was not interested in shifting blame to Barker.[157] While recognizing that an inherent conflict of interest exists between criminal defendants in the same proceeding, the court found that the jury could determine whether Pifer's testimony was being shaped against Barker.[158] The court also noted that Pifer declined to attribute sole responsibility to Barker. Assuming this is correct,[159] the fact remains that Barker never had the opportunity to cross-examine the most damaging witness against him, while attorneys for his potential co-defendants had the opportunity to shape the testimony that was crucial in convicting Barker.[160]

The court's findings regarding the content of the cross-examination of Pifer raise serious questions. Many areas of Pifer's cross-examination clearly were intended to focus blame for the homicides on Barker. It is questionable whether the jury could discern these defense tactics utilized at Barker's expense. The court's rationale overlooks a basic premise underlying the Confrontation Clause: that the accused has a right to confront his accuser to protect *his* interests, not the adverse interests of his co-defendant. Because of the inherent conflict between criminal defendants in the same proceeding,[161] cross-examination by co-defendants seeking to shift primary responsibility to an absent defendant can only present a distorted picture when later offered against that defendant.

By sanctioning the "similar interest" rationale in a criminal case, the court in *Barker* created a new hearsay exception and then went on to proclaim its constitutionality. While the rules of evidence are subject to legislative change, the Confrontation Clause must function as the final

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> This limitation preserves the right of a person accused of a crime to confront and cross-examine the witnesses against him. When a person's life or liberty is at stake—as it is in a criminal action—*the defendant should not be compelled to rely on the fact that another person has had an opportunity to cross-examine the witness.*

CAL. EVID. CODE § 1291 (West 1982) (advisory committee notes) (emphasis added); *see generally* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804-96 to 804-97 (M. Bender 1985) (providing an overview of the conflicting arguments on this issue).

156. 761 F.2d at 1402.

157. *Id.*

158. *Id.* at 1403. This finding by the court was highly conclusory and no rationale to support it was offered, except for the fact that Barker's trial attorney informed the jury of the potentially differing interests of the preliminary hearing defendants. The court also failed to consider the tactical differences between cross-examination at a preliminary hearing and cross examination at trial.

159. After Pifer testified that one of the victims had died, the prosecutor asked Pifer what happened. Pifer replied "so Richard [Barker] came out and said, 'kill that son of a bitch. We don't want no witnesses. That guy is dead.' " Videotape Testimony of W. Pifer, *supra* note 19, at 66. Note that Barker's criminal responsibility was based on his having ordered the killing.

160. Barker and Moran were the only two of six defendants to be convicted of first degree murder.

161. *See supra* notes 157-158 and accompanying text.

protection against damaging hearsay not subject to cross-examination.[162] However, as *Barker* illustrates, lower courts since *Ohio v. Roberts* can, if they so choose, eliminate confrontation clause considerations altogether by finding that hearsay is reliable for confrontation clause purposes. The unconfronted hearsay is then admissible even though no exception applies.

The court in *Barker* also found that the videotape provided the jury a chance to evaluate the witness' demeanor. The court considered videotape a valuable tool for evaluating the reliability of a declarant's earlier testimony when necessity is demonstrated.[163] Although the impact of videotape has been widely debated, the court failed to cite any authority to support its assumption. Numerous commentators have argued that videotape often gives a distorted picture.[164] Professor Raburn notes that "the prejudicial weight of [videotaped] evidence due to the jury's emotional reaction to the tape would be extremely difficult to counter. While Courts may argue that tapes are mere moving pictures plus sound, tapes have the potential of being far more prejudicial than mere words set on paper."[165] The court's failure to address this serious possibility of prejudice demonstrates a lack of insight into the impact and use of this medium. More importantly, it evidences a disturbing tendency by the courts to reach far and wide to find uncross-examined hearsay testimony reliable and hence admissible. Until the Supreme Court rethinks this issue, lower courts will have free reign to make the law as they see fit in a particular case.

IV. Proposals for Determining When Hearsay Will Not Violate the Confrontation Clause

Commentators have proposed various methods for determining when the use of hearsay will not violate the Confrontation Clause. For example, Professor Baker proposed a due process check on the admission

162. *See* Pointer v. Texas, 380 U.S. 400 (1965) (declaring the Confrontation Clause fundamental and thereby binding on the states through the Due Process Clause of the Fourteenth Amendment).

163. 761 F.2d at 1403.

164. Raburn, *Videotapes in Criminal Courts*, 17 CRIM. L. BULL. 405, 421 (1981). *See also* Note, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567 (1976); Brackel, *Videotape in Trial Proceedings: A Technological Obsession?*, 61 A.B.A.J. 956 (1975); Note, *The Role of Videotape in the Criminal Court*, 10 SUFFOLK U.L. REV. 1107 (1976); Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017 (1974); Note, *Videotape Trials: Legal and Practical Implications*, 9 COLUM. J.L. SOC. PROBS. 363 (1973); Doret, *Trial by Videotape—Can Justice Be Seen to be Done?*, 47 TEMP. L.Q 228 (1974); Miller & Fontes, *Real Versus Reel: What's the Verdict: The Effect of Videotaped Court Materials on Juror Response*, NSF-RANN Grant Apr. 75-15815, Dept. of Communication, Mich. State Univ. at 235-38.

165. Raburn, *supra* note 164.

of uncross-examined hearsay.[166] If the state desires to use "crucial" or "devastating" hearsay, the court should conduct a pretrial hearing to determine admissibility.[167] To justify admitting such testimony, the prosecutor must show that the declarant is unavailable and that the statement is reliable.[168] If the declarant is unavailable, and the statement falls within a jurisdictional hearsay exception, the statement is presumed reliable and thus admissible.[169] This presumption can be overcome if the defendant produces evidence of the statement's unreliability or prosecutorial misconduct.[170]

Professor Baker's proposal is of limited use. First, it does not define what the due process hearing should entail. There is no definition of what evidence will justify admission or exclusion of testimony or what amount of evidence is required for this purpose. Second, the presumption of reliability for statements falling within a jurisdictional hearsay exception fails to resolve the inconsistency and uncertainty generated by *Roberts*. Without a method for determining reliability, Professor Baker's approach affords no protection under the Confrontation Clause in cases where a state legislature or Congress may have enacted an overly broad hearsay exception.[171] Without a consistent standard, trial courts will have little guidance in determining when the admission of unconfronted hearsay violates the Clause.[172]

Professor Graham has also attempted to devise a standard for determining when the admission of unconfronted hearsay would not violate the Confrontation Clause.[173] Graham contends that a trial court must first determine whether the witness is a principal witness against the defendant.[174] For this purpose, he essentially adopts the "crucial or devastating" approach of *Dutton*.[175] If the testimony sought to be introduced is merely cumulative or inconsequential, it may be admitted without violating the Confrontation Clause and the witness need not be produced or

166. Baker, *The Right to Confrontation, the Hearsay Rules and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974).

167. *Id.* at 549.

168. *Id.* This requirement is essentially the same as in *Roberts*. *See supra* notes 103-105 and accompanying text.

169. Baker, *supra* rule 166, at 549. This "presumption" favoring reliability is narrower than the "inference" of reliability referred to in *Roberts* for statements "falling within a well rooted hearsay exception," *id.*, but it too contemplates a wider range of exceptions.

170. Baker, *supra* note 166, at 549-50.

171. *See, e.g.*, FED. R. EVID. 803(24), 804(b)(5) (1985).

172. Under this proposal, Pifer's testimony would have been excluded at Barker's trial because it did not fall under a hearsay exception recognized in California. *See supra* notes 20-23 and accompanying text.

173. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972).

174. *Id.* at 129.

175. *See supra* notes 79-83 and accompanying text.

confronted.[176] If the witness is essential—that is, crucial or devastating—the defendant must have the opportunity to confront and cross-examine.[177] The impact of the profferred evidence must be analyzed in the context of the case, not in the abstract.[178]

The strength of Graham's proposal is that it attempts to bar convictions based solely on hearsay. However, its application presents practical difficulties. It is unlikely that a judge could predict accurately whether a jury would regard a particular piece of evidence as essential. Certain evidence not essential on its face may acquire special significance when considered in conjunction with other evidence and a party's theory of the case.[179]

Professor Natali has offered a third proposal to reconcile the hearsay exceptions and the Confrontation Clause.[180] Natali noted that, irrespective of the rules of hearsay, the Confrontation Clause demands that prior to the admission of any out-of-court statement, the declarant must be in court and subject to cross-examination. The only exception is where "substantial guarantees of trustworthiness are present which satisfy the trial court that the defendant's confrontation rights are fully compensated."[181] If the defendant can show that the statement was not made voluntarily or was made under circumstances indicating another party's control,[182] it will not be admitted. Finally, uncross-examined hearsay will not be admitted unless *prima facie* evidence is presented to support a conviction against the defendant.[183]

This proposal, while more precise than the others, still leaves serious questions unanswered. Perhaps the biggest problem is in determining what constitutes "substantial guarantees of trustworthiness." In his examples, Natali employs factors similar to those in *Dutton*. Since these factors closely parallel the rationales underlying the hearsay exceptions, Natali's proposal would in some respects make the Confrontation Clause coextensive with the rules of hearsay.[184]

The strength of Natali's proposal lies in his concern for "circum-

176. *Id.*

177. *Id.*

178. This approach would apply regardless of which hearsay exception is used to justify the admission of the declarant's testimony.

179. There is little question that under Graham's proposal, Pifer's testimony would not have been admitted at Barker's trial. Pifer's testimony took two and one half days of the eight-week long trial. Moreover, Green and Moran were both co-defendants and, as the *Barker* court noted, had a motive to try and shift the blame to Barker.

180. Natali, *Green, Dutton, and Chambers: Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43 (1975).

181. *Id.* at 62.

182. *Id.*

183. *Id.* at 63.

184. *See supra* note 108 and accompanying text. Natali's proposal would not solve one of the main problems created by the *Roberts* decision: how to determine reliability.

stances which indicate one party's control of the declarant."[185] The phrase "under another's control" could be read to include cross-examination by a party with a "similar" interest. This situation would always violate the Confrontation Clause when the prior testimony does not come within a hearsay exception. There is also the obvious possibility that such "controlled" testimony will be biased. Ironically, in *Barker*, the court found that cross-examination by non-parties made the testimony more reliable.

If the *Barker* court had applied Natali's analysis, Pifer's videotape testimony probably would have been excluded. Although the court might have found the testimony sufficiently trustworthy, the other two prongs of Natali's test would have disqualified the evidence. First, it is doubtful that a *prima facie* case existed against Barker without Pifer's testimony.[186] Second, Pifer's testimony was clearly shaped and controlled by others.[187] Thus, under Natali's approach, the testimony would be inadmissable even though arguably reliable.

Although Natali's proposal still allows courts some room to engage in subjective value judgments as to the reliability of proffered evidence, it is considerably more precise than the vague test promulgated by the *Roberts* Court. Natali's proposal would also require trial courts to articulate their reasons for admitting testimony over confrontation clause objections, enabling appellate courts to review lower court decisions more effectively. Most importantly, this analysis distinguishes the Confrontation Clause from the rules of hearsay by emphasizing primarily the defendant's right to cross-examine adverse witnesses to protect his or her interests, as opposed to merely guaranteeing that admitted evidence meets minimum standards of reliability.

Conclusion

The Confrontation Clause was included in the Constitution to force an accuser to come face to face with the defendant in the courtroom and to undergo cross-examination. A defendant may then protect his or her interests by testing the accuser in front of the trier of fact. Any analysis that does not achieve this result must be carefully scrutinized to ensure that the sixth amendment right of confrontation has been satisfied.

The Supreme Court has long expressed the notion that the Sixth Amendment guarantees a criminal defendant the right to cross-examine the witnesses against him, except in extraordinary circumstances. In *Ohio v. Roberts*, however, the Court left a confusing precedent with dan-

185. Natali, *supra* note 180, at 62.

186. Absent Pifers testimony, there would not have been a case against Barker. The only corroborating testimony went to the fact that a killing occurred and Barker was present. 761 F.2d at 1402. *See supra* note 152.

187. *See supra* notes 153-161 and accompanying text.

gerous implications for the confrontation right. While expressing a preference for cross-examination, the Court created an imprecise standard for determining when testimony not subject to cross-examination may be admitted without violating the Confrontation Clause. Because *Roberts* failed to present clear guidelines for determining when out of court testimony is sufficiently reliable under the Confrontation Clause, lower courts may admit uncross-examined hearsay when it furthers a desired result. On appeal, the admissibility question ultimately turns on a particular court's sense of fairness.

The Ninth Circuit's opinion in *Barker v. Morris* demonstrates the loose, subjective approach adopted by the federal circuit courts since *Ohio v. Roberts*. The *Barker* court strained to find the testimony admitted by the trial court sufficiently "reliable" to overcome the Confrontation Clause's preference for cross-examination. The court found that cross-examination of an accomplice by co-defendants, conducted at an earlier hearing to which the defendant was not a party, satisfied the defendant's confrontation right. This strained interpretation of *Roberts* highlights the need for a precise standard under which confrontation issues can be adjudicated.

Allowing courts to decide whether testimony is reliable, and hence admissible under the Confrontation Clause, calls into question the integrity of the judicial process itself. The Supreme Court should evaluate the decisions applying *Ohio v. Roberts*, and rethink its confrontation clause analysis. By continuing to allow decisions like *Barker v. Morris* and the grand jury cases to stand untouched, the Court is shirking its responsibility to preserve both the integrity and the basic constitutional protections of the criminal justice system.

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