Volume 18
Number 4 *Summer 1984*

*pp.*965-1006

Summer 1984

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ADMISSIBILITY OF AN UNAVAILABLE WITNESS' GRAND JURY TESTIMONY: UPHOLDING THE PURPOSES BEHIND THE CONFRONTATION CLAUSE

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] Read literally, the confrontation clause imposes an absolute bar against the presentation of testimony by an out-of-court witness against criminal defendants.[2] The Supreme Court, however, has never interpreted the clause in this manner.[3] The Court recognizes the admissibility of certain extra-judicial statements that fall under recognized exceptions to the hearsay[4] rule.[5] Deciding which hearsay exceptions qualify for admission under the confrontation clause has proven to be a particularly troublesome issue for the Court.[6]

Recent Supreme Court decisions have generated considerable confusion concerning the relationship between the evidentiary limitations imposed by the hearsay rule and its exceptions, and the constitutional limitations imposed by the confrontation clause.[7] These decisions

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

2. 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 cited as Comment, *Admission at Trial of Slain Informant's Prior Grand Jury Testimony*]. *See also* Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32 (1973).

3. Comment, *Admission at Trial of Slain Informant's Prior Grand Jury Testimony*, *supra* note 2, at 685.

4. Hearsay is an out-of-court declaration offered to prove the truth of the matter asserted. 5 WIGMORE, EVIDENCE § 1361 (3d ed. 1940). Because hearsay is not cross-examined, courts find the declarations too unreliable to be admitted into evidence. *Id.* § 1362. Where some substitute for cross-examination provides alternative assurances of reliability, the hearsay rule does not bar the admission of out-of-court declarations. *Id.* § 1420.

5. The Supreme Court has always recognized the admissibility of dying declarations. Mattox v. United States, 146 U.S. 140, 151 (1892). In certain instances, the Court also recognizes the admissibility of a witness' former trial testimony. Mattox v. United States, 156 U.S. 237, 240-44 (1895).

6. Natali, *Green, Dutton, and Chambers: Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43, 43-47 (1975); Younger, *supra* note 2, at 32.

7. *See generally* 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, 530-32 (Spring, 1974); Natali, *supra* note 6, at 43.

demonstrate the Court's inability to develop a coherent theory of the relationship between confrontation and hearsay.[8] As a result, substantial disunity exists among the United States Federal Circuit Courts of Appeals regarding the proper approach and resolution of the confrontation-hearsay query. Of particular interest is the discrepancy among the circuits concerning the admissibility of an unavailable[9] witness' grand jury testimony pursuant to Federal Rule of Evidence 804(b)(5),[10]

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8. Weston, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1214 (1979); Younger, *supra* note 2, at 41; Note, *Constitutional Law—Right of Confrontation*, 59 U. DET. J. URB. L. 127, 145 (1981) [hereinafter cited as Note, *Right of Confrontation*].

9. The term "unavailable" as used herein refers to witnesses who are unavailable to testify in person at trial pursuant to Federal Rule of Evidence 804(a). Federal Rule of Evidence 804(a) states:

> Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
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> (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 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.

10. Federal Rule of Evidence 804(b)(5) will hereinafter be referred to as Fed. R. Evid. 804(b)(5). Fed. R. Evid. 804(b)(5) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material

one of the so-called catch-all hearsay exceptions.[11]

The federal circuit courts of appeals are experiencing considerable difficulty in deciding the admissibility of an unavailable witness' grand jury testimony. Because grand jury proceedings are *ex parte* in nature, the circumstances surrounding the elicitation and admission of an unavailable witness' grand jury testimony do not afford criminal defendants an opportunity to cross-examine the testifying witness.[12] This uncross-examined hearsay evidence is nevertheless admissible under Fed. R. Evid. 804(b)(5).[13] The circuits disagree, however, on whether the criminal defendant's lack of opportunity to cross-examine the grand jury witness renders the hearsay testimony inadmissible under the confrontation clause.

Four circuit courts have decided the admissibility of an

> fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

When witnesses are determined to be "unavailable" pursuant to Fed. R. Evid. 804(a), their grand jury testimony has been admitted into evidence by the federal circuit courts under Fed. R. Evid. 804(b)(5). *See infra* note 13.

11. Fed. R. Evid. 804(b)(5), as well as 803(24), are frequently referred to as catch-all hearsay exceptions. *See* Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule,* TEX. TECH. L. REV. 587 (1980); Note, *The Federal Courts and the Catchall Hearsay Exceptions,* 25 WAYNE L. REV. 1361 (1979) [hereinafter cited as Note, *Catchall Hearsay*].

12. Grand jury proceedings do not provide an accused with an opportunity to cross-examine witnesses who testify against him. *See generally* Note, *Evidence—Constitutional Law—The Confrontation Clause and the Catch-All Exception to the Hearsay Doctrine,* 17 LAND & WATER L. REV. 703 (1982) [hereinafter cited as Note, *The Confrontation Clause and the Catch-All Exception*].

13. The Fifth Circuit is the only federal circuit court that bars the admission of an unavailable witness' grand jury testimony under Fed. R. Evid. 804(b)(5). United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977). Four circuit courts admit the hearsay testimony under Fed. R. Evid. 804(b)(5): United States v. Barlow, 693 F.2d 954 (6th Cir. 1982); United States v. Boulahanis, 677 F.2d 586 (7th Cir.), *cert. denied,* 103 S. Ct. 375 (1982), United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied,* 439 U.S. 936 (1978), United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977).

unavailable witness' grand jury testimony.[14] The Fourth,[15] Seventh,[16] and Sixth[17] Circuits admit the hearsay testimony. These circuit courts hold that where an unavailable witness' grand jury testimony is corroborated by other admissible evidence, the testimony is reliable enough to be admitted under the confrontation clause.[18] Only the Tenth Circuit bars the admission of an unavailable witness' grand jury testimony.[19] It does so because the circumstances surrounding the elicitation and admission of the testimony do not provide criminal defendants with an opportunity to cross-examine the witness testify-

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14. The following circuits have decided whether the admission of an unavailable witness' grand jury testimony violates the confrontation clause: the Fourth Circuit in *Garner*, 574 F.2d at 1141, and *West*, 574 F.2d at 1131; the Tenth Circuit in United States v. Balano, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); the Seventh Circuit in *Boulahanus*, 677 F.2d at 586; the Sixth Circuit in *Barlow*, 693 F.2d at 954. Before the Federal Rules of Evidence became effective (July 1, 1975), the Second Circuit decided the admissibility of grand jury testimony of a witness who might have qualified as an unavailable witness pursuant to Fed. R. Evid. 804(a). United States v. Fiore, 443 F.2d 112 (2nd Cir. 1971). This note limits discussion to instances where the circuits have decided the admissibility of grand jury testimony of a witness unavailable pursuant to Fed. R. Evid. 804(a). Therefore, the *Fiore* decision will not be discussed.

Two other circuits, the Eighth and Fifth, have also been presented with the question of whether the admission of an unavailable witness' grand jury testimony violates the confrontation clasue. In *Carlson*, 547 F.2d at 1357, the Eighth Circuit found that the defendants had waived their confrontation rights because they had brought about the witness' unavailability. The court therefore found it unnecessary to reach the mereits of the confrontation-hearsay issue. *Id.* The Fifth Circuit has on two occasions failed to reach the question of whether receiving an unavailable witness' grand jury testimony under Fed. R. Evid. 804(b)(5) violates a criminal defendant's right to confrontation. In *Gonzalez*, 559 F.2d at 1274, the Fifth Circuit did not address the merits of the confrontation-hearsay issue because it found the uncross-examined hearsay testimony inadmissible under Fed. R. Evid. 804(b)(5). In *Thevis*, 665 F.2d at 627-30, the Fifth Circuit left the confrontation question unresolved because it found that the defendants had waived their confrontation rights. Like the *Carlson* defendant, the *Thevis* defendants caused the grand jury witness' unavailability. *Id.* This note is not concerned with the waiver issue, or whether an unavailable witness' grand jury testimony should be admissible under Fed. R. Evid. 804(b)(5). Therefore, the *Carlson, Gonzalez,* and *Thevis* decisions will not be discussed.

15. The Fourth Circuit has twice found an unavailable witness' grand jury testimony admissible under the confrontation clause. *Garner*, 574 F.2d at 1141; *West*, 574 F.2d at 1131.

16. The Seventh Circuit admitted an unavailable witness' grand jury testimony in *Boulahanis*, 677 F.2d at 586.

17. In *Barlow*, 693 F.2d at 954, the Sixth Circuit admitted an unavailable witness' grand jury testimony.

18. *See infra* notes 31-102 and accompanying text for a full discussion of the *Garner, West, Boulahanis,* and *Barlow* decisions.

19. *Balano*, 618 F.2d at 624.

ing against them.[20] Although the Supreme Court has had several opportunities to resolve the circuit split, it has declined to do so.[21]

This note demonstrates, by thorough examination of these circuit decisions and Supreme Court precedent, that where an unavailable witness' grand jury testimony is admitted into evidence in a criminal proceeding, the purposes behind the confrontation clause are not upheld. Supreme Court precedent establishes that the constitutional protections afforded a criminal defendant entail more than a mere determination that the evidence sought to be introduced against him is to some degree corroborated and, therefore, reliable.[22] The confrontation clause requires a much fuller factual development which, in certain circumstances, can only be satisfied by the corrective test that cross-examination makes possible.

Discussion begins with an examination of how the circuits have resolved the admissibility of an unavailable witness' grand jury testimony. Next, the Supreme Court's treatment of the confrontation-hearsay issue will be analyzed. This discussion focuses upon the Court's most recent confrontation-hearsay decisions. Careful examination of these decisions demonstrates that the Court emphasizes cross-examination as a protector of confrontation values. The Court's emphasis on cross-examination in deciding confrontation issues precludes the admission of an unavailable witness' grand jury testimony, despite the circuit court holdings to the contrary.

CIRCUIT DECISIONS ON THE ADMISSIBILITY OF AN UNAVAILABLE WITNESS' GRAND JURY TESTIMONY

Since adopting the Federal Rules of Evidence,[23] the United States Federal Circuit Courts of Appeals have decided the admissibility of an unavailable witness' grand jury testimony on five separate

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20. *See infra* notes 103-19 and accompanying text for a full discussion of the *Balano* decision.

21. The Supreme Court has denied petitions for a writ of certiorari requesting review of the admissibility of an unavailable witness' grand jury testimony in the following cases: United States v. Boulahanis, 677 F.2d 586 (7th Cir.), *cert. denied,* 103 S. Ct. 375 (1982); United States v. Thevis, 665 F.2d 616 (5th cir.), *cert. denied,* 103 S. Ct. 57, 102 S. Ct. 3489, 102 S. Ct. 2300 (1980); United States v. Balano, 618 F.2d 624 (10th Cir.), *cert. denied,* 449 U.S. 840 (1980); United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied,* 439 U.S. 936 (1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977).

22. *See infra* notes 120-279 and accompanying text for discussion of Supreme Court confrontation-hearsay decision.

23. The Federal Rules of Evidence, became effective on July 1, 1975.

occasions.[24] The fact situations in these five cases are indistinguishable in several critical respects: in each case a witness testified against the defendant before a grand jury,[25] the witness was unavailable to testify at the defendant's trial,[26] and a transcript of the witness' grand jury testimony was offered into evidence at the defendant's trial.[27] Despite these similarities, the circuits approached and ultimately resolved the confrontation issue in these five cases quite differently. The approach utilized by the circuits that admit unavailable witnesses' grand jury testimony[28] views the confrontation clause as a rule of evidence.[29] Here the focus of inquiry is whether the grand jury testimony is reliable. The circuit that bars the admission of the uncross-examined hearsay testimony views the clause as a rule of trial procedure.[30] This approach emphasizes cross-examination.

Circuits Admitting Grand Jury Testimony of Unavailable Witnesses

The Fourth Circuit was the first of three federal appellate courts to find that the introduction of an unavailable witness' grand jury testimony did not violate a criminal defendant's sixth amendment right to confrontation.[31] In *United States v. West*[32] and its companion case *United States v. Garner*,[33] the Fourth Circuit held that where an

24. *Barlow*, 693 F.2d at 954; *Boulahanis*, 677 F.2d at 589; *Balano*, 618 F.2d at 624; *Garner*, 574 F.2d at 1146; and *West*, 574 F.2d at 1138.

25. *Barlow*, 693 F.2d at 957; *Boulahanis*, 677 F.2d at 588; *Balano*, 618 F.2d at 626; *Garner*, 574 F.2d at 1142; *West*, 574 F.2d at 1134.

26. In each of the five cases the witness was ruled unavailable to testify pursuant to Fed. R. Evid. 804(a). *Barlow*, 693 F.2d at 957; *Boulahanis*, 677 F.2d at 589; *Balano*, 618 F.2d at 626; *Garner*, 574 F.2d at 1143; *West*, 574 F.2d at 1134.

27. *Barlow*, 693 F.2d at 957; *Boulahanis*, 677 F.2d at 588; *Balano*, 618 F.2d at 626; *Garner*, 574 F.2d at 1143; *West*, 574 F.2d at 1134.

28. The circuits that have found that the admission of an unavailable witness' grand jury testimony does not violate the confrontation clause are: the Fourth Circuit in *Garner*, 574 F.2d at 1141, and *West*, 574 F.2d at 1131; the Seventh Circuit in *Boulahanis*, 677 F.2d at 586; and the Sixth Circuit in *Barlow*, 693 F.2d at 954.

29. *See infra* notes 31-102 and accompanying text for a full discussion of *West, Garner, Boulahanis,* and *Barlow.*

30. The Tenth Circuit bars the admission of an unavailable witness' grand jury testimony. *Balano*, 618 F.2d at 624. For full discussion of the *Balano* decision, see *infra* notes 103-19 and accompanying text.

31. In *West*, 574 F.2d at 1138, the Fourth Circuit became the first federal appellate court to admit an unavailable witness' grand jury testimony. The court also admitted an unavailable witness' grand jury testimony in *Garner*, 574 F.2d at 1146. *Garner* was decided only four days after *West.*

32. 574 F.2d 1131 (4th Cir. 1978).

33. 574 F.2d 1141 (4th Cir. 1978).

unavailable witness' grand jury testimony bears sufficient guarantees of reliability and where the circumstances surrounding that testimony provide the jury with a sufficient basis to judge its trustworthiness, the admission of that evidence does not violate the confrontation clause.[34] The essence of this two-part test, as applied by the Fourth Circuit, is that grand jury testimony must be reliable in order to be admissible. To satisfy this reliability requirement, the court evaluated the degree to which the testimony was corroborated by other admissible evidence.[35]

The extent to which the grand jury testimony was corroborated in *West* can only be described as extraordinary.[36] The grand jury witness in *West* had been imprisoned on drug charges and agreed to assist government agents by purchasing drugs while under police surveillance.[37] He purchased drugs on several occasions from the accused, and thereafter testified to that fact before a grand jury.[38] Unfortunately, the witness was murdered by unknown persons prior to the defendants' trial.[39] Each drug purchase was subject to elaborate police surveillance procedures[40] which included photographing the drug purchases and recording all conversations between the witness and defendants.[41] Furthermore, detailed summaries[42] of the events at each drug purchase were prepared by the witness and government agents after each transaction occurred.[43] The substance of this corroborating evidence, photographs, and audio recordings of the drug purchases, along with the testimony of government agents concerning their observations of the deceased witness' activities, was introduced at the defendants' trial.

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34. *Garner*, 574 F.2d at 1144; *West*, 574 F.2d at 1136.

35. *Garner*, 574 F.2d at 1145-46; *West*, 574 F.2d at 1137-38.

36. In *Garner*, 574 F.2d at 1143, the court stated that in *West* there existed "extraordinary corroboration of the grand jury testimony."

37. *West*, 574 F.2d at 1133.

38. *Id.* at 1133-34.

39. The witness was murdered "in a manner suggestive of contract killers," having been shot four times in the head while driving his car. The defendants were not charged with his murder. *Id.* at 1134. Hence, no waiver issue is presented in this case.

40. Before each purchase the witness was strip-searched by government agents to make sure that he possessed no drugs. The witness' car was also thoroughly searched before each meeting with the defendants. *Id.* at 1133.

41. *Id.*

42. *Id.* The witness heavily relied upon these reports when testifying before the grand jury. At the hearing the government attorney read portions of the reports to the witness, periodically asking him if they were correct. *Id.* at 1134.

43. *Id.* at 1133.

Similarly, the grand jury testimony at issue in *Garner* was also strongly supported by corroborating evidence. The *Garner* defendants were charged with numerous drug related offenses arising out of the alleged importation of heroin from Europe.[44] An alleged co-conspirator testified before a grand jury that he and the defendants had made several trips to Europe where they had purchased heroin and subsequently smuggled the contraband into the United States.[45] The witness thereafter refused to testify at the defendants' trial.[46] At that trial, the prosecution introduced into evidence records of airline tickets, customs declarations, passport endorsements, and European hotel registrations, proving the witness and defendants had made several visits to Europe during a brief time span.[47] This evidence substantiated the major points of the witness' story.[48] Furthermore, live testimony of a young woman who had accompanied the witness and defendants on one of their journeys to Europe "fully confirmed" the witness' grand jury testimony as to that particular trip.[49]

Relying upon this corroborative evidence, the Fourth Circuit found that neither the *West* nor *Garner* defendants' confrontation rights were violated by the admission of the unavailable witnesses' grand jury testimony.[50] The court held that the only constitutional limitation the sixth amendment imposes upon the admission of hearsay statements is the "exclusion of extra-judicial statements which have no badges of reliability."[51] From this premise, a two-part test

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44. *Garner*, 574 F.2d at 1142.

45. *Id.* at 1143.

46. The court found the witness to be unavailable within the meaning of Fed. R. Evid. 804. At trial, the witness did agree to answer some questions put to him by the defense counsel and stated that his grand jury testimony was inaccurate. He also indicated that he knew nothing of drug trafficking. The circuit court found that this testimony left the impression not that his grand jury testimony was false, but that the witness was unwilling to testify. *Id.*

47. *Id.* at 1144.

48. *Id.* at 1145.

49. The young woman testified that she had accompanied the witness and defendants on a trip to Amsterdam for the purpose of serving as a courier. She confessed to helping the defendants smuggle the drugs into the United States from Amsterdam. Her testimony corroborated that of the grand jury witness. *Id.* at 1144.

50. The court found in both *West* and *Garner* that because the grand jury testimony was corroborated by other admissible evidence, it is admissible under the confrontation clause. *West*, 574 F.2d at 1135, 1137-38; *Garner*, 574 F.2d at 1144-46.

51. *West*, 574 F.2d at 1136. The *Garner* opinion expressly adopted the *West* holdings regarding the admissibility of an unavailable witness' grand jury testimony. The *Garner* court prefaced its decision by stating, "Since we have canvassed this scene in *West*, we need not repeat it here." *Garner*, 574 F.2d at 1144.

for determining the admissibility of an unavailable witness' grand jury testimony was established: "The admission of such sworn testimony is not a violation of the Confrontation Clause of the Constitution if it bears sufficient guarantees of reliability and the circumstances [surrounding the testimony] contain a sufficient basis upon which the jury may assess its trustworthiness."[52] In neither *West* nor *Garner* does the Fourth Circuit provide a meaningful discussion of the test criterion. However, the court clearly indicates that a criminal defendant's lack of opportunity to cross-examination grand jury witnesses is not a critical consideration.

Acknowledging that in several instances the Supreme Court excluded hearsay testimony because the evidence had not been subjected to cross-examination,[53] the Fourth Circuit nevertheless rejected the notion that only cross-examination can provide sufficient guarantees of reliability.[54] The court's application of its two-part reliability test focused upon the circumstances surrounding the grand jury testimony. The court reasoned that, "just as surrounding circumstances may give an assurance of reliability" to the more traditional hearsay declarations, "so surrounding circumstances may give assurance of reliability to prior recorded testimony that was not subject at the time to cross-examination."[55] The court argued that these same circumstances would also provide a sufficient basis upon which to judge the testimony's trustworthiness.[56]

The circumstances that the Fourth Circuit found to provide suf-

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52. *Garner*, 574 F.2d at 1144. This is the same test of admissibility established in *West*, 574 F.2d at 1136. The Fourth Circuit relies upon Dutton v. Evans, 400 U.S. 74, 89 (1970), in establishing this admissibility test. For a full discussion of the *Dutton* decision, *see infra* notes 169-224 and accompanying text.

The same admissibility test was set out by the Eighth Circuit in *Carlson*, 547 F.2d at 1357. However, because the court did not reach the merits of the confrontation question, an analysis of the *Carlson* decision is not warranted. *See supra* note 14.

53. The Fourth Circuit acknowledged that the Supreme Court barred the admission of uncross-examined preliminary hearing testimony. *West*, 574 F.2d at 1137 (citing Pointer v. Texas, 380 U.S. 400 (1965)). It also noted that in Douglas v. Alabama, 380 U.S. 415 (1965), the Supreme Court barred the admission of a defendant's confession against a co-defendant because the co-defendant had been unable to cross-examine the defendant. *West*, 574 F.2d at 1137. *See infra* notes 125-48 for full discussion of the *Pointer* and *Douglas* decisions.

54. The specific language of the court was: "The Supreme Court has never intimated, however, that cross-examination is the only means by which prior recorded testimony may be qualified for admission under the Confrontation Clause." *West*, 574 F.2d at 1137.

55. *Id.*

56. *Id.*

ficient "indicia of reliability" and a sufficient basis upon which to judge trustworthiness were the articles of evidence which corroborated the unavailable witnesses' grand jury testimony: in *West*, the testimony of the government agents who worked on the case, as well as the photographs and audio recordings of the witness' drug purchases;[57] in *Garner*, the European travel records and the testimony of the young woman who accompanied the witness and defendants on one of their trips to Europe.[58] In both decisions, the court acknowledged that these same circumstances were found to satisfy the trustworthiness requirement of Fed. R. Evid. 804(b)(5).[59] As such, the *West* and *Garner* decisions may reduce the confrontation clause to the status of a mere evidentiary rule.[60]

In several instances, the circumstances surrounding the grand jury testimony in *West* and *Garner* indicated that the hearsay evidence was unreliable. The Fourth Circuit gave little or no weight to these considerations. Limited significance was accorded to the witnesses' backgrounds and motives for testifying before the grand jury as possible indicators of unreliability. Both witnesses had criminal records and their testimony was secured as part of plea bargain agreements.[61] Logically, the witnesses' desire to avoid incarceration would motivate them to testify to facts favorable to the prosecution, regardless of

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57. *Id.* at 1137-38.

58. The court emphasized that the defendant's limited opportunity to cross-examine the grand jury witness did not satisfy its admissibility test. *See infra* note 46. The court stated:

> We do not hold, however, that this cross-examination under these difficult circumstances was adequate to meet the requirements of the Confrontation Clause. . . . It is enough that the grand jury testimony was admissible because of its strong corroboration by the testimony of Miss McKee [the young woman who accompanied the defendants to Europe] and the undeniable [travel] records.

Garner, 574 F.2d at 1146.

59. *Id.* at 1146; *West*, 574 F.2d at 1138.

60. In the *West* dissent Judge Widener argues that the majority's treatment of the confrontation issue in *West* reduces the confrontation clause "to the status of a mere rule of evidence." *West*, 574 F.2d at 1139 (Widener, J., dissenting). He also contends that by viewing confrontation as a question of reliability, the *West* majority equates the confrontation clause and hearsay rule. *Id.* The Tenth Circuit shares these views: "We believe, however, that *West* improperly reduces the confrontation clause to a mere consideration of evidentiary value." *Balano*, 618 F.2d at 627. *See infra* notes 103-19 and accompanying text for a full discussion of the *West* dissenting opinion and the *Balano* decision.

61. *Garner*, 574 F.2d at 1142-43; *West*, 574 F.2d at 1133-34.

their accuracy.[62] The Fourth Circuit failed to consider this possibility in *Garner*,[63] while in *West* it flatly rejected this scenario, finding that the elaborate surveillance techniques employed by government agents made it inconceivable that the witness could deceive them.[64] Moreover, because the witness was cognizant of the surveillance and verification procedures being utilized, he knew that any attempted deception would probably fail and that he would thereby lose the prosecution's favor. The court held that these factors gave the witness every incentive to be extremely accurate when testifying, providing yet another indicator of the grand jury testimony's reliability.[65]

The implications of the *West* and *Garner* holdings are clear. Where the grand jury testimony of an unavailable witness is corroborated in part, the admission of that testimony is not barred by the sixth amendment. The essence of the Fourth Circuit's admissibility test is not whether there is adequate confrontation of the witness by the defendant, but whether that witness' testimony appears reliable.[66]

Reliability is also the focus of the Seventh Circuit's constitutional inquiry when determining the admissibility of an unavailable witness' grand jury testimony.[67] The Seventh Circuit also holds that the admission of an unavailable witness' grand jury testimony does not

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62. Comment, *Evidence—Hearsay—Applicability of Federal Rule of Evidence 804(b)(5) to Grand Jury Testimony*, 15 WAKE FOREST L. REV. 416, 424 (1979) [hereinafter cited as Comment, *Evidence—Hearsay*].

63. The court did discuss the witness' recantation of his grand jury testimony. It concluded that the witness' trial appearance and testimony may have aided the jury in assessing the truthfulness of the grand jury testimony. *Garner*, 574 F.2d at 1146. This determination is contrary to the holdings of *Carlson*, 547 F.2d at 1346, and *Gonzalez*, 559 F.2d at 1271. There the Eighth and Fifth Circuits held that the reaffirmation for recantation of a witness' grand jury testimony is a determinative factor in deciding whether the testimony possesses "equivalent circumstantial guarantees of trustworthiness" under Fed. R. Evid. 804(b)(5). *Carlson*, 547 F.2d at 1354; *Gonzalez*, 559 F.2d at 1274. The Fourth Circuit held that the Federal Rules of Evidence "circumstantial guarantees of trustworthiness" were the very same circumstances that permit admission of grand jury testimony under the confrontation clause. *See supra* notes 57-59 and accompanying text. Thus, the recantation provides an indication of unreliability that the *Garner* court failed to consider in resolving the admissibility of the grand jury testimony.

64. *West*, 574 F.2d at 1135.

65. *Id.*

66. *Id.* at 1139 (Widener, J., dissenting).

67. United States v. Boulahanis, 677 F.2d 586, 589 (7th Cir. 1982) (the court admitted an unavailable witness' grand jury testimony because its content was probably true).

violate the confrontation clause if the testimony appears sufficiently reliable.[68] Like *West* and *Garner*, the court emphasizes corroboration as a means of satisfying the reliability requirement.[69]

The fact situation of the case decided by the Seventh Circuit parallels that of *West* and *Garner*. The defendants were accused of extortion.[70] The government alleged that they had gone to a Chicago social club, beaten the club's proprietor, destroyed several articles of furniture, and returned the following evening threatening the proprietor with similar incidents unless he paid them protection money.[71] A witness testified before a grand jury that he was present at the club on the nights the alleged incidents occurred.[72] He testified that he observed the defendants beat the club proprietor on the first evening and return te following night.[73] Fearing for his safety, the witness refused to testify at the defendants' trial.[74] As in the Fourth Circuit decisions, live testimony of eyewitnesses and an audio recording corroborated the grand jury testimony. The in-court testimony of several unidentified eyewitnesses[75] corroborated the grand jury testimony "on most points."[76] An audio recording of the club proprietor's meeting with the defendants on the second evening[77] corroborated the grand

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68. *See infra* notes 80-81 and accompanying text.

69. In admitting the unavailable witness' grand jury testimony, the Seventh Circuit emphasized that the testimony was "corroborated by other highly probative evidence." Other factors found by the court to help satisfy the reliability requirement were that the witness was under oath when testifying before the grand jury and that his statements were made voluntarily. *Boulahanis*, 677 F.2d at 589.

70. *Id.* at 587

71. The defendants told the club proprietor "that if he did not pay them $300 for the past month and $500 per month thereafter for allowing gambling in the club, they would shut it down, while if he did pay, they would not 'terrorize nobody more in here,' but would beat up anyone else who was trying to extort money" from the club. *Id.*

72. *Id.* at 588.

73. *Id.*

74. The witness feared he would be killed if he testified. The club proprietor had been murdered by persons unknown prior to the defendants' trial. The opinion clearly indicates, however, that no threats were made to the witness by the defendants regarding his testifying at their trial. *Id.* Thus, the issue of waiver is not present.

75. The opinion only identifies one of the eyewitnesses, and fails to indicate the specific facts to which the eyewitnesses testified.

76. *Boulahanis*, 677 F.2d at 588.

77. Prior to the events of the second evening, the club proprietor went to the Federal Bureau of Investigation (FBI) to report the incident of the prior evening. The FBI equipped him with a recording device which was strapped to his ankle. He wore the device that evening and thereby recorded his conversation with the defendants. It was that very conversation in which the defendants threatened the proprietor with further violence. *Id.* at 587.

jury testimony "at every point."[78] This corroborating evidence ultimately provided the principal means by which the defendants' convictions were secured.[79]

The approach utilized by the Seventh Circuit in deciding the admissibility of the unavailable witness' grand jury testimony remained that of determining whether there existed sufficient corroborative evidence to ascertain that the testimony was reliable.[80] However, the admissibility test enunciated by the Seventh Circuit differs from that articulated by the Fourth.[81] The Seventh Circuit deems hearsay testimony admissible under the confrontation clause if the witness offering the hearsay testimony is subject to cross-examination, and the circumstances under which the hearsay statements are made indicate that its content is "probably true."[82] The court found the cross-examination requirement inapplicable to the case at bar because the accuracy of the transcript in recording the grand jury testimony was not challenged.[83] This holding was premised upon the court's belief that the purpose of the cross-examination requirement is to assure that the hearsay statement is accurately reported.[84] The court found the truthfulness requirement satisfied by the highly probative corroborating evidence: the live testimony of the eyewitnesses and the audio recording of the defendants' conversation with the club proprietor.[85] Accordingly, the court found no sixth amendment violation in admitting the grand jury testimony.[86]

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78. *Id.* at 588.

79. *Id.* at 589.

80. The test employed by the Seventh Circuit required hearsay statements to be "probably true" for them to be admissible under the confrontation clause. The court determined that evidence corroborating the grand jury testimony met the truthfulness requirement. *Id.*

81. The test enunciated in *Garner* and *West* required that hearsay testimony bear sufficient guarantees of reliability and the circumstances surrounding that testimony provide the jury with a sufficient basis to judge its trustworthiness. *See supra* notes 51-52 and accompanying text.

82. *Boulahanis*, 677 F.2d at 589. To support its test of admissibility, the court cites Davis v. Franzen, 671 F.2d 1056, 1058 (7th Cir. 1982). In *Franzen* the Seventh Circuit emphasized that it would continue to follow the *Dutton* plurality opinion. The court stated that it extracted from that opinion the proposition that the confrontation clause does not bar the admission of hearsay statements when the witness offering the hearsay statement is cross-examined and the circumstances surrounding the statement indicate that the statement is true. *Id.* at 1058 For discussion of *Dutton* see *infra* notes 169-224 and accompanying text.

83. *Boulahanis*, 677 F.2d at 589.

84. *Id.*

85. In holding that the truthfulness requirement was satisfied by the corroborative evidence, the court cited the *West* decision. *Id.* (citing *West*, 574 F.2d at 1136-38).

86. *Id.*

The third and final circuit court to admit an unavailable witness' grand jury testimony also adopts the reliability approach. The Sixth Circuit agrees that the admission of an unavailable witness' grand jury testimony does not violate a criminal defendant's right to confrontation.[87] The admissibility test enunciated by the court, that an unavailable witness' grand jury testimony must possess adequate "indicia of reliability,"[88] is very similar to the test established in *West* and *Garner*.[89] However, while the Fourth Circuit primarily relied upon corroborative evidence to satisfy the reliability requirement, the Sixth Circuit considers additional factors.[90]

The facts of the case decided by the Sixth Circuit are unique. A witness testified before a grand jury that, contrary to the defendant's alibi, she was not with the accused at the time of his alleged theft.[91] Thereafter, the witness married the defendant, and at his trial, exercised her privilege not to testify against her spouse.[92] The trial court declared the witness unavailable pursuant to Fed. R. Evid. 804(a)[93] and admitted her grand jury testimony into evidence.[94]

The Sixth Circuit determined that three considerations provided the witness' grand jury testimony with sufficient "indicia of reliability:"[95] the existence of other admissible evidence corroborating

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87. United States v. Barlow, 693 F.2d 954, 965 (6th Cir. 1982).

88. In establishing its admissibility test, the Sixth Circuit cited Ohio v. Roberts, 448 U.S. 56 (1980), the Supreme Court's most recent confrontation-hearsay decision. Despite relying upon *Roberts* in establishing its admissibility test, the Sixth Circuit concluded that *Roberts* did not provide much guidance in resolving the issue before it. The court found that *Roberts* "left unresolved . . . whether prior cross-examination, or the opportunity to cross-examine, is essential to satisfy the constitutional requirements." *Id.* at 963-64. *See infra* notes 245-67 and accompanying text for full discussion of *Roberts*.

89. The admissibility test established by the Sixth Circuit is identical to the first part of the Fourth Circuit's admissibility test, that hearsay testimony must bear sufficient guarantees of reliability. *See supra* notes 51-52 and accompanying text for a discussion of the Fourth Circuit admissibility test. However, the admissibility test articulated in *West*, 574 F.2d at 1136, and *Garner*, 574 F.2d at 1144, includes the requirement that the circumstances surrounding the testimony provide a sufficient basis for the jury to judge truthfulness. The *Barlow* admissibility test does not.

90. *See infra* notes 95-99 and accompanying text.

91. *Barlow*, 693 F.2d at 957.

92. *Id.*

93. *Id.* at 961.

94. *Id.* at 957.

95. To support its determination that cross-examination of a hearsay declarant is not a prerequisite for the grand jury testimony's admission, and that the testimony possessed adequate "indicia of reliability," the court relied upon *Dutton*, 400 U.S. at

the witness' statements,[96] the witness' personal knowledge of the facts to which she testified, and the absence of any motive for the witness to lie or embellish her story.[97] The court failed to identify the corroborating evidence.[98] Neither did it explain whey the witness had no motive to lie. Nevertheless, the Sixth Circuit found the grand jury testimony admissible under the confrontation clause.[99]

As was the case in *West* and *Garner*,[100] the Sixth Circuit acknowledged that the approach it had adopted, in determining the admissibility of an unavailable witness' grand jury testimony under the confrontation clause, parallelled that utilized to determine admissibility under the hearsay rules.[101] The court conceded that from its opinion it would appear that the confrontation clause and Fed. R. Evid. 804(b)(5) are functional equivalents.[102] This argument, that the admissibility tests employed by the Fourth, Seventh, and Sixth Circuits relegate the confrontation clause to the status of a mere evidentiary rule, has become the focal point of those who contend that the sixth amendment bars the admission of an unavailable witness' grand jury testimony.

The Circuit Barring Grand Jury Testimony of Unavailable Witnesses

Only one circuit holds that the admission of an unavailable witness' grand jury testimony violates a criminal defendant's right

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74. *Barlow*, 693 F.2d at 964-65. The Sixth Circuit held that the very same factors which supplied the necessary "indicia of reliability in *Dutton* were also present in *Barlow*. *Id.* at 965. For a full discussion of *Dutton*, see *supra* notes 169-224 and accompanying text.

96. The Sixth Circuit placed less emphasis on the presence of corroborating evidence. The court's reasons for so doing may lie with the unique nature of the grand jury testimony. Unlike *West*, *Garner*, and *Boulahanis*, the grand jury testimony in *Barlow* provided only circumstantial evidence of the defendant's guilt. In discussing the admissibility of the testimony under Fed. R. Evid. 804(b)(5), the court held that where testimony does not relate direct evidence of criminal activity, the amount of corroboration required to provide the necessary circumstantial guarantees of trustworthiness need not be as great. *Barlow*, 693 F.2d at 962.

97. *Id.* at 965.

98. The *Barlow* opinion only indicates that the corroborating evidence is both physical and testimonial. *Id.* at 962.

99. *Id.* at 965.

100. *See supra* notes 57-60 and accompanying text.

101. *Barlow*, 693 F.2d at 965.

102. The specific language used by the court was, "as discussed in the text, it would appear from the analysis of this case that Rule 804(b)(5) and the confrontation clause are functional equivalents." *Id.* at 965 n.10.

to confront the witnesses gainst him.[103] Conceding that the confrontation clause does not altogether bar the admission of uncross-examined hearsay testimony against criminal defendants,[104] the Tenth Circuit[105] nevertheless opposes dispensing with cross-examination as a required element of confrontation when hearsay evidence consists of an unavailable witness' grant jury testimony. Accordingly, in *United States v. Balano*, the court barred the admission of the hearsay testimony because the defendant had not been afforded an opportunity to cross-examine the grand jury witness.[106]

The approach adopted by the Tenth Circuit in deciding the admissibility question is essentially that which was advocated in Judge Widener's dissenting opinion in *West*. Judge Widener argues that the approach employed by the *West* majority, that of ascertaining whether the prior testimony is in fact truthful, relegates the confrontation clause to the status of an evidentiary rule.[107] His dissent maintains that the confrontation clause was intended to regulate trial procedure in criminal actions by compelling the physical presence of the accusor before the defendant and jury.[108] He postulates that the proper approach should be one of determining whether there is adequate physical confrontation.[109] Employing this line of reasoning, Judge Widener concluded that the nature of grand jury proceedings is such that the admission of an unavailable witness' grand jury testimony is equivalent to "trial by affidavit, the very practice against which

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103. *Balano*, 618 F.2d at 624. The waiver question was presented in *Balano*, the defendants having caused the grand jury witness' unavailability. *Id.* at 626. However, dissimilar to the Eighth and Fifth Circuits (*see supra* note 14), the Tenth Circuit found it necessary to decide whether a confrontation violation exists before resolving the waiver issue. *Balano*, 618 F.2d at 626.

104. *Id.* at 628.

105. This portion of the majority opinion reflects only the analysis of its author, Judge McKay. *Id.* at 626. In the concurring opinion, Judges Holloway and Logan neither agreed nor disagreed with Judge McKay's analysis. They found it unnecessary to determine whether the defendant's confrontation rights were violated because the defendant had waived his confrontation rights. *Id.* at 633 n.3 (Holloway, J. and Logan, J., concurring).

106. *Id.* at 628.

107. Justice Widener stated, "The majority's treatment of the confrontation clause . . . reduces the constitutional provision to the status of a mere rule of evidence." *West*, 574 F.2d at 1139 (Widener, J., dissenting).

108. *Id.* at 1140.

109. Justice Widener emphasized that "the whole question is not, as the majority treats it, whether the testimony is in fact truthful; rather, the issue is whether there has been such 'adequate confrontation' as to satisfy the requirements of the Constitution's Sixth Amendment." *Id.* at 1139 (citing *Dutton*, 400 U.S. at 97 (Harlan, J., dissenting)).

the Confrontation Clause was designed to protect."[110] Consequently, the *West* dissent found the prior testimony inadmissible.[111]

The Tenth Circuit also rejected the approach employed by the *West* majority, holding that the Fourth Circuit had erroneously subjugated the confrontation clause "to a mere consideration of evidentiary value."[112] The court concurred with the *West* majority that cross-examination is not the only means of qualifying prior recorded testimony for admission under the confrontation clause. However, the Tenth Circuit emphasized the importance the Supreme Court has placed upon cross-examination as a protector of confrontation.[113] Arguing that the inherent veracity of hearsay statements was not the sole concern of the confrontation clause, the Tenth Circuit found that the ultimate constitutional prescription of the clause was one of regulating trial procedure.[114] Hence, the court held the admission of an unavailable witness' grand jury testimony to be equivalent to trying a defendant on evidence consisting of *ex parte* depositions, the particular vice the confrontation clause was meant to suppress.[115] Here the court emphsized that it was the prosecution who had secured the witness' grand jury testimony.[116] Maintaining that gran jury proceedings no longer functioned as protectors of individual rights, it characterized grand juries as agents of the prosecution, and as the arm of the examining magistrate.[117] Accordingly, the court found that when the prosecution itself secures hearsay testimony, as is the case with grand jury testimony, that it was "unwilling to dispense with cross-examination as a required element of confrontation."[118] It therefore decided that the admission of the unavailable witness' grand jury testimony violates the sixth amendment.[119] In so holding, the Tenth Circuit created a split among the federal circuit courts of appeal.

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110. *Id.* at 1140.
111. *Id.* at 1141.
112. *Balano*, 618 F2.d at 627.
113. *Id.* at 628.
114. The specific language of the court was:

> The Confrontation Clause is not concerned only with the inherent veracity of hearsay statements. "[W]e should not be lured by the possible reliability of out-of-court statements, important as that is in the consideration of the problem as a rule of evidence, away from the ultimate constitutional prescription [of the Confrontation Clause], which is the regulation of trial procedure."

Id. at 627 (quoting *West*, 574 F.2d at 1139 (Widener, J., dissenting)).
115. *Id.* (citing California v. Green, 399 U.S. 149, 156 (1970)).
116. *Id.* at 627-28.
117. *Id.* at 627.
118. *Id.* at 628.
119. *Id.*

The discrepancy among the circuits concerning the admissibility of an unavailable witness' grand jury testimony reflects the circuits' disagreement over what are the true purposes of the confrontation clause. The circuits finding such evidence admissible contend that the purpose of the confrontation clause is to ensure that only reliable evidence will be admitted against defendants. The circuit holding that such prior testimony is inadmissible suggests that the real purpose of confrontation is to compel the physical presence of a witness before the defendant and jury. Ascertaining which is the true purpose of the confrontation clause requires a careful examination of Supreme Court precedent.

SUPREME COURT CONFRONTATION-HEARSAY DECISIONS

Supreme Court precedent provides minimal guidance for resolving the constitutionality of admitting into evidence an unavailable witness' grand jury testimony.[120] In addition to never having decided the issue, the Supreme Court has failed to set out a coherent theory clarifying the relationship between confrontation and hearsay. Commentators roundly criticize the Court for its inability to reconcile the confrontation clause and the hearsay rule.[121] One commentator refers to the Court's recent confrontation-hearsay decisions as "at best inconsistent and, at worst, irreconcilable."[122]

The Court's attempts to determine the proper relationship between confrontation and hearsay have produced two differing views of the confrontation clause. One line of the Court's confrontation-

120. Much of the Supreme Court's analysis of the right to confrontation and its relationship to hearsay evidence appears in recent decisions. Note, *Right of Confrontation, supra* note 8, at 146. The confrontation clause was not applied to the states until 1965. *Pointer*, 380 U.S. at 406-07. Since that time, the Court's consideration of the confrontation-hearsay issue has increased dramatically. From 1965 until 1973, the Court decided eight confrontation-hearsay decisions of considerable import: Chamber v. Mississippi, 410 U.S. 284 (1973); Mancusi v. Stubbs, 408 U.S. 204 (1972); *Dutton*, 400 U.S. at 74; *Green*, 399 U.S. at 149; Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968); *Douglas*, 380 U.S. at 415; *Pointer*, 380 U.S. at 400. There has been just one notable confrontation-hearsay decision handed down since that time, *Roberts*, 448 U.S. at 56.

121. *See generally* Baker, *supra* note 7, at 529; Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978) [hereinafter cited as Graham]; Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972); Natali, *supra* note 6, at 43. Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Weston, *supra* note 8, at 1185; Younger, *supra* note 2, at 32; Note, *Right of Confrontation, supra* note 8, at 127.

122. Natali, *supra* note 6, 47.

hearsay decisions view the clause as a guarantee of physical confrontation, namely cross-examination.[123] These cases indicate that the sixth amendment is violated where there is no opportunity for criminal defendants to cross-examine the witnesses testifying against them. The Court's most recent confrontation-hearsay decisions view the confrontation clause as a guarantee against the admission of unreliable evidence.[124] Both views merit a thorough analysis Discussion begins with an examination of the notion that confrontation guarantees cross-examination.

Confrontation as a Guarantee of Cross Examination

In several confrontation-hearsay decisions, the Supreme Court accentuated the relationship between confrontation and cross-examination, indicating that the lack of opportunity to cross-examine certain hearsay declarants violates a criminal defendant's right to confrontation.[125] These decisions view the confrontation clause as a guarantee of cross-examination.[126] Three relatively recent Supreme Court opinions embrace this view. These decisions, *Pointer v. Texas*,[127] *Douglas v. Alabama*,[128] and *Bruton v. United States*,[129] are the subject of frequent commentary.[130] An examination of the factual settings and holdings of these cases is essential to an understanding of the Court's reasoning in these decisions.

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123. *See infra* notes 125-68 and accompanying text for a full discussion of these Supreme Court decisions.

124. *See infra* notes 169-267 and accompanying text for a full discussion of these decisions.

125. *See generally* Younger, *supra* note 2, at 32; Comment, *Admission at Trial of Slain Informants Prior Grand Jury Testimony, supra* note 2, at 682; Note, *Right of Confrontation, supra* note 8, at 127.

126. *See e.g.*, Younger, *supra* note 2, at 32-35; Note, *Right of Confrontation, supra* note 8, at 130-32.

127. 380 U.S. 400 (1965).

128. 380 U.S. 415 (1965).

129. 391 U.S. 123 (1968).

130. Two other recent Supreme Court decisions, California v. Green, 399 U.S. 149 (1970), and Barber v. Page, 390 U.S. 719 (1968), also adopt the view that the confrontation clause guarantees cross-examination. In *Barber* the Court refused to admit the preliminary hearing testimony of a witness not present at the defendant's trial because he was incarcerated. 390 U.S. at 726. The Court found the witness not "unavailable" because good faith efforts of the prosecution to obtain his presence at trial were not made. *Id.* at 723-25. In *Green* the Court permitted the admission of a witness' preliminary hearing testimony because the witness was available at trial for cross-examination. 399 U.S. at 153-65. Dictum in both decisions suggests that the preliminary hearing testimony would be admissible had the witness been unavailable at trial for cross-examination. In *Barber* the Court states:

The *Pointer* decision provides a factual setting analogous to that of the admission of an unavailable witness' grand jury testimony. At a preliminary hearing, a criminal defendant, who was without counsel, was identified by a witness as the perpetrator of a robbery.[131] The defendant did not cross-examine the witness at the hearing.[132] Having moved out of state, the witness was not available to testify at the defedant's trial.[133] As a result, at trial the prosecution introduced into evidence the transcript of the witness' preliminary hearing testimony.[134]

Using strong language, the Court found that the admission of the preliminary hearing testimony violated the defendant's right to confrontation because the accused was not afforded an adequate opportunity to cross-examine the witness.[135] The Court emphasized that

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> Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. . . . The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.

390 U.S. 725-26. The specific language of the Court in *Green* is to the same effect:

> We also think that Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial.

399 U.S. at 165. As dicta, the Court's remarks in *Barber* and *Green* are of limited value. The purpose of this note is to determine the admissibility of grand jury testimony of witnesses whose unavailability is not disputed. Because *Barber* and *Green* turn on the availability of the hearsay declarant to testify at the defendant's trial, an analysis of these decisions is not warranted. The Supreme Court decisions discussed in this portion of the note involve the testimony of witnesses whose availability at trial is not questioned by the Court.

131. *Pointer*, 380 U.S. at 401.

132. *Id.*

133. *Id.*

134. *Id.*

135. The Court held that:

> Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. . . . Because the transcript of Phillips' statement offered against

the primary purpose of the confrontation clause is to provide criminal defendants with the opportunity to cross-examine witnesses testifying against them.[136] In so holding, the Court recognized the indispensability of cross-examination in assuring the accuracy of the truthfinding process. The Court distinctly stated:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.[137]

Thus, at the core of the *Pointer* decision is the Court's belief that cross-examination is essential to the truthfinding process, so as to guarantee criminal defendants a constitutionally fair trial.[138]

The implications of the *Pointer* decision are obvious. If a criminal defendant's right to confrontation is offended by the admission of an unavailable witness' preliminary hearing testimony merely because the defendant is without counsel at that hearing, and thereby not provided with an adequate opportunity to cross-examine the witness, surely a defendant's confrontation rights are violated when the defendant has no right whatsoever to cross-examine the witness. Such is the case when an unavailable witness' grand jury testimony is admitted

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> petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment.

Id. at 406-07.

136. The specific language of the Court was, "As has been pointed out, a major reason underlying the constitutional rule is to give a defendant charged with crime an opportunity to cross-examine the witnessess against him." *Id.*

137. *Id.* at 404.

138. The Court stressed the fundamental nature of the right to cross-examine witnesses, stating:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Id. at 405.

into evidence. Similar to a preliminary hearing, the function of a grand jury proceeding is to determine whether probable cause exists to believe a crime has been committed.[139] Preliminary hearings, however, are primarily adversarial, affording the accused an opportunity to cross-examine witnesses who testify against him, call his own witnesses, and introduce evidence proving his innocence.[140] Grand jury proceedings are *ex parte* in nature. At grand jury hearings, the accused has no opportunity to cross-examine witnesses testifying against him.[141] He is not provided an opportunity to present evidence on his own behalf, nor is the prosecuting attorney obligated to do so.[142] Had the *Pointer* defendant himself sought to question the witness at the preliminary hearing and the court denied him an opportunity to do so, his situation would be analogous to that of an accused indicted by a grand jury. The *Pointer* decision, therefore, implies that the confrontation clause bars the admission of an unavailable witness' grand jury testimony. The Court's holdings in *Douglas v. Alabama*,[143] *Pointer's* companion case, also indicate that the introduction of the grand jury testimony violates the confrontation clause.

In *Douglas*, the Court again suggests that the lack of opportunity to cross-examine witnesses violates the confrontation clause. In this case, an accomplice's confession, inculpating the defendant, was read to the jury despite its inadmissibility as evidence.[144] The accomplice, who had already been tried and convicted, refused to testify, asserting his privilege against self-incrimination.[145] In light of the defedant's inability to cross-examine his accomplice, the Court found that the

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139. Keeney & Walsh, *American Bar Association's Grand Jury Principles: A Critique From a Federal Criminal Justice Perspective*, 14 IDAHO L. REV. 545, 550 (1978).

140. *See generally* Y. KAMISOR, W. LAFAVE, & J.ISRAEL, MODERN CRIMINAL PROCEDURE, 1000-007 (5th ed. 1980).

141. *See generally* Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33 (1979).

142. Because the prosecution has no affirmative duty to present or disclose evidence which tends to negate the accused guilt, grand jury proceedings do not provide the "full story" surrounding the accused guilt or innocence. *See e.g.*, Comment, *Grand Jury—Prosecuting Attorney Generally Not Obligated to Present Evidence Favorable to the Defense*, 11 RUT.-CAM. L. J. 359 (1980). Thus, when the prosecution examines grand jury witnesses, he only attempts to elicit testimony unfavorable to the accused. As such, the testimony of a grand jury witness tends to be one sided, and does not provide a full factual development of what the witness has seen or heard.

143. 380 U.S. 415 (1965).

144. *Douglas*, 380 U.S. at 417-18.

145. *Id.* at 416.

defendant's sixth amendment right to confrontation had been violated.[146]

The Court emphasized that the primary interest secured by the confrontation clause was the right of a criminal defendant to cross-examine witnesses testifying against him:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of 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.[147]

Implicit in the *Douglas* decision is the Court's belief that a constitutionally fair trial mandates the kind of factual development that can only be made possible through the corrective test of cross-examination. Because the circumstances surrounding an unavailable witness' grand jury testimony do not allow cross-examination of the hearsay declarant, such evidence is not subject to the type of factual development that the confrontation clause requires. Thus, like *Pointer*, the *Douglas* decision indicates that the confrontation clause bars the admission of an unavailable witness' grand jury testimony. The same is true of *Bruton v. United States*,[148] another Supreme Court decision that emphasizes cross-examination in determining the admissibility of hearsay evidence.

The fact situation of *Bruton* is analogous to that of *Douglas*. The confession of a co-defendant, inculpating the defendant, was admitted into evidence.[149] The trial court carefully instructed the jury that the confession was admissible only against the co-defendant and that it should be disregarded in determining the defendant's guilt or innocence.[150] The co-defendant chose not to testify at trial and hence,

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146. The specific language of the Court was, "In the circumstances of this case, petitioners inability to cross-examine Loyd [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.* at 419.

147. *Id.* (citing *Mattox*, 156 U.S. at 242-43).

148. 391 U.S. 123 (1968).

149. *Bruton*, 391 U.S. at 124.

150. *Id.* at 125.

the defendant was unable to cross-examine him.[151] Having determined that there was substantial risk that the jury considered the co-defendant's confession in determining the defendant's guilt or innocence despite the trial court's limiting instructions, the Court was left with the question of whether the defendant's sixth amendment right to confrontation had been violated.[152]

Quoting numerous passages from *Pointer* and *Douglas*, the Court found that the defendant's right to confrontation was violated because he was not provided with an opportunity to cross-examine his co-defendant.[153] Again, the Court emphasized that the right to confrontation implies the right of cross-examination.[154] It stressed that cross-examination of witnesses is the primary purpose of the confrontation clause.[155] The implication of the *Bruton* decision is clear. Viewed as a guarantee of cross-examination, the confrontation clause should bar the introduction of an unavailable witness' grand jury testimony because the circumstances surrounding the admission of that testimony do not permit cross-examination of the hearsay declarant.

Implicit in the *Bruton* decision, as well as in *Pointer* and *Douglas*, is the importance the Supreme Court attaches to cross-examination in assuring the accuracy of the truthfinding process in its full context. Underlying the Court's determination that the confrontation clause guarantees cross-examination is the belief that a constitutionally fair trial requires the kind of factual development that can only be provided through the corrective test of cross-examination. Referred to as the "greatest legal engine ever invented for the discovery of truth,"[156] the value of cross-examination in exposing falsehood and bringing out the truth at the trial of a criminal defendant has never been disputed.[157] Cross-examination not only permits the defendant

151. *Id.* at 128.

152. *Id.* at 126.

153. The specific language used by the Court was: "Plainly the Evans' [co-defendant] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. petitioner thus was denied his constitutional right of confrontation." *Id.* at 127-28.

154. Quoting *Pointer*, the Court maintained "'that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him' secured by the Sixth Amendment." *Id.* at 126 (quoting *Pointer*, 380 U.S. at 404).

155. *Id.*

156. 5 WIGMORE, EVIDENCE §1367 (3d ed. 1940).

157. "In spite of abuses and frequently unskillful management it is recognized by all American courts and all courts under the English system of jurisprudence as being an indispensible tool in litigation." R. REDFIELD, CROSS EXAMINATION AND THE WITNESS 13 (1963).

a means by which to test the accuracy of a witness' prior statements, it affords the defendant an opportunity to explore the breadth of a witness' testimony.[158] It enables the defendant "to test the witness' recollection, to probe into the details of his alibi, or to sift his conscience,"[159] so as to ensure that the "full story" is made known to the fact finder. The absence of cross-examination calls into question the ultimate integrity of the fact-finding procedure.[160]

Admittedly, the emphasis *Pointer*, *Douglas*, and *Bruton* place upon cross-examination as a protector of confrontation values is inconsistent with the Court's prior determination that dying declarations[161] are admissible under the confrontation clause.[162] The circumstances surrounding the making of a dying declaration, and its admission into evidence, never afford criminal defendants an opportunity to cross-examine the hearsay declarant.[163] The admissibility of this uncross-examined hearsay testimony is contrary to the Court's equation of confrontation and cross-examination in *Pointer, Douglas,* and *Bruton.* If the confrontation clause is truly a guarantee of cross-examination, as these three cases suggest, dying declarations should not be admissible.

The Court failed to reconcile its holdings in *Pointer, Douglas,* and *Bruton* with the admissibility of dying declarations.[164] In *Douglas* and *Bruton,* the admissibility of dying declarations is not even discussed. In *Pointer,* the Court acknowledged the admissibility of dying declarations and noted that there may exist "analogous situations which might not fall within the scope of the constitutional rule re-

158. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court found that a criminal defendant was denied due process because a state evidentiary rule prevented a criminal defendant from cross-examining a witness. The Court stressed the importance of cross-examination as a means by which to ensure the accuracy of the truth-finding process. "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truthfinding process." *Id.* at 295.

159. *Id.* (citing *Mattox*, 156 U.S. at 242).

160. *Id.* (citing *Berger v. California*, 393 U.S. at 242-43).

161. Statements made by a declarant while believing that his death is imminent, concerning the circumstances surrounding his death are dying declarations. *See generally* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §282 at 680-81 (E. Cleary 2d ed. 1972). Generally, they are only admissible in criminal homicide prosecutions where the defendant is charged with the death of the declarant. *Id.*

162. The Supreme Court recognized the admissibility of dying declarations in *Mattox*, 156 U.S. at 240-44.

163. Dying declarations are admissible at trial only if the declarant is dead. *See supra* note 161. Thus, there is no opportunity to cross-examine the declarant at trial.

164. *E.g.*, Younger, *supra* note 2, at 33-35.

quiring confrontation of witnesses."[165] However, no argument was advanced by the Court to distinguish its decision from the admissibility of dying declarations. Without explanation, it summarily decided that the circumstances surrounding the admission of an unavailable witness' preliminary hearing testimony do not present an "analogous situation."[166]

The Court's inability to reconcile its holdings in *Pointer, Douglas,* and *Bruton,* with the admissibility of dying declarations is not surprising. The admissibility of dying declarations is premised upon the notion that the circumstances under which dying declarations are made, the declarant's sense of impending death, render them inherently truthful.[167] This suggests that the confrontation clause does not guarantee cross-examination, but that it merely ensures that only reliable evidence will be admissible against criminal defendants.[168] The Court expressly adopts this view of the confrontation clause in three subsequent confrontation-hearsay decisions.

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165. *Pointer*, 380 U.S. at 407.

166. *Id.*

167. Acknowledging the admissibility of dying declarations, the Court held that "the sense of impending death is presumed to remove all temptation to falsehood." *Mattox*, 146 U.S. at 244 (citing *Mattox*, 146 U.S. 140, at 142). This assumption is the subject of recent critical commentary. *E.g.*, Baker, *supra* note 7, at 550. The limitations generally imposed upon dying declarations, that they are admissible only in criminal homocide prosecutions where the defendant is charged with the death of the declarant, are inconsistent with the Court's determination that the statements are inherently truthful. *Id.*

168. The admissibility of dying declarations does not suggest that an unavailable witness' grand jury testimony is admissible. Dying declarations are admissible because the circumstances surrounding their elicitation, the declarant's sense of impending death, render the statements inherently reliable. The nature of grand jury proceedings is such that an unavailable witness' grand jury testimony could not be regarded as inherently reliable. Grand jury proceedings are one-sided affairs controlled by the prosecution. *See supra* note 142. They are referred to as the "agent of the prosecution," "tool of the executive," and "arm of the examining magistrate." *See* M. FRANKEL & G. NAFTALIS, THE GRAND JURY 99-102 (1977); Comment, *Grand Jury—Prosecuting Attorney Generally Not Obligated to Present Evidence Favorable to the Defense*, 11 RUT.-CAM. L. J. 359 (1980). *See also Balano*, 618 F.2d at 618 (nature of grand jury proceedings are a critical consideraton in finding grand jury testimony inadmissible). Because grand jurys not bound by normal evidentiary rules, they are allowed to hear evidence too unreliable to be admitted at trial. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33 at 49 (1979). For example, a grand jury witness' hearsay testimony is admissible as evidence at a grand jury hearing even if the hearsay statement does not fall under a traditional hearsay exception. As such, an unavailable witness' grand jury testimony cannot be characterized as inherently reliable. The admissibility of dying declarations is, therefore, distinguishable from the inadmissibility of an unavailable witness' grand jury testimony.

Confrontation as a Guarantee Against the Admission of Unreliable Evidence

Three of the Supreme Court's most recent confrontation-hearsay decisions[169] abandon the view that a criminal defendant's lack of opportunity to cross-examine the witnesses against him violates the confrontation clause. Deciding that the admission of hearsay evidence bearing sufficient "indicia of reliability" does not offend the confrontation clause, *Dutton v. Evans*,[170] *Mancusi v. Stubbs*,[171] and *Ohio v. Roberts*,[172] view the confrontation clause as a guarantee against the admission of unreliable hearsay evidence. In so holding, the Court very nearly constitutionalizes the hearsay rule.[173] To understand fully the Court's reasoning requires a thorough examination of the facts and holdings of *Dutton, Mancusi,* and *Roberts,* focusing upon the factors supplying the requisite "indicia of reliability."

The Court first articulated the "indicia of reliability" standard in the plurality opinion of *Dutton v. Evans*.[174] Subject to incessant commentary, the *Dutton* decision has slight precedential value[175] since no opinion of the Court commanded a majority.[176] Nevertheless, the circuits admitting unavailable witnesses' grand jury testimony heavily rely upon this decision for support.[177] Therefore, the *Dutton* opinion merits considerable discussion.

The fact situation of *Dutton* is analogous to those instances in which the circuits have admitted unavailable witnesses' grand jury testimony in one critical respect. In both situations, the circumstances

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169. Ohio v. Roberts, 448 U.S. 56 (1980); Mancusi v. Stubbs, 408 U.S. 204 (1972); and Dutton v. Evans, 400 U.S. 74 (1970).

170. 400 U.S. 74 (1970).

171. 408 U.S. 204 (1972).

172. 448 U.S. 56 (1980).

173. *See* Younger, *supra* note 2, at 41; *see also* Note, *Right of Confrontation*, *supra* note 8, at 134.

174. In setting out the "indicia of reliability" test, the Court stated that the presence of "indicia of reliability" is "determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." *Dutton*, 400 U.S. at 89.

175. Younger, *supra* note 2, at 39.

176. Justice Stewart's plurality opinion was concurred in by Justices Blackmun and White, and Chief Justice Burger; Justice Harlan concurred in the result. *Dutton*, 400 U.S. at 75. Justices Black, Douglas, and Brennan concurred in Justice Marshall's dissent. *Id.* at 100.

177. The circuits that admit unavailable witnesses' grand jury testimony all cite the *Dutton* decision for support. *See supra* notes 53-56, 82, 95, and accompanying text.

surrounding the admission of the hearsay evidence did not afford the criminal defendant an opportunity to cross-examine the hearsay declarant.[178] The defendant in *Dutton* and two co-conspirators were charged with murder.[179] At the defendant's trial, the cell-mate of one co-conspirator was called to testiy.[180] That witness described an occasion when the co-conspirator stated to him that, "if it hadn't been for that dirty son-of-a-bitch, Alex Evans [the defendant], we wouldn't be in this now."[181] The prosecutor did not call upon the co-conspirator to testify, nor did he explain his reason for not doing so. Despite the defendant's objection that his lack of opportunity to cross-examine his co-conspirator violated his right to confrontation, the trial court admitted the witness' inculpating hearsay statement.[182]

Deciding that the declaration of the absent and previously unconfronted co-conspirator bore sufficient "indicia of reliability," the Court found that the admission of the hearsay evidence did not offend the confrontation clause.[183] In so holding, the Court specifically identified four indicators of reliability: first, because the co-conspirator's statement "contained no express assertion of past fact, . . . it carried on its face a warning to the jury against giving the statement undue weight;"[184] second, the co-conspirator's personal knowledge of the crime charged against the defendant was clearly established by other admissible evidence;[185] third, the circumstances surrounding the co-conspirator's hearsay declaration were such that

178. In each circuit decision that admits the grand jury testimony of an unavailable witness, the criminal defendant was not afforded an opportunity to cross-examine the grand jury witness. *See supra* notes 25-27 and accompanying text.

179. *Dutton*, 400 U.S. at 76.

180. *Id.* at 77.

181. *Id.*

182. The evidence was admitted under Georgia's version of the conspiratorial-admission exception to the hearsay rule. *Id.* at 77-78.

183. The opinion sets forth four considerations supporting the credibility of the co-conspirator's out-of-court declaration and concludes that "there was no denial of the right to confrontation." *Id.* at 88-89.

184. The Court reasoned that since the co-conspirator's hearsay declaration did not contain an express assertion of the defendant's guilt, the jury was alerted not to give the hearsay statement "undue weight." *Id.* at 88.

185. The testimony of the defendant's other co-conspirator implicated the hearsay declarant and thereby established his personal knowledge of the identity and role of those persons responsible for murder charged against the defendant. As such, the Court concluded that it was "inconceivable" that cross-examination could have shown that the hearsay declarant did not have personal knowledge of the event his hearsay statement allegedly refers to. *Id.* at 88-89.

there was only a remote possibility of faulty recollection;[186] fourth, since the co-conspirator's statement was spontaneous and against his penal interests, there was no apparent reason for him to lie.[187] Along with these "indicia of reliability," the Court emphasized that the defendant "vigorously and effectively" cross-examined the trial witness on the question of whether the co-conspirator actually made the hearsay declaration.[188] Implying that the reliability of the co-conspirator's hearsay declaration was ensured by the defendant's confrontation of the trial witness, the Court concluded that it was inconceivable that cross-examination of the co-conspirator could prove the hearsay declaration unreliable.[189] The Court subsequently admitted the hearsay evidence, finding the defendant's lack of opportunity to cross-examine the co-conspirator excused by the assurances of reliability provided by the circumstances surrounding the hearsay testimony.[190]

The reasoning employed by the Court in setting out the considerations that provided the co-conspirator's hearsay declaration with sufficient "indicia of reliability" is tenuous. The Court advances no explanation in finding that the declarant's recollection could not have been faulty. His declaration was made some eighteen months after

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186. The Court does not explain why there was only a slight possibility of faulty recollection. The specific language of the Court was: "Third, the possibility that William's (the hearsay declarant) statement was founded on faulty recollection is remote in the extreme." *Id.* at 89. *See infra* notes 191-194 and accompanying text for further discussion of this consideration the Court identifies as an "indicia of reliability."

187. The specific language of the Court was:

> . . . the circumstances under which Williams [the declarant] made the statement were such as to give reason to suppose that Williams did not represent Evans' [the defendant] involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw [the witness]. His statement was spontaneous, and it was against his penal interest to make it.

Dutton, 400 U.S. at 89.

188. *Id.* at 87.

189. The Court did not explain why the defendant's cross-examination of the trial witness on the question of whether the co-conspirator actually made the hearsay declaration rendered the hearsay statement reliable:

> Evans [the defendant] exercised, and exercised effectively, his right to confrontation on the factual question whether Shaw [the trial witness] had actually heard Williams make the statement Shaw related. And 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. *See also*, Natali, *supra* note 6, at 51, where Professor Natali criticizes the Court's determination that cross-examination of the trial witness made the declarant's hearsay statement more reliable.

190. *Dutton*, 400 U.S. at 88-90.

the event is allegedly refers to occurred.[191] This suggests that there was a possibility of faulty recollection. It also indicates that his statement was not spontaneous.[192] Moreover, the declaration, standing alone, is much two ambiguous to amount to a declaration against interest.[193] Thus, it seems that the assurances of reliability surrounding the co-conspirator's hearsay declaration are not as strong as the Court believed them to be.[194] Nevertheless, the Court admitted the hearsay evidence in apparent violation of the defendant's sixth amendment right.

In admitting the co-conspirator's uncross-examined hearsay declaration, the Court abandons the view that cross-examination is the primary purpose of the confrontation clause.[195] The *Dutton* pluraltiy regards the confrontation clause as a guarantee against the admission of evidence not bearing sufficient "indicia of reliability."[196] It equates confrontation with reliability.[197] The pupose of the hearsay rule is also that of precluding the admission of unreliable evidence.[198] It too is a guarantee of reliability.[199] Thus, the *Dutton* plurality equates the confrontation clause with the evidentiary hearsay rule.[200] Ironical-

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191. Natali, *supra* note 6, at 52 n.57.

192. Under Georgia law, the *Dutton* hearsay declaration is not regarded as spontaneous. *Id.*

193. *Id. See also Dutton*, 400 U.S. 103-04 (Marshall, J., dissenting) (declarant's remark is so ambiguous that its meaning cannot be ascertained).

194. One commentator argues that the hearsay statement in *Dutton* is extremely unreliable because it could easily be interpreted as a "tawdry attempt to shift blame." Natalie, *supra* note 6, at 52 n.57.

195. The *Dutton* plurality expressly rejects the view that cross-examination is the primary purpose of the confrontation clause:

> The 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."

400 U.S. at 89 (quoting *Green*, 399 U.S. at 161). By deciding that hearsay evidence bearing "indicia of reliability" provides a court with a "satisfactory basis for evaluating the truth" of prior statements, the Court equates confrontation with reliability. Thus, the *Dutton* plurality views the confrontation clause as a guarantee of reliability, ensuring against the admission of unreliable evidence.

196. *See* Younger, *supra* note 2, at 41; *see also* Note, *Right of Confrontation*, *supra* note 8, at 134.

197. Younger, *supra* note 2, at 41.

198. *See generally* Yasser, *supra* note 11, at 587; Note, *Catchall Hearsay*, *supra* note 11, at 1361.

199. *See* Younger, *supra* note 2, at 36. *See also generally* Yasser, *supra* note 11, at 587; Note, *Catchall Hearsay*, *supra* note 11, at 1361.

200. *See e.g.*, Younger, *supra* note 2, at 41:

> . . . reliability is what confrontation guarantees. We have seen that it

ly, this is contrary to what the Court believed it was doing: "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now."[201] Nevertheless, by allowing the co-conspirator's uncross-examined hearsay statement to be admitted into evidence, the Court implies that the confrontation clause and evidentiary hearsay rule are co-extensive.[202] This, in effect, very nearly constitutionalizes the hearsay rule.[203]

The Court's equation of the confrontation clause and hearsay rule is the subject of considerable critical commentary.[204] However, this is by no means the only aspect of the *Dutton* decision that has been criticized. Much has been made of the Court's lack of analysis on the question of the co-conspirator's unavailability.[205] Prior holdings of the Court require the prosecution to make a good faith effort to secure a witness' trial attendance before it will admit that witness' prior recorded testimony.[206] The *Dutton* plurality made no inquiry into whether the *Dutton* prosecutor could have compelled the co-conspirator's attendance at the defendant's trial. It did not require that the prosecutor call the co-conspirator as a witness or explain his reason for not doing so. In discussing the co-conspirator's absence, the Court went no further than to remark that the defendant could have subpoenaed the hearsay declarant.[207] The *Dutton* plurality thereby suggests that the co-conspirator was not actually unavailable to testify at the defendant's trial. As such, the Court's admission of the co-conspirator's hearsay declaration is inconsistent with prior decisons in which the Court refused to admit uncross-examined hearsay testimony of declarants not shown to be actually unavailable.[208]

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is also what the hearsay rule guarantees. If the receipt of reliable hearsay does not offend the Confrontation Clause, then the right of confrontation is nothing more than the hearsay rule. Things that are equal to the same thing are themselves equal.

201. *Dutton*, 400 U.S. at 86.

202. Younger, *supra* note 2, at 41.

203. Note, *Right of Confrontation*, *supra* note 8, at 134.

204. *See, e.g.*, Younger, *supra* note 2, at 39-42; Note, *Right of Confrontation*, *supra* note 2, at 134. *See generally* Comment, *Admission at Trial of Slain Informant's Prior Grand Jury Testimony*, *supra* note 8, 683.

205. *See e.g.*, Baker, *supra* note 7, at 534; Younger, *supra* note 2, at 39; Note, *State Hearsay Exceptions for Co-conspirators Statement Held Not to Violate Sixth Amendment Confrontation Clause*, 49 N. CAR. L. REV. 788 (1971); *The Supreme Court 1970 Term*, 85 HARV. L. REV. 3, 188-99 (1971).

206. In Barber v. Page, 390 U.S. 719 (1968), the Court refused to admit a witness' preliminary hearing testimony because the prosecution failed to make a good faith effort to secure the witness' attendance at trial. *See supra* note 130.

207. *Dutton*, 400 U.S. at 88 n.19.

208. Younger, *supra* note 2, at 39.

Another aspect of the *Dutton* decision commonly viewed with disfavor by commentators concerns the Court's attempts to reconcile its admission of the uncross-examined hearsay testimony with its holdings in *Pointer, Douglas,* and *Bruton.*[209] At the outset of the *Dutton* plurality opinion, the Court emphasizes that unlike its prior confrontation-hearsay decisions, the hearsay evidence at issue in *Dutton* is neither "crucial" nor "devastating" to the defendant.[210] Noting that no less than twenty witnesses appeared and testified against the defendant, the Court stressed that the co-conspirator's hearsay declaration was of "peripheral significance at most."[211] The most logical and obvious implication of these findings is that *Dutton* is distinguishable from prior confrontation-hearsay decisions because the admission of the uncross-examined hearsay evidence is harmless error.[212] The *Dutton* plurality, however, did not reach this conclusion. There remain only two other plausible inferences that can be drawn from the Court's comments on the content of the hearsay evidence: the admission of the hearsay evidence was error, not harmless, but of an insufficient magnitude to overturn the defendant's conviction;[213] or, the admission of the hearsay evidence was not error, the degree of protection afforded a criminal defendant under the confrontation clause lessens as the adverse impact of an extra-judicial declaration decreases.[214] The former, a due process argument, [215] is inconsistent with the Court's assertion that *Dutton* is decided under the confrontation clause.[216] The latter is referred to as unsupportable and unworkable.[217] Neither ade-

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209. *See, e.g.*, Natali, *supra* note 6, at 50-52; Younger, *supra* note 2, at 39-40.

210. Having analyzed its holdings in *Pointer*, *Douglas*, and *Bruton*, the *Dutton* plurality concluded that, "this case does not involve evidence in any sense 'crucial' or 'devastating,' as did all the cases just discussed." *Dutton*, 400 U.S. at 87.

211. *Id.*

212. The emphasis the Court placed upon the content of the co-conspirators hearsay statement indicates that the "harmless error test was transparently in control. . . ." Natali, *supra* note 6, at 51.

213. Younger, *supra* note 2, at 40.

214. This view of the *Dutton* holdings was discussed and ultimately rejected by the Fourth Circuit in *West*, 574 F.2d at 1138. *See also The Supreme Court, 1970 Terms*, 85 HARV. L. REV. 3, 192, 196 (1971).

215. This view of the Court's holdings postulates that the admission of the co-conspirator's hearsay declaration was error, but of an "insufficient magnitude to warrant disturbing the conviction of so guilty a man." Younger, *supra* note 2, at 40. As such, it constitutes a due process argument. *Id.*

216. *Id.*

217. The Fourth Circuit found no basis for applying this rule. The court held that, "A flexible standard of more or less indicia of reliability triggered by suppositions about the force of the impact of the particular evidence upon the jury could hardly provide a workable standard." *West*, 574 F.2d at 1138.

quately distinguishes *Dutton* from those confrontation-hearsay decisions which view the confrontation clause as a guarantee of cross-examination.

Disregarding the critical commentary that surrounds the *Dutton* decision, a very strong argument can be made that the *Dutton* plurality's view of the confrontation clause would permit the admission of an unavailable witness' grand jury testimony.[218] Under *Dutton,* hearsay evidence is never rendered inadmissible merely because no opportunity to cross-examine the hearsay declarant is afforded a criminal defendant.[219] If hearsay evidence bears sufficient "indicia of reliability," the *Dutton* plurality would allow that evidence to be admitted under the confrontaion clause.[220] Thus, where an unavailable witness' grand jury testimony bears sufficient "indicia of reliability," the admission of that evidence would not offend the sixth amendment. The question that remains unresolved is whether an unavailable witness' grand jury testimony could carry sufficient "indicia of reliability" to permit its introduction into evidence. Admittedly, where grand jury testimony is strongly corroborated by other admissible evidence, such testimony would bear indicators of reliability equalling or, more likely, exceeding those associated with the *Dutton* hearsay evidence.[221] Thus, the *Dutton* opinion suggests that corroborated grand jury testimony of an unavailable witness is admissible under the confrontation clause.[222]

The controversial nature of the *Dutton* decision, however, cannot be ignored. As seen, the reasoning employed by the *Dutton*

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218. *See generally* Comment, *Admission at Trial of Slain Informant's Prior Grand Jury Testimony, supra* note 2, at 693.

219. The admission of the co-conspirator's uncross-examined hearsay declaration demonstrates that the *Dutton* plurality does not view the confrontation clause as a guarantee of cross-examination. *See supra* notes 195-203 and accompanying text.

220. This is precisely what the circuits have argued in admitting unavailable witnesses' grand jury testimony. *See supra* notes 53-56, 82, 95, and accompanying text.

221. This is not to say that corroboration is an extremely effective means of assuring the reliability of hearsay evidence. Rather, it reflects the tenuous nature of the Court's reasoning in setting out the considerations that provided the *Dutton* hearsay evidence with sufficient "indicia of reliability." *See supra* notes 183-94 and accompanying text.

222. Admittedly, in most instances grand jury testimony would include express assertions of past fact. Thus, the first of the four considerations that the Court sets out as supplying sufficient "indicia of reliability" in *Dutton* would almost never be present where grand jury testimony is introduced into evidence. *See supra* note 184 and accompanying text. Because the Court accorded no extraordinary significance to this consideration as a means by which to assure reliability, its non-existence where grand jury testimony is admitted into evidence is not of critical importance.

plurality is suspect in several instances.[223] Moreover, as a mere plurality opinion, the decision is of limited precedential value.[224] Therefore, in order to determine whether an unavailable witness' grand jury testimony is admissible under the reliability approach, the Court's application of the "indicia of reliability" test in subsequent decisions must be carefully examined.

The Court next employed the "indicia of reliability" test in *Mancusi v. Stubbs*.[225] The hearsay evidence at issue in *Mancusi* consists of an unavailable witness' former trial testimony.[226] The *Mancusi* defendant was charged with murder and kidnapping.[227] At the defendant's first trial, one of the kidnap victims testified against the defendant.[228] As a consequence of that witness' testimony, the defendant was convicted.[229] However, he was thereafter awarded a retrial.[230] Having moved out of the United States, the witness was not present to testify at the defendant's second trial.[231] The prosecutor therefore read into evidence the transcript of the witness' former trial testimony.[232] The defendant objected, contending that the admission of the hearsay evidence offended his sixth amendment right to confrontation.[233]

Citing *Dutton*, the Court decided that an unavailable witness'[234] former trial testimony is admissible if that testimony bears sufficient "indicia of reliability."[235] In determining whether the *Mancusi* witness' former trial testimony carried with it sufficient "indicia of reliability," the Court did not discuss the considerations that furnished the requisite indicators of reliability in *Dutton*. Neither did the Court concern itself with the question of whether the testimony was cor-

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223. *See supra* notes 191-217 and accompanying text.

224. Younger, *supra* note 2, at 39.

225. 408 U.S. 204 (1972).

226. *Id.* at 209.

227. The defendant was charged with murder in the first degree and two counts of kidnapping. *Id.* at 207.

228. *Id.* at 209.

229. *Id.* at 207.

230. The defendant was awarded a second trial on the ground that he had been denied effective assistance of counsel. *Id.* at 209.

231. The witness had taken up permanent residence in Sweden. *Id.*

232. *Id.*

233. *Id.*

234. The court held the witness unavailable for purposes of the confrontation clause, because the state was unable to compel the appearance of persons residing in foreign countries. *Id.* at 212.

235. The court stated that in order for an unavailable witness' prior recorded testimony to be admissible, that evidence "must bear some of these 'indicia of reliability' referred to in *Dutton*." *Id.* at 213.

roborated by other admissible evidence. Instead, the Court focused its inquiry upon the adequacy of the defendant's opportunity to corss-examine the witness at the initial trial.[236] Deciding that the defendant's counsel had effectively cross-examined the witness at the first trial,[237] the Court found that the defendant was provided with an adequate opportunity to cross-examine the witness and, therefore, the evidence bore sufficient "indicia of reliability."[238] Accordingly, the Court held that the admission of the former trial testimony did not violate the confrontation clause.[239]

Like *Pointer, Douglas,* and *Bruton,* the admissibility of the hearsay evidence in *Mancusi* turns upon the adequacy of the defendant's opportunity to cross-examine the hearsay declarant.[240] However, while *Pointer, Douglas,* and *Bruton* view the confrontation clause as a guarantee of cross-examination, in *Mancusi* the Court regards the clause as a guarantee of reliability.[241] It views cross-examination as merely a means by which to ensure reliability.[242] The Court does not assert that an unavailable witness' former trial testimony carries sufficient "indicia of reliability" only where the defendant is provided

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236. The specific language of the Court was, "Before it can be said that Stubbs' [the defendant] constitutional right to confront witnesses was not infringed, however, the adequacy of Holm's [the unavailable witness] examination at the first trial must be taken into consideration." *Id.* at 213. The Court identified no other considerations as "indicia of reliability."

237. *Id.* at 214.

238. The Court specifically found that the adequacy of the defendant's opportunity to cross-examine the witness at the frist trial satisfied the "indicia of reliability" test:

> Since there was an adequate opportunity to cross-examine Holm [the unavailable witness] at the first trial, and counsel for Stubbs [the defendant] availed himself of that opportunity, the transcript of Holm's testimony in the first trial bore sufficient "indicia of reliability" and afforded " 'the trier of fact a satisfactory basis for evaluating the truther of the prior statement.' "

Id. at 216 (citing *Dutton,* 400 U.S. at 89).

239. *Id.*

240. In *Pointer, Douglas,* and *Bruton,* the Court found the admission of hearsay evidence barred by the confrontation clause because the criminal defendant was not afforded an opportunity to cross-examine the hearsay declarant. *See supra* notes 135, 146, 153, and accompanying text.

241. The Court will not admit hearsay evidence unless that evidence bears "indicia of reliability." *See supra* note 235. This bars the admission of unreliable evidence which in effect guarantees reliability. *See also* Note, *The Right of Confrontation, supra* note 8, at 135.

242. The Court found the "indicia of reliability" test satisfied by the adequacy of the defendant's opportunity to cross-examine the hearsay declarant. *See supra* notes 235-39 and accompanying text.

with an adequate opportunity to cross-examine the witness. Nevertheless, the Court's failure to identify other "indicia of reliability," coupled with the importance the Court attaches to cross-examination as a means by which to assure sufficient reliability, suggests that uncross-examined prior recorded testimony of an unavailable witness might not bear the requisite indicators of reliability.[243] Thus, the *Mancusi* decision can be read as implying that an unavailable witness' grand jury testimony is inadmissible.[244] The Court's holdings in *Ohio v. Roberts*,[245] its most recent confrontation-hearsay decision, also indicate that grand jury testimony of an unavailable witness is inadmissible for lack of sufficient "indicia of reliability."

The hearsay evidence at issue in *Roberts* consists of an unavailable witness' preliminary hearing testimony.[246] The preliminary hearing witness in question had been a defense witness whose testimony was unfavorable to the defendant.[247] The state was unable to ascertain the whereabouts of the witness for testifying at the defendant's trial.[248] For this reason, the prosecutor introduced into evidence the transcript of the witness' preliminary hearing testimony.[249]

Adopting the reliability approach utilized in *Mancusi,* the Court decided that the admission of the unavailable[250] witness' preliminary hearing testimony would not violate the confrontation clause if that evidence bore sufficient "indicia of reliability."[251] In determining

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243. The *Mancusi* decision does not contain an exhaustive analysis of the confrontation-hearsay issue. Thus, the contention that *Mancusi* would bar the admission of uncross-examined prior recorded testimony of unavailable witnesses is not conclusive.

244. As seen, the circumstances surrounding the admission of an unavailable witness' grand jury testimony do not afford criminal defendants an opportunity to cross-examine the grand jury witness. Thus, an unavailable witness' grand jury testimony qualifies as uncross-examined hearsay evidence.

245. 448 U.S. 56 (1980).

246. *Id.* at 59.

247. The *Roberts* defendant was charged with forging checks. At the defendant's preliminary hearing, the defense counsel called and examined the witness in question, attempting to elicit from her an admission that she had given the defendant permission to use the checks he subsequently forged. *Id.* at 58.

248. *Id.* at 60.

249. *Id.* at 59.

250. The Court concluded that the prosecutor established the unavailability of the witness through what the Court determined to be a good faith effort to locate the declarant prior to trial. *Id.* at 74-77.

251. The specific language of the Court, was, "In sum, when a hearsay declarant is not present for cross-examination at trial, . . . his statement is admissible only if it bears adequate indicia of reliability." *Id.* at 66.

whether the witness' hearsay declaration carried sdufficient assurances of reliability, the Court did not concern itself with the considerations that supplied the requisite "indicia of reliability" in *Dutton.* Like *Mancusi,* the Court only considered the adequacy of the defendant's opportunity to cross-examine the hearsay declarant as the means by which to satisfy the "indicia of reliability" requirement.[252] The *Roberts* decision discusses no other factors indicating that the preliminary hearing testimony was reliable.

To determine whether the *Roberts* defendant was provided with an adequate opportunity to cross-examine the hearsay declarant, the Court carefully analyzed the defendant's direct examination of the witness at the preliminary hearing.[253] Noting that the defendant's attorney asked numerous leading questions,[254] the Court found that as a matter of form, the defense counsel's direct examination of the witness was the equivalent of cross-examination.[255] The Court next examined the substantive nature of the questions the defendant's attorney asked the witness.[256] It concluded that:

> . . . counsel's questioning comported with the principal purpose of cross-examination: to challenge "whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.[257]

Hence, the Court decided that the defendant's direct examination of the witness at the preliminary hearing provided the defendant with an adequate opportunity to cross-examine the unavailable hearsay declarant.[258] Accordingly, the Court found that the testimony

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252. To satisfy the "indicia of reliability" test, the Court focused its inquiry upon whether the defendant's direct examination of the witness was the equivalent to cross-examination at trial. *Id.* at 67-72.

253. *Id.* at 70-71.

254. The Court found that the defendant's attorney asked the witness "seventeen plainly leading questions." *Id.* at 70 n.11.

255. The Court held that, "counsel's questioning clearly partook of cross-examination as a matter of form. His presentation was replete with leading questions, the principal tool and hallmark of cross-examination." *Id.* at 70-71.

256. *Id.* at 71.

257. *Id.* (quoting, Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 HARV. L. REV. 1378 (1972).

258. The specific language of the Court was ". . . defense counsel in this case tested Anita's [the unavailable witness] testimony with the equivalent of significant cross-examination." *Id.* at 70.

bore sufficient "indicia of reliability" and was admissible under the confrontation clause.[259]

The reasoning employed by the Court in equating direct examination at a preliminary hearing with cross-examination at trial is tenuous. The nature and objective of a preliminary hearing and a trial differ considerably.[260] In a preliminary hearing, the ultimate issue is whether there exists probable cause to believe a crime has been committed and that the defendant committed it.[261] At trial, the ultimate issue is whether the defendant is guilty beyond a reasonable doubt.[262] Accordingly, a defense attorney's objectives in examining witnesses at a preliminary hearing differ significantly from that when questioning witnesses at trial. Consequently, at a preliminary hearing, the questioning of witnesses is much less thorough than their examination at trial.[263]

In *Roberts,* the Court briefly considered this argument, ultimately rejecting it.[264] The Court nevertheless acknowledged that some dif-

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259. *Id.* at 73.

260. In his dissenting opinion in *Green,* 399 U.S. at 195, Justice Brennan argued that because the nature and objectives of the two proceedings differ significantly, confrontation at a preliminary hearing cannot compensate for the absence of confrontation at trial. *See also* Note, *Right of Confrontation, supra* note 8, at 136-37.

261. *Green,* 399 U.S. at 197 (Brennan dissenting).

262. *Id.*

263. Justice Brennan noted several reasons why examination at preliminary hearings "pales beside that which takes place at trial." Each related to the nature of preliminary hearings as compared to trials:

> First, as noted, the objective of the hearing is to establish the presence or absence of probable cause, not guilt or innocence proved beyond a reasonable doubt; thus, if evidence suffices to establish probable cause, defense counsel has little reason at the preliminary hearing to show that it does not conclusively establish guilt—or, at least, he had little reason before today's decision. Second, neither defense nor prosecution is eager before trial to disclose its case by extensive examination at the preliminary hearing; thorough questioning of a prosecution witness by defense counsel may easily amount to a grant of gratis discovery to the State. Third, the schedules of neither court nor counsel can easily accommodate lengthy preliminary hearings. Fourth, even were the judge and lawyers not concerned that the proceedings be brief, the defense and prosecution have generally had inadequate time before the hearing to prepare for extensive examination. Finally, though counsel were to engage in extensive questioning, a part of its force would never reach the trial factfinder, who would know the examination only second hand.

Id.

264. Citing the majority opinion of *Green,* the Court refused to "disassociate preliminary hearing testimony previously subjected to cross-examination . . . from cross-examined trial testimony." *Roberts,* 448 U.S. at 72-73 (citing *Green,* 399 U.S. at 165).

ferences exist between the examination of witnesses at a preliminary hearing and that at trial.[265] Hence, the Court had good reason to bolster its opinion by identifying any additional considerations which indicated that the preliminary hearing testimony was reliable. Its failure to do so suggests that the circumstances surrounding the admission of an unavailable witness' preliminary hearing testimony do not provide alternative considerations which satisfy the "indicia of reliability" requirement.

Unlike preliminary hearing testimony, the circumstances surrounding the admission of an unavailable witness' grand jury testimony never afford a criminal defendant an adequate opportunity to cross-examine the hearsay declarant.[266] Thus, alternative means of satisfying the "indicia of reliability" requirement must be found for grand jury testimony to be admissible under the confrontation clause. The circumstances surrounding grand jury hearings are virtually identical to those associated with preliminary hearings. The only significant difference between the two proceedings is that preliminary hearings afford the accused an opportunity to call his own witnesses and cross-examine those who testify against him.[267] Since *Roberts* indicates that the circumstances surrounding the admission of an unavailable witness' preliminary hearing testimony do not furnish alternative considerations which satisfy the "indicia or reliability" requirement, it is only logical to assume that neither would the circumstances surrounding an unavailable witness' grand jury testimony. Thus, the *Roberts* decision suggests that an unavailable witness' grand jury testimony is inadmissible for lack of sufficient "indicia of reliability."

The circuits that have found unavailable witnesses' grand jury testimony admissible under the "indicia of reliability" approach[268] misinterpret *Dutton, Mancusi,* and *Roberts.* Each circuit that admits grand jury testimony of unavailable witnesses cites the *Dutton* plurality opinion for suport.[269] Their reliance upon this decision is mis-

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265. The Court acknowledged that testimony elicited at preliminary hearings merely approximates that which is elicited at trial. *Id.* at 69 (citing *Green,* 399 U.S. at 165).

266. *See supra* notes 141-42 and accompanying text.

267. *See supra* notes 139-42 and accompanying text.

268. All three federal circuit courts of appeals that admit grand jury testimony of unavailable witnesses have done so under the Supreme Court's "indicia of reliability" test. *See supra* notes 51-52, 82, 89, and accompanying text.

269. *See supra* notes 51-52, 82, 95 and accompanying text. *See also* Comment, *Admission at Trial of Slain Informant's Prior Grand Jury Testimony, supra* note 2, at 693, where the author concludes that the Fourth Circuit admits unavailable witness' grand jury testimony based upon the *Dutton* holding.

placed. Having failed to resolve the question of the hearsay declarant's unavailability,[270] the *Dutton* opinion represents an anomaly in this line of the Court's confrontation-hearsay decisions.[271] The holdings of the *Dutton* plurality ultimately rest upon the Court's determination that the hearsay evidence at issue was of "peripheral significance."[272] Each time the circuits have admitted an unavailable witness' grand jury testimony, that evidence was an important consideration in convicting the defendant.[273] The *Dutton* decision is, therefore, distinguishable from those instances when the circuits have admitted grand jury testimony. Accordingly, it does not support the proposition that an unavailable witness' grand jury testimony is admissible under the Court's "indicia of reliability" test. The same can be said about the *Mancusi* and *Roberts* decisions.

Neither *Mancusi* nor *Roberts* postulate that all hearsay evidence is inadmissible for lack of sufficient "indicia of reliability" absent an adequate opportunity for the defendant to cross-examine the hearsay declarant. However, by emphasizing cross-examination as a means by which to assure adequate reliability, and by failing to identify other "indicia of reliability," both decisions suggest that nothing other than cross-examination, or equivalent physical confrontation, can provide prior recorded testimony with the requisite assurances of reliability. Because the circumstances surrounding the elicitation and admission of an unavailable witness' grand jury testimony do not afford a criminal defendant an opportunity to cross-examine the hearsay declarant, or equivalent physical confrontation, that evidence is inadmissible for lack of sufficient "indicia of reliability."

In deciding that corroborated grand jury testimony of unavailable witnesses bears sufficient "indicia of reliability,"[274] the Fourth, Seventh, and Sixth Circuits reduce the confrontation clause to the status of

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270. The *Dutton* plurality implies that the declarant of the hearsay testimony at issue was available to testify at the defendant's trial. As such, *stare decisis* requires a holding that the defendant's lack of opportunity to cross-examine the hearsay declarant violates the confrontation clause. *E.g.*, Younger, *supra* note 2, at 39. The *Dutton* plurality did not resolve this issue. *See supra* notes 205-08 and accompanying text.

271. Comment, *The Confrontation Clause and the Catchall Exception*, *supra* note 12, at 707-08.

272. *Id. See generally* Natali, *supra* note 6, at 50-51.

273. *See* Comment, *Admission at Trial of Slain Informant's Prior Grand Jury Testimony*, *supra* note 2, at 693, where the author notes that the *West* grand jury testimony was a critical consideration in determining the defendant's guilt.

274. Each circuit that admits unavailable witness' grand jury testimony relies upon corroborative evidence to supply the necessary "indicia of reliability." *See supra* notes 57-58, 85, 96, and accompanying text.

the evidentiary hearsay rule.[275] These courts imply that evidence reliable enough to be admissible under the hearsay rule is reliable enough to be admissible under the confrontation clause. This is not always the case.[276] An unavailable witness' prior recorded testimony may be reliable enough to be admissible under the hearsay rule absent an opportunity for the criminal defendant to cross-examine the hearsay declarant.[277] However, the *Mancusi* and *Roberts* decisions indicate that an unavailable witness' prior recorded testimony does not carry adequate assurances of reliability to be admissible under the confrontation clause unless the criminal defendant is afforded an opportuity to cross-examine the witness.[278] The Fourth, Seventh, and Sixth Circuits ignore the emphasis the Supreme Court places upon physical confrontation as a means of assuring sufficient reliability. In so doing, they misapply the Court's "indicia of reliability" test. An unavailable witness' grand jury testimony does not bear sufficient "indicia of reliability" because the circumstances surrounding that hearsay testimony do not afford a criminal defendant an opportunity to cross-examine the hearsay declarant.

Thus, whether viewed as a guarantee against the admission or evidence not bearing sufficient "indicia of reliability," or as a guarantee of cross-examination, the confrontation clause bars the admission of an unavailable witness' grand jury testimony. Neither of the Supreme Court's interpretations of the confrontation clause dispense with cross-examination as a required element of confrontation when hearsay evidence consists of unavailable witness' prior recorded testimony. Both interpretations emphasize that substantial compliance with the purposes behind the confrontation requirement cannot be attained when hearsay evidence is an unavailable witness' prior recorded testimony, unless the criminal defendant is afforded an adequate opportunity to physically confront the hearsay declarant. The circumstances surrounding an unavailable witness' grand jury testimony never afford criminal defendants an opportunity to cross-examine the hearsay declarant. Accordingly, under both of the Court's views of the confrontation clause, the admission of an unavailable witness' grand

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275. *See supra* notes 107-15 and accompanying text.

276. The Supreme Court has "more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." *Green*, 399 U.S. at 155-56 (citing *Barber*, 390 U.S. at 719; *Pointer*, 380 U.S. at 400).

277. *See supra* note 13 and accompanying text. *See also* Comment, *Evidence—Hearsay*, *supra* note 62, at 416.

278. *See supra* notes 240-244, 260-266, and accompanying text.

jury testimony is an impermissible violation of a criminal defendant's confrontation rights.

Only one of four circuits that have decided the admissibility of an unavailable witness' grand jury testimony is cognizant of the emphasis the Supreme Court places upon cross-examination as a protector of confrontation values.[279] Refusing to reduce the confrontation clause to a mere consideration of evidentiary value, the Tenth Circuit found the hearsay evidence inadmissible under the confrontation clause because the criminal defendant was not provided with an opportunity to cross-examine the witness. Supreme Court precedent proves this to be the proper resolution of the admissibility of an unavailable witness' grand jury testimony.

CONCLUSION

The Supreme Court has yet to set out a coherent theory of the relationship between the confrontation clause and the hearsay rule. One line of the Supreme Court's confrontation-hearsay decisions views the confrontation clause as a guarantee that assures criminal defendants the opportunity to cross-examine witnesses testifying against them. A second line of the Court's confrontation-hearsay decisions indicates that the confrontation clause is a guarantee against the admission of unreliable evidence. Despite their difference in focus, both views emphasize cross-examination as the ultimate protector of confrontation values. Neither view dispenses with cross-examination as a required element of confrontation when hearsay evidence is prior recorded testimony. Hence, to resolve the admissibility of an unavailable witness' grand jury testimony it is unnecessary to decide which of the Court's theories of confrontation is "correct." The circumstances surrounding the elicitation and admission of an unavailable witness' grand jury testimony do not afford criminal defendants an opportunity to cross-examine the witness testifying against them. Thus, whether viewed as a guarantee of cross-examination, or as a guarantee of reliability, the confrontation clause bars the admission of an unavailable witness' grand jury testimony.

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279. *See supra* note 113 and accompanying text.