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Brian J. Hurley

CONFRONTATION AND THE UNAVAILABLE WITNESS: SEARCHING FOR A STANDARD

I. INTRODUCTION

The confrontation clause of the sixth amendment insures the criminal defendant the right to confront his accusers.[1] Part of the rationale underlying the concept of confrontation is that testimony by a witness against a criminal defendant will be more reliable if it is given in open court and in the presence of the accused, enabling the defendant to cross-examine the witness face-to-face. If confrontation was absolute, it would require that all evidence be given by live witnesses in open court. Obviously, this is not the case. The confrontation clause has never been held to be absolute.[2] Although a fundamental right,[3] the sixth amendment has been found to be satisfied in some situations where a face-to-face confrontation between witness and defendant is absent.[4] For example, it could be argued that the defendant's confrontation right is violated by the admission of hearsay statements.[5] Yet, the confrontation clause is not normally a bar to the admission of statements that meet a hearsay exception.[6]

Much has been written regarding the interplay between the confrontation clause and the hearsay exceptions.[7] *Ohio v. Ro-*

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1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. [Emphasis supplied.]

2. *See* Ohio v. Roberts, 448 U.S. 56, 64 (1980). *See also* Mancusi v. Stubbs, 408 U.S. 204, 212 (1972) (witness out of the country and recorded testimony held admissable at defendant's retrial); Mattox v. United States, 156 U.S. 237, 243 (1895) (dying declaration held admissable notwithstanding fact defendant never had an opportunity to confront the declarant). *See infra* notes 79-98 and accompaning text.

3. *See* Pointer v. Texas, 380 U.S. 400 (1965) (right of confrontation made applicable to the states through the fourteenth amendment).

4. *Roberts*, 448 U.S. at 64. *See also supra* note 2.

5. Hearsay is defined as: "a statement other than one made at trial or hearing offered in evidence to prove the truth of the matter asserted." BLACK'S LAW DICTIONARY 649 (5th ed. 1979).

6. *Roberts*, 448 U.S. at 64 (a well rooted hearsay exception does not violate the confrontation clause).

7. *See* F. HELLER, THE SIXTH AMENDMENT 105 (1951); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972) [hereinafter cited as Graham]; Jaffe, *The Constitution and Proof By Dead or Unconfrontable Declarants*, 33 ARK. L. REV. 227 (1979) [hereinafter cited as Jaffe]; Read, *The New Confrontation Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972) [hereinafter cited as Read]; Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76 (1971); Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979)

berts[8] established a two-prong test delineating when hearsay will be admissible against a criminal defendant and not violate the defendant's confrontation right. First, the prosecution must demonstrate that the witness is unavailable and cannot be produced at trial for confrontation.[9] Second, the unavailable witness' statement must meet the test of reliability.[10] Therefore, if a witness against a criminal defendant is unavailable to testify at trial, his hearsay statements will be admitted if the statements are reliable.[11]

There are two aspects of the criminal defendant's right of confrontation regarding witnesses testifying at trial.[12] The first involves the conduct of the prosecutor regarding his duty to attempt to make witnesses against the defendant available at trial.[13] The second aspect requires an analysis of the reliability of witness' hearsay statement.[14] Although the reliability aspect of confrontation has been extensively examined and scrutinized, similar analysis of the unavailability aspect is lacking. The purpose of this note is to examine the efforts a prosecutor must make before a witness against a defendant will be considered unavailable.

Many reasons exist for the unavailability of a witness. The witness may be unavailable due to acts of the prosecution or acts of the defendant.[15] If the prosecution is shown to have caused the

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[hereinafter cited as Westen, *Confrontation*]; Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 HARV. L. REV. 567 (1978) [hereinafter cited as Westen, *Unified Theory*]; *Westen, Compulsory Process II,* 74 MICH. L. REV. 191 (1975) [hereinafter cited as Westen *II*]; Younger, *Hearsay and Confrontation or, What Every Criminal Defense Lawyer Should Have in Mind When He Objects to the Prosecutor's Offer of Hearsay,* 2 NAT. J. CRIM. DEF. 65 (1976) [hereinafter cited as Younger]; Note, *The Confrontation Test for Hearsay Exceptions; An Uncertain Standard,* 59 CALIF. L. REV. 580 (1971) [hereinafter cited as *Uncertain Standard*]; Note, *The Supreme Court 1970 Term,* 85 HARV. L. REV. 38, 194 (1971) [hereinafter cited as *1970 Term*]; Note, *Confrontation and Hearsay,* 75 YALE L.J. 1434 (1966) [hereinafter cited as *Confrontation and Hearsay*].

8. 448 U.S. 56 (1980).

9. *Id.* at 66.

10. *Id. Roberts* dealt only with the relationship between hearsay and confrontation. While hearsay and confrontation overlap, the constitutional guarantee is in some ways broader. For example, confrontation insures the right of the defendant to be present at his own trial. *See* Illinois v. Allen, 397 U.S. 337 (1970).

11. A statement will be considered reliable if there are circumstantial guarantees of trustworthiness. *Roberts,* 448 U.S. at 65.

12. *Id.* at 65-66.

13. *Id. See also* Note, *1970 Term, supra* note 7, at 194.

14. *See supra* note 11.

15. *See,* Motes v. United States, 178 U.S. 458 (1900) (witness disappeared due to negligence of prosecution). If the defendant causes the unavailability of the witness

unavailability of a witness, it is reversible error to admit the witness' statement.[16] On the other hand, if the declarant is unavailable due to wrongful acts of the defendant, the accused cannot complain that his right of confrontation is violated by the admission of the declarant's statement.[17]

A witness may also be absent from trial for reasons that cannot be attributed to either acts of the defendant or of the prosecutor. Unavailability of a witness may result from a situation where the witness is present at trial but either cannot or will not testify.[18] On the other hand, the situation may arise where a necessary witness simply cannot be located.[19] When a witness, although present at trial, refuses to testify, the court makes a finding for purposes of confrontation that the witness is to be considered unavailable and if the witness' out-of-court statement is reliable, it will be admitted into evidence. The question of the witness' unavailability plays a much larger role in determining the defendant's confrontation right when the witness is not present at trial.

Before the trial court will consider whether an absent witness' statement contains the necessary reliability, the prosecution must, in some situations, show that it has made a good-faith effort to secure the witness' presence at trial.[20] To fulfill its duty under the confrontation clause, the prosecution must first be able to recognize when a good-faith effort is required. Next, the prosecution must know what is required to meet the good-faith standard. The requirement of a good-faith effort by the prosecution to locate and produce its witnesses at trial has resulted in inconsistent interpretations and applications of the unavailability aspect.[21]

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he waives the right of confrontation. There is disagreement among the circuit courts as to the standard of proof required to show waiver. *See* Steele v. Taylor 684 F.2d 1193, 1202 (6th Cir. 1982) (prosecution must show that the defendant caused the unavailability of the witness by a preponderance of the evidence). *But cf.* United States v. Thevis, 665 F.2d 616 (5th Cir. 1982) (court required clear and convincing standard).

16. Jaffe, *supra* note 7, at 239.

17. *Id.*

18. *See, e.g.,* California v. Green, 399 U.S. 149 (1970) (witness could not recall his earlier testimony); United States v. Barlow, 693 F.2d 954 (6th Cir. 1982) (witness would not testify at trial because she married the defendant after her statement against the defendant and before the trial); *Steele,* 684 F.2d 1193 (witness refused to testify on grounds of self incrimination).

19. *See Roberts,* 448 U.S. 56 (witness could not be located); *Mancusi,* 408 U.S. 204 (witness moved to foreign country); *Mattox,* 156 U.S. 237 (witness died before trial).

20. *Roberts,* 448 U.S. at 74. *See also* Barber v. Page, 390 U.S. 719, 725 (1968). *See infra* notes 30-40 and accompanying text.

21. *Compare* Graham, *supra* note 7, at 129 (if witness not crucial or devastating

Both courts and commentators disagree as to the issue of when the good-faith effort is required and about the scope of the requisite effort.[22] The objective is to set a standard for unavailability which prosecutors can follow, accomodating the state's interest in effective law enforcement and the confrontation rights of the defendant. This note will critique the existing guidelines and develop new standards by examining the scope of the prosecution's duty to show that a witness is unavailable for live testimony before admitting an absent witness' hearsay statement.

II. THE IMPORTANCE OF THE UNAVAILABILITY ASPECT OF CONFRONTATION

The interaction between the unavailability and reliability aspect of confrontation illustrates the need for clear standards when a witness cannot be produced at trial. The *Roberts* Court stated that the reliability prong of the two part confrontation test would be satisfied if the declaration was previously cross-examined[23] or fit a "well-rooted" hearsay exception.[24] This prong of the *Roberts* test is often easily satisfied. In recent years there has been a liberalization of the hearsay rules.[25] Furthermore, there are many situations where the defendant may have had an opportunity to cross-examine a witness prior to trial.[26] If the declaration meets a well-rooted hearsay exception, or if the witness was previously cross-examined, the confrontation right of the defendant rests solely on the court's determination of the witness' unavailability.

The unavailability aspect significantly protects the defendant's interest in confronting witnesses. Even in situations where the hearsay is reliable enough the confrontation clause still requires the pro-

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to prosecutor's case then confrontation not implicated) *with* Westen, *Unified Theory, supra* note 7, at 604 n. 105 (distinguishing witnesses as "not crucial" is not useful).

22. *Compare* United States v. Lynch, 499 F.2d 1011 (6th Cir. 1974) (efforts by prosecution to locate the witness insufficient) *with* People v. Hines, ___ Ill. App. ___, 419 N.E.2d 420 (1981) (prosecution not required to show unavailability unless defendant shows he has been prejudiced by the absence of the witness).

23. *Roberts*, 448 U.S. at 66.

24. *Id.*

25. One note writer recognized the potential for prosecutorial abuse by stating that liberalized hearsay rules may result in prosecutorial negligence in securing the presence of witnesses. Note, *Confrontation and Hearsay, supra* note 7, at 1438. For further analysis of the trend toward liberalization of the hearsay rules see MCCORMICK ON EVIDENCE § 326 (2d ed. 1972).

26. *Green*, 399 U.S. 149 (witness testified at preliminary hearing); *Barber*, 390 U.S. 719 (witness testified at preliminary hearing).

secutor to demonstrate that the declarant is unavailable to testify at trial.[27] For example, if the prosecution wanted to use the testimony of a witness who could not withstand cross-examination, the state could present its entire case at the preliminary hearing where defense counsel would most likely be unprepared to fully cross-examine the witness.[28] At trial, the prosecution could introduce the preliminary hearing testimony because the opportunity to cross-examine was supplied at the preliminary hearing. However, the unavailability aspect of confrontation prohibits this by mandating that the prosecution present its case with live witnesses whenever possible, thereby insuring the defendant's right of confrontation. If a live witness cannot be produced, the state must show it made a good-faith effort to bring the witness to the trial.

The unavailability aspect is based on the conduct of the prosecutor prior to trial.[29] Clear standards are necessary to enable the prosecution to discern when it must make an effort to procure a witness' presence at trial and what that effort entails. Unfortunately, the Supreme Court has not sufficiently refined the requisite standards for unavailability.

III. THE DEVELOPMENT OF THE UNAVAILABILITY ASPECT

The initial standard for unavailability was established in *Motes v. United States*.[30] The defendant and a co-conspirator were arrested for murder.[31] While in jail, the co-conspirator decided to testify against the defendant and so his deposition was taken prior to trial.[32] The government agent handling the case took the witness out of jail and put him in a hotel. On the day of the trial, the witness disappeared and the trial court allowed his deposition to be admitted as part of the government's case.[33] The Supreme Court found that the defendant's confrontation rights were violated because he did not have the opportunity to confront the witness due to the government's negligence.[34] As a result of this decision, the controlling constitutional

27. *Roberts*, 448 U.S. at 65.

28. *See* Graham, *supra* note 7, at 121 n. 108.

29. Note, *1970 Term*, *supra* note 7, at 194.

30. 178 U.S. 458 (1900).

31. *Id.* at 461.

32. *Id.* at 467. It should also be noted that the defense counsel did not cross-examine the witness during the preliminary hearing.

33. *Id.*

34. *Id.* at 476. The Court made its ruling even though a diligent effort was made to locate the witness after he disappeared.

standard for unavailability centered on whether or not the witness' unavailability was caused by the prosecution.[35]

In 1968, the Court determined that a more affirmative duty should be placed on the prosecution. The Court interpreted the confrontation clause as requiring the prosecution to pursue witnesses and to secure their presence at trial. This new standard for determining unavailability, which required the prosecution to make a good-faith effort, was articulated in *Barber v. Page.*[36] In *Barber*, two men were arrested for armed robbery in Oklahoma, and at a preliminary hearing one man agreed to be a witness against the defendant, Barber.[37] The prosecutor sought to admit the witness' preliminary hearing transcript at trial because the witness was out of the jurisdiction in a Texas prison.[38] Recognizing that the state of Oklahoma had no subpoena power in Texas, the trial court decided that the witness was unavailable and admitted the transcript.[39] The Supreme Court found that Barber's confrontation right was violated and stated that the Oklahoma prosecutor had a duty to make a good-faith effort to secure the witness' presence at trial.[40]

In establishing this duty, Justice Marshall found that the traditional reasons for declaring a witness unavailable were no longer viable. Historically, when a witness was out of the jurisdiction, he was *per se* unavailable due to the absence of the state's subpoena power outside the jurisdiction.[41] This view, however, was merely a reflection of the past when transportation was still in its early development. Justice Marshall cited recent Congressional enactments which increased cooperation among the states regarding the procurement of witnesses outside a particular jurisdiction as changes that supported the new standard.[42]

Requiring affirmative action on the part of the prosecution by mandating a good-faith effort was the main policy enunciated by the

35. *See* Note, *Uncertain Standard, supra* note 7, at 584 n. 29.
36. 390 U.S. 719 (1968).
37. *Id.* at 720.
38. *Id.*.
39. *Id.*
40. *Id.* at 725-26.
41. *Id.* at 723.
42. *Id.* at 724-25. Specifically, Marshall made reference to the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings. The act provides that a prosecutor from a forum state can obtain an order from the court of the jurisdiction where the witness is domiciled, ordering the witness' attendance at the trial in the forum state. *See* 9 UNIFORM LAWS ANN. 50 (1967 Supp.).

Court, thereby signalling an end to the standard in *Motes*.[43] Instead of merely refraining from wrongful acts, the confrontation clause was now interpreted as requiring the prosecutor to make a good-faith effort to obtain the presence of witnesses against the defendant at trial.[44] The Oklahoma prosecutor in *Barber* had made no attempt to bring the witness to trial because he had to rely on the cooperation of prison officials outside the state.[45] Indeed, these officials may have refused to extradite the witness. However, the Court stated that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff."[46] A new constitutional standard was established. It required the prosecution to make an affirmative effort to secure a witness' presence.

In 1970,[47] the Supreme Court ignored the good-faith standard when it decided the case of *Dutton v. Evans*.[48] *Dutton* was another co-conspirator case. Evans and the declarant were charged with the murders of three police officers.[49] After being arraigned, the declarant returned to his cell and made a statement to his cell-mate directly incriminating Evans.[50] At Evans' trial, the prosecution presented twenty witnesses[51] including the declarant's former cell-mate. When the cell-mate testified that the declarant had incriminated Evans the defense objected on the grounds of hearsay and that the defendant's confrontation right was violated since the declarant himself was not confronted in court.[52] The Court held that Evans' confrontation right was not violated although the declarant was in a prison and reasonable efforts could have secured his presence at trial.[53] Previously the Court held that the absence of a good-faith effort to bring a witness to trial resulted in a violation of the defendant's confrontation right.[54] The

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43. *See supra* notes 30-34 and accompanying text.

44. *Barber*, 390 U.S. at 724-25 *See also* 5 J. WIGMORE EVIDENCE § 1405 (Chadbourne Rev. 1974) (witness unavailable if diligent search has failed to produce the witness).

45. *Barber*, 390 U.S. at 725.

46. *Id.*

47. While only two years had passed since the *Barber* decision, the composition of the Court had been altered by two appointments. Chief Justice Warren had been replaced by Chief Justice Burger, and Justice Blackmun replaced Justice Fortas.

48. 400 U.S. 74 (1970). Regarding the inconsistency between *Barber* and *Dutton* see Note, *Uncertain Standard, supra* note 7, at 590.

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

50. "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." *Id.* at 77.

51. *Id.* at 87.

52. *Id.* at 77-78.

53. *Id.* at 102.

54. *Barber*, 390 U.S. 719.

Dutton Court therefore found it necessary to distinguish its decision.[55]

The attempt to distinguish *Barber* from *Dutton* did not lessen the inconsistency between the two decisions. The plurality opinion by Justice Stewart distinguished *Barber* as a case of prosecutorial misconduct.[56] However, if *Barber* was a case of prosecutorial misconduct, then *Dutton* was also such a case.[57] In both cases the declarants were in out-of-state prisons. If the prosecutor acted wrongfully by not attempting to procure the witness from prison in *Barber*, the same was true of the prosecutor in *Dutton*.

Stewart further attempted to distinguish the cases by comparing the substance of the hearsay in *Dutton* with that of the testimony in *Barber*.[58] The plurality found that the hearsay admitted in *Dutton* was not "crucial or devastating" to the defendant's position at trial and that the utility of confronting the witness would have been slight.[59] However, these distinctions are problematic because in order to determine the effect of the statement on the defendant's position and the utility of confrontation the Court had to examine the substance of the hearsay. By looking to the substance of the hearsay, the Court in effect shifted the burden from the prosecution to the defendant.[60]

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55. The decision resulted in four opinions. Justice Stewart was joined by Justices White, Blackmun, Harlan and the Chief Justice. Besides the plurality opinion, Blackmun wrote a concurrence finding the admission of the hearsay harmless consititutional error. *Dutton*, 400 U.S. at 90. Justice Harlan's concurrence was based on whether Evans had received a fair trial under a due process analysis. (For further discussion of the due process approach to the confrontation clause see *infra* note 169.) Harlan criticized the plurality opinion because it failed to explain how the seemingly mandatory language of the sixth amendment and the result of the case could be reconciled.

56. *Dutton*, 400 U.S. at 87.

57. The Court in *Motes* held that the prosecution was negligent in not securing a witness' presence at trial because the witness was freed from jail and though pending trial for a separate charge, the government failed to keep him under surveillance. *See supra* notes 30-36 and accompanying text. In *Barber*, the Court moved away from this non-negligence standard of prosecutorial conduct by imposing an affirmative duty on the prosecutor to produce witnesses at trial even if they are out of the state's jurisdiction. *Barber*, 390 U.S. at 724-25. Prior to *Barber*, once a witness was outside the jurisdiction, he was considered unavailable. This is no doubt why the prosecutor in *Barber* did not make an effort to request the Texas prison official's cooperation in the production of the witness. *Barber* was not a case of prosecutorial misconduct because the prosecutor was acting in conformity with what he thought to be the law. To say that he acted wrongfully would imply that the prosecutor could predict, before the defendant went to trial, how the Supreme Court would ultimately rule on the case. *See* Seidelson, *supra* note 7, at 86.

58. *Dutton*, 400 U.S. at 87-89.

59. *Id.*

60. Graham, *supra* note 7, at 123.

Formerly, it was the responsibility of the prosecution to justify its use of the hearsay under the confrontation clause by establishing the witness' absence.[61] *Dutton*, however, put the burden on the defendant to show how he was prejudiced by the witness' unavailability.[62] This is entirely inconsistent with the constitutionally-based rules of criminal procedure as one would clearly not expect such a burden to be on the defendant.[63]

Stewart's final attempt to distinguish the two decisions focused on the distinction between hearsay that is oral and that which is transcribed.[64] The plurality argued that since the hearsay in *Dutton* was oral it was more reliable than the hearsay in *Barber*, which was in the form of a transcript. The rationale for such a distinction is that a transcript may be given more weight by the jury because it is tangible and carefully articulated and prepared by the party introducing it.[65] Yet, oral hearsay can be as carefully articulated and prepared as testimony in transcribed form.[66] Indeed, it is arguable that since the out-of-court testimony in *Barber* was transcribed and given under oath, it was more reliable than the hearsay statements in *Dutton* where the declarant was never under oath.[67] Therefore, the plurality's distinctions were not convincing. While the *Dutton* Court did not overrule *Barber*, it clearly did not apply the *Barber* standard. The *Dutton* Court did not require the prosecution to establish the unavailability of the declarant by making a good-faith effort to produce the witness at trial. Implicit in the *Dutton* plurality is the idea that situations exist where unavailability need not be shown. However, the problems the Court had in distinguishing *Dutton* from *Barber* made it difficult to identify such situations.

The confusion caused by *Dutton* was the result of the important question the case left unanswered. It did not explain when the prosecution would be required to make a showing of unavailability.[68] Thus, after *Dutton*, the good-faith effort was still required in some situa-

61. *Id.*

62. Stewart's plurality opinion stressed that the defendant could not have been aided by the presence of the declarant at trial and that Evans suffered little prejudice because the statement was not crucial or devastating. *Dutton*, 400 U.S. at 87-98.

63. *See* Graham, *supra* note 7, at 123.

64. *Dutton*, 400 U.S. at 87. *See* Note, *1970 Term*, *supra* note 7, at 191.

65. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 443 (1971).

66. *Id.*

67. *See* Read, *supra* note 7, at 16 (discussing the requirements of an oath as one value protected by confrontation).

68. Note, *1970 Term*, *supra* note 7, at 194.

tions because *Dutton* did not overrule *Barber*. But, due to the weak distinctions drawn between the two decisions, it was unclear when the good-faith effort would be imposed.

After *Dutton*, a prosecutor faced with making the determination of whether he should attempt to secure a witness' presence at trial was required to consider a number of factors. In considering the substance of the hearsay, the prosecutor had to determine whether the testimony was "crucial or devastating."[69] Analysis of whether confrontation would be of any value to the defendant required speculation regarding the substance and substantive effect of the hearsay.[70] The prosecutor had to determine whether it would be a case of prosecutorial misconduct if no effort was made to produce the declarant.[71] In addition, the minimal differences between oral and transcribed testimony had to be weighed.[72] Application of these factors was complex and confusing and did not clearly delineate when a prosecutor must make a good-faith effort to establish the unavailability of a witness.[73]

The Burger Court added to the factors enunciated in *Dutton* when it decided the case of *Mancusi v. Stubbs*.[74] Stubbs was tried and convicted of murder.[75] The only witness to the crime was the victim's husband who testified at the defendant's initial trial.[76] In 1964, Stubbs was granted a writ of habeas corpus on the grounds of ineffective assistance of counsel.[77] The state of Tennessee retried Stubbs the same year, but the eye-witness had moved to Sweden.[78] The trial court admitted the witness' transcribed testimony into evidence on the grounds that he was unavailable, though no effort was made to bring him to the United States to testify.[79] The defendant was again convicted[80] and

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69. *See supra* note 60-63 and accompanying text. *See* Westen, *Unified Theory, supra* note 7, at 599 n. 97.

70. *See supra* note 57.

71. *See supra* note 56.

72. *See supra* notes 62-67 and accompanying text.

73. One reason for the vagueness of the Stewart plurality was to allow the state courts to develop and experiment with their own hearsay rules. *See* Read, *supra* note 7, at 28-30; Note, *1970 Term, supra* note 7, at 198.

74. 408 U.S. 204 (1972).

75. *Id.* at 208.

76. *Id.* at 207.

77. *Id.* at 209. Stubbs v. Bomar, Civil Action No. 3585 (M.D. Tenn. 1964).

78. *Mancusi*, 408 U.S. at 209.

79. *Id.*

80. *Id.* The conviction was affirmed by the Tennessee State Supreme Court in Stubbs v. State, 216 Tenn. 567, 393 S.W. 2d 150 (1965).

again sought a writ of habeas corpus on the grounds that his sixth amendment right of confrontation was violated because the state failed to make a good-faith effort to produce the witness at trial.[81] The Supreme Court, in an opinion by Justice Rehnquist[82] found no sixth amendment violation, establishing another situation when the good-faith effort would not be required.[83]

The affirmative duty established in *Barber*, characterized as a good-faith effort, was recognized by Justice Rehnquist as an obligation of the prosecution.[84] However, the Court found that the good-faith standard did not apply when a witness was out of the country.[85] While advances had been made in securing the attendance of witnesses from outside a particular state,[86] the majority in *Mancusi* found that no analogous vehicles existed to make witnesses residing in a foreign country amenable to testify in a state criminal proceeding.[87] Stubbs argued that a federal statute existed that was designed to authorize courts to subpoena witnesses from a foreign country.[88] However, the

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81. *Id.* The district court denied Stubbs' writ but on appeal the decision was reversed in Mancusi v. Stubbs, 442 F.2d 561 (2nd Cir. 1971).

82. Justice Rehnquist was appointed in 1972 replacing Justice Harlan. Also, Justice Powell had been appointed the same year to replace Justice Black. Justice Black had joined in Justice Marshall's dissent in *Dutton* and Justice Marshall's majority opinion in *Barber*. Thus, Justice Black was a proponent of the strict affirmative good-faith requirement. *See* Read, *supra* note 7, at 32-33. Justices Rehnquist and Powell, on the other hand, came to the Court with more conservative viewpoints. Both reflected the Harlan approach that the sixth amendment right of confrontation was to be analyzed with respect to the due process standard. *See* Justice Powell's majority opinion in Chambers v. Mississippi, 410 U.S. 284 (1973) where the Court reversed the defendant's conviction on the basis that he had not received a fair trial. For further analysis of how Justice Rehnquist's opinion in *Mancusi* reflects Harlan's conservative views see Jaffe, *supra* note 7, at 238-39 n. 6.

83. *Mancusi*, 408 U.S. at 216.

84. *Id.* at 212.

85. Justice Marshall, the author of the majority opinion in *Barber*, wrote a strong dissent and Justice Douglas joined in the portion of that dissent which addressed the unavailability aspect of the confrontation clause.

86. For a discussion of these advances see *supra* notes 37-42 and accompanying text.

87. *Mancusi*, 408 U.S. at 212-13.

88. 28 U.S.C. § 1783 (1982).

> *Subpoena of person in foreign country.* (a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing in any other manner.

Court interpreted the statute as applying only to federal courts, and therefore, the Tennessee trial court was powerless to compel the witness' attendance.[89] *Mancusi* therefore represented yet another situation when the good-faith standard did not apply.

The *Mancusi* decision was inconsistent with the rationale underlying the prosecutor's duty to make a good-faith effort.[90] The prosecution in *Barber* presumed that the witness was unavailable because he was beyond the subpoena power of the state. However, the holding in *Barber* rejected any such presumption and required that the prosecution make a good-faith effort.[91] In *Mancusi*, the prosecutor made a similar presumption and claimed that, because the state was powerless to compel the attendance of a witness residing in a foreign country, no effort by the prosecution was required. This time the Court agreed.[92] The only tenable explanation that would reconcile *Barber* with *Mancusi* is that a good-faith effort is required only if there is a likelihood of its success.[93] Due to comity and federalism, a forum state can reasonably expect sister states to cooperate by producing necessary witnesses.[94] However, because there is no such comity between the United States and another country, it then follows that no reasonable expectation of cooperation exists.[95] After *Mancusi*, the prosecutor must weigh another factor in his analysis. In addition to the factors established in *Dutton*,[96] a prosecutor must discern whether an effort to produce a witness would be successful. If the effort is likely to be fruitless, then *Mancusi* controls and no effort is required.

The holding in *Mancusi* further limited the good-faith requirement established in *Barber*. Yet, limited to their facts, the two decisions provided a simple rule. If the witness was out of the state, *Barber* required a good-faith effort to bring the witness to trial. If the witness was out of the country, the confrontation clause did not require such an effort. However, one question remained. Would the Supreme Court extend the factors from *Barber*, *Dutton* and *Mancusi* to a situation where the witness' location was unknown? This question was answered in 1980.

The most recent opportunity for the Court to explain the bound-

89. *Mancusi*, 408 U.S. at 213.
90. Westen, *II*, *supra* note 7, at 287.
91. *Barber*, 390 U.S. at 725.
92. *Mancusi*, 408 U.S. at 222.
93. *Id.*
94. Westen, *II*, *supra* note 7, at 287.
95. *Id.*
96. *See supra* notes 69-72 and accompanying text.

aries of the good-faith effort requirement was in *Ohio v. Roberts*.[97] Roberts was arrested on January 7, 1975, and on January 10 a preliminary hearing was held.[98] The defense counsel called a witness who testified against the defendant.[99] The witness did not attend the trial and the prosecution sought to admit her preliminary hearing testimony, claiming that she was unavailable and that a good-faith effort to locate her had failed.[100] At trial, the court held that the state had made a good-faith effort to locate the witness and the Ohio Supreme Court[101] affirmed.[102] Justice Blackmun, writing for the

97. 448 U.S. 56 (1980).

98. *Id.* at 59.

99. *Id.* at 58. The defense expected the witness to testify in its favor. However, when called, the witness surprised the defense counsel and made inculpatory statements. At this point, defense counsel could have moved to have the witness declared adverse, thereby enabling counsel to question the witness as if cross-examining her. The defense did not utilize this option.

100. The history of the prosecution's search for the witness is as follows. At the end of January, 1975, she moved to Tuscon, Arizona. About three or four months later, her parents received a letter from a San Francisco welfare office, stating that she had applied for welfare. From the address on the letter, her mother was able to telephone a social worker and ultimately contact the witness. That summer, the witness contacted her parents and told them that she would be travelling outside of Ohio. The trial, originally set for July 17, 1975, was continued six times and finally took place on March 4, 1976. In an unavailability hearing, the prosecution emphasized the efforts made by the witness' mother. However, the entire effort of the prosecution consisted of issuing subpoenas to the witness' parents' address and a phone call to the witness' mother. *Id.* at 59-60.

101. State v. Roberts, 55 Ohio St. 2d 191, 378 N.E.2d 492 (1978). The Ohio Supreme Court relied on New York Central R.R. v. Stevens, 126 Ohio St. 395, 185 N.E. 542 (1933), a civil case which involved state law regarding hearsay unavailability and not constitutional law regarding confrontation unavailability. The Ohio court recognized Wigmore's position that unavailability due to disappearance is shown only by the prosecution's "inability to find [a witness] after a diligent search." 5 J. WIGMORE ON EVIDENCE, § 1405 (Chadbourne rev. 1974). Yet this approach was dismissed and the state court held that in Ohio the proponent must show merely that a diligent search would have been fruitless. The Ohio Supreme Court's standard for unavailability, therefore, centered not on an affirmative duty of the prosecution, but rather on a showing that any effort would have been futile. The subsequent United States Supreme Court opinion leaves some crucial questions unanswered. How can Ohio utilize as precedent a state civil case decided before *Barber* when the Supreme Court has stated that unavailability is constitutionally based on the confrontation clause of the sixth amendment incorporated by, and made applicable to, the states through the fourteenth amendment? The Ohio court's reliance on a civil case is immediately suspect because the holding was based on an evidentiary hearsay analysis since civil cases never even implicate the confrontation right. Treating an evidentiary ruling in a civil case as controlling a confrontation question in a criminal case is tantamount to constitutionalizing the hearsay rules—something the Supreme Court wished to avoid at all costs. *See Green*, 399 U.S. at 162. *See also* Read, *supra* note 7, at 25-26. For a contrary view of the Ohio Supreme Court's rationale see Comment, 12 AKRON L. REV. 572, 576 (1979).

102. The Ohio appellate court held that, because the prosecution failed to show

majority,[103] upheld the Ohio Supreme Court finding that the prosecution had made a good-faith effort.[104]

It is difficult to analyze the law set forth in *Roberts* because the legal basis for the decision is somewhat confusing. Confined to its facts, it would seem that since the witness was within the United States, *Barber* would require a good-faith effort to produce her at trial.[105] In fact, the Court stated that the witness was unavailable because the prosecution had made sufficient efforts to locate her.[106] However, the Court relied on *Mancusi* for the proposition that any effort to locate the witness, though within the country, would have been futile and therefore no effort was required of the prosecution.[107] For this reason, it is impossible to discern whether the Court held that a good-faith effort was satisfied or that no good-faith effort was required.

Beyond the difficulty in discerning the legal basis for the Court's finding of unavailability, an analysis of the case indicates that the facts neither support a finding that a good-faith effort was made nor that any effort to locate the witness would have been futile. The prosecution's total effort to locate the witness involved issuing subpoenas and making a single phone call. Such limited attempts to locate the witness were insufficient and severely diluted the amount of effort required to meet the good-faith standard.[108] As additional support for

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that its efforts supported a finding of unavailability, the admission of the witness' testimony violated the defendant's confrontation rights. *Roberts*, 448 U.S. at 60. The state supreme court found, contrary to the lower court, that the witness was unavailable, but upheld the reversal of the defendant's conviction because the testimony was not reliable due to the fact that it was never subjected to the cross-examination by the defense. *Roberts*, at ____, 378 N.E.2d at 497.

103. The majority opinion by Justice Blackmun was joined by Justices Rehnquist, Powell, Stevens, Stewart, White and the Chief Justice. A strong dissent was authored by Justice Brennan joined by Justice Marshall.

104. While the Court upheld the unavailability finding by the Ohio Supreme Court it reversed the state court on the ultimate question of the admissability of the preliminary hearing testimony. The Court held that the questioning by the defense counsel at the preliminary hearing satisfied the confrontation clause because the defendant had an opportunity to cross-examine the witness. *Roberts*, 448 U.S. at 78.

105. Implicit in the *Mancusi* decision is the distinction between witnesses inside and outside the jurisdiction. *See supra* notes 74-78 and accompanying text.

106. "The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Roberts*, 448 U.S. at 74.

107. The Court recognized the holding in *Barber* that the probability of a refusal is not the same as asking for and receiving a rebuff. However, Justice Blackmun stated, "the law does not require the doing of a futile act." *Id.*

108. *See Roberts*, 448 U.S. 79-80 (Brennan, J., dissenting).

its finding of unavailability, the Court cited *Mancusi*, reasoning that since the witness' location was unknown, any effort to produce her at trial would probably have been futile.[109] Not only was this reasoning contrary to the majority's earlier statement that an effort should be made to locate a witness even if the probability of the effort's success is remote,[110] but it was also somewhat inaccurate. Two leads which might have assisted the state in locating the witness were never pursued.[111] The facts in *Roberts* do not indicate that a good-faith effort was made, neither do they indicate that any effort to locate the witness would have been futile. Yet, the Court found the witness unavailable for purposes of the confrontation clause.

Since the Court set forth the requirement that the prosecution must make a good-faith effort to produce, at trial, witnesses against the defendant, it has added many factors to be considered when determining the unavailability of a witness. Besides the good-faith effort in *Barber*, other factors which the Court set forth were: (1) whether the testimony against the defendant was crucial or devastating,[112] (2) whether the utility of confrontation is minimal,[113] (3) whether the facts indicate prosecutorial misconduct,[114] and (4) whether efforts to produce the witness at trial would probably be unsuccessful.[115] However, after the recent Supreme Court decisions it is difficult to discern the weight that should be given to these factors. These four factors limited the number of situations when the good-faith effort must be made. The complexity and subjectivity of the factors has caused difficulty for both prosecutors and judges.

It should be noted that the only cases decided by the Supreme Court that set a standard regarding the type of effort required of

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109. Justice Brennan stated that he felt the standard for unavailability could never be met where the prosecution makes no effort simply because the attempt would be unlikely to bear fruit. *Id. See also Mancusi*, 408 U.S. at 223 (Marshall J., dissenting): "If, as the Court contends it is more difficult to produce at trial a resident [from a foreign country] . . . that fact might justify a failure to produce the witness; it cannot justify a failure even to try."

110. "But if there is a possibility, albeit remote, that affirmative measures might produce the declarant the obligation of a good-faith effort may demand their effectuation." *Roberts*, 448 U.S. at 74.

111. The majority opinion admitted that the prosecutor could have pursued the social worker and tried to get information from her. Also, the dissent pointed out that the witness' mother indicated that there was a girl in Tuscon, Arizona who might have been able to contact the witness. *Id.* at 76, 81-82.

112. *See supra* notes 60-63 and accompanying text.

113. *See supra* notes 56-59 and accompanying text.

114. *See supra* notes 56-57 and accompanying text.

115. *See supra* notes 93-96 and accompanying text.

a prosecutor when attempting to produce a witness was *Barber*. Since *Barber*, the Supreme Court has decided only cases that limited the situations when the state must make efforts to produce the witness at trial.[116] Therefore, while the good-faith effort is still a requirement, the situations in which the effort will be required, and just how far the state must go to establish a good-faith effort are issues not well-defined.[117]

IV. CRITIQUE OF CURRENT LAW[118]

A. *The Factors Are Not Useful to the Prosecutor*

Since it is very difficult, prior to trial, for the prosecution to determine the utility to the defendant of confronting a witness or whether testimony against a defendent is devastating, the application of the Burger Court factors is difficult. Since *Dutton*, a prosecutor may look to the substance and the substantive effect of the recorded testimony when determining whether a witness must be produced at trial.[119] To determine whether confrontation would be of any use to a defendant, a prosecutor must speculate as to what questions the defense would ask, how the witness would answer, and how the jury would perceive the demeanor of the witness. The dissent in *Dutton* noted the inherent difficulty in trying to predict how a defense lawyer will use cross-examination.[120] The "crucial or devasting" factor also requires speculation and analysis of the substance of the hearsay itself.

It is also very difficult to determine in advance which prosecution witnesses will be crucial to its case or devastating to the defendant.[121] The prosecutor decides whether or not to pursue a witness before trial.[122] Although he may believe the witness is not crucial or the value of confrontation would be slight, he probably

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116. It is recognized that in *Roberts* the prosecution mailed five subpoenas and called the witness' mother inquiring about the witness' location. Arguably, the State made a good-faith effort. However, the efforts made were treated by the Court as a verification that any effort would have been futile rather than a verification of a good-faith effort. Thus, the Court also excused the prosecution from making a good-faith effort. Note, *Constitutional Law-Right of Confrontation,* 59 U. DET. J. URB. L. 125, 142 n. 119.

117. *See supra* note 22.

118. The factor regarding presence or absence of prosecutorial fault will not be critiqued in the text of this note. For further analysis of this factor see Graham, *supra* note 7, at 121.

119. *See supra* notes 60-63 and accompanying text.

120. *Dutton*, 400 U.S. at 103-04 (Marshall, J., dissenting).

121. Westen, *Unified Theory*, *supra* note 7, at 604 n. 105.

122. *See supra* note 119.

should still make an effort because these determinations are so speculative that a subsequent judge may disagree with his determinations. Therefore, prior to trial, the "crucial or devastating" factor and the "utility of confrontation" factor are not useful to the prosecution.

Utilization of these factors is also inconsistent in the context of current confrontation law. It has been established that unavailability must be shown even where confrontation would be of little help to the defendant. In a situation where a witness has been called by the prosecution and cross-examined by the defendant at a prior trial, it seems that a reading of the witness' transcribed testimony at a subsequent retrial of the defendant would not be objectionable. The utility of confrontation in this scenario would seem slight since the prior testimony was given under oath and subject to cross-examination. However, the Supreme Court has held that the transcribed testimony from a prior trial is admissable only if the prosecution can demonstrate the unavailability of the declarant.[123] Yet, a court can excuse the absence of an effort by the prosecution in a situation where the defendant has had no prior opportunity to cross-examine the witness by establishing that the utility of confrontation would be slight.[124] To require a showing of unavailability when there has already been cross-examination, while dismissing the need for such a showing when a judge determines that the utility of confrontation would be slight, is inconsistent.

Similarly, it is inconsistent that a court would excuse the prosecutor from making a showing of unavailability because the testimony admitted against the defendant was not "crucial or devastating."[125] One of the best indicators of the damaging nature of evidence is the fact that a prosecutor intends to use it in his case against the

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123. *See Mancusi*, 408 U.S. 204 (witness unavailable because out-of-country court did not require good-faith effort but still required a showing of unavailability); *cf.* Stores v. State 625 P.2d 820 (Alaska 1980) (prosecutor knew chief witness would be out of town and had his deposition video taped; court held that prosecutor must still make a showing of unavailability before video tape admissible).

124. *See* Harrison v. United States, ___ D.C. App. ___, 435 A.2d 734 (1981) (court held prosecution not required to subpoena the out-of-state victim because the utility of confrontation was slight).

125. It should be noted that if a court believed that the admission of the evidence, although violative of the defendant's confrontation right, was so peripheral and unimportant that it could not have effected the outcome of the decision, the court could leave the verdict undisturbed by finding constitutional harmless error. *See generally* Harrington v. California, 395 U.S. 250 (1969). One of the greatest criticisms of *Dutton* was that it should have been decided as a case of harmless error. *See Dutton*, 400 U.S. at 90 (Blackmun, J., concurring). *See also* Younger, *supra* note 7, at 74.

defendant.[126] If a prosecutor seeks to introduce hearsay, it is likely to be crucial and devastating. Therefore, the "utility of confrontation" factor is in some ways inconsistent with the current law and the "crucial or devastating" factor is inconsistent in its application. Yet the greatest problem with the application of these factors is that they incorrectly shift the burden from the prosecution to the defendant.

B. *The Factors Shift the Burden Regarding the Ultimate Admissability of the Hearsay*

Under the confrontation clause, the burden of establishing the admissability of evidence against the defendant should always be on the prosecution.[127] This is based on the premise that the prosecution must establish the propriety of the evidence it seeks to introduce.[128] However, this burden shifts away from the prosecution and onto the defendant when the excusing factors are applied. Instead of the prosecution justifying the need to use hearsay by establishing the witness' unavailability, application of the Burger Court factors places the burden on the defendant to rebut the admissability of the evidence.[129] Excusing an effort to produce a witness at trial because such an effort would probably be unsuccessful, creates a presumption of unavailability that the defendant must overcome.[130] In this situation, the defendant has the burden of showing that affirmative efforts may have been successful. The "utility of confrontation" and "crucial or devastating" factors shift the burden from requiring the prosecution to justify dispensing with live testimony, to requiring the defendant to show that he has been prejudiced by the absence of the witness.[131] Therefore, while the burden should be on the prosecution to establish the unavailability of a witness, the Burger Court factors require the defendant to bear the burden of showing prejudice or prosecutorial neglect.

Another reason why the burden of establishing the unavailability of a witness should stay with the prosecution is because the risk

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126. "Perhaps the most accurate indicator of the degree of cruciality or devastation inherent in . . . testimony is the fact that the prosecution saw fit to introduce it." Seidelson, *supra* note 7, at 85.

127. The burden of showing the unavailability of a witness like other evidentiary issues is on the prosecution. *Roberts*, 448 U.S. 74-75.

128. *Id.*

129. Jaffe, *supra* note 7, at 238 n. 36.

130. *Id.*

131. *See supra* note 134 and accompanying text. *See also* Graham, *supra* note 7, at 123.

of losing reliable evidence of the defendant's guilt should be on the prosecution.[132] A comparison between the confrontation clause and the compulsory process clause clarifies this argument.

C. *Confrontation and Compulsory Process*

The compulsory process clause grants the defendant, through the prosecution's subpoena power, the right to compel the attendance at trial of witnesses in his favor.[133] Under compulsory process the initial burden to locate witnesses is on the accused, whereas under the confrontation clause the initial burden should always be on the prosecution.[134] An analysis of the differences and similarities between the two constitutional guarantees illustrates why the burden to justify the admissability of unconfronted statements under confrontation should stay on the prosecution.[135]

The similarities between confrontation and compulsory process are striking.[136] Under the two constitutional guarantees the prosecution must make a good-faith effort to produce witnesses.[137] The Supreme Court has found that the compulsory process clause, like the confrontation clause, is not absolute.[138] There are situations where the prosecution may be excused from making attempts to produce witnesses for the defendant at trial. Those situations are similar to the situations identified by the Burger Court that excuse good-faith efforts of the prosecution under confrontation.

Compulsory process does not require the prosecution to search for a witness when the search is unlikely to produce the declarant.[139] Similarly, in *Mancusi*, the Court found that the confrontation clause did not require the prosecution to search for a witness if the search

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132. Graham, *supra* note 7, at 121; Westen, *Unified Theory, supra* note 7, at 604.

133. *See supra* note 1.

134. Westen, *Unified Theory, supra* note 7, at 602.

135. In Pointer v. Texas, 380 U.S. 400 (1965), the confrontation clause was made applicable to the states through the fourteenth amendment. Two years later the compulsory process clause was imposed on the states through the due process clause in Washington v. Texas, 388 U.S. 14 (1967). The *Washington* opinion referred to *Pointer* and placed the two constitutional guarantees on the same footing.

136. *See* Westen, *Unified Theory, supra* note 7 at 588.

137. In Preston v. Blackledge, 332 F. Supp. 681 (E.D.N.C. 1971), the court addressed the issue of whether absence from the jurisdiction excused the prosecutor from making a good-faith effort to locate and produce witnesses for the defendant under compulsory process. The court stated that a good-faith effort was required. *Id.* at 685.

138. Westen, *Unified Theory, supra* note 7, at 588.

139. *Id.*

was likely to be unsuccessful.[140] Furthermore, compulsory process does not require the prosecution to search for a witness who is not material to and necessary for the defendant's case.[141] This is very similar to the "utility of confrontation" factor and the "crucial or devastating" factor. Compulsory process places the burden on the defendant to show that he is prejudiced by the absence of a defense witness. Application of the confrontation factors established by the Burger Court likewise allocates the burden to the defendant to show that he is prejudiced by the admission of an absent witness' transcribed testimony.

To determine whether the defendant's confrontation or compulsory process rights are prejudiced the substance of the testimony must be examined. Compulsory process necessitates analysis of the substance of the witness' testimony to determine its materiality and necessity to the defendant's case.[142] Similarly, under the Burger Court factors confrontation requires an analysis of the hearsay's substance to determine whether it is devastating to the accused or whether the defendant would derive any use from confrontation.[143] The Burger Court's analysis places the same duty upon the prosecution concerning the production of witnesses, regardless of whether the defendant is utilizing his confrontation right or his compulsory process right. However, an examination of the policy concerns and rationale underlying the compulsory process and confrontation clauses illustrates that the two constitutional rights should be applied differently.

Compulsory process places the burden of initiating the search for a witness upon the defendant to name and identify the witness he desires to use at trial before the prosecution is obligated to search for the witness.[144] Under the compulsory process clause, if the defendant asks the prosecution to produce a witness, but conveys no information concerning the witness' location, it is unreasonable to expect the state to search for the witness because the search would most likely be futile.[145] Under compulsory process, the prosecution should have the flexibility to refrain from making an effort if that effort would be futile because the likelihood of a search being successful depends

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140. *See supra* notes 92-95 and accompanying text.

141. United States v. Valenzuela-Bernal, ___ U.S. ___, ___, 102 S.Ct. 3440, 3446 (1982); *Preston*, 332 F. Supp. at 683; Westen, *II*, *supra* note 7, at 213-14.

142. *See supra* note 148.

143. *See supra* notes 60-63 and accompanying text.

144. Westen, *II*, *supra* note 7, at 280.

145. When the defendant requests production of a witness under compulsory process, the witness' whereabouts are something rarely within the prosecutor's knowledge. Westen, *II*, *supra* note 7, at 280 n. 341.

upon the information provided by the defendant.[146] This is logical in the compulsory process context because the risk of the loss of reliable evidence should be on the defendant since he is the party who benefits from the witness' presence.

No similar logic exists for excusing a prosecutor from making a good-faith effort where there is little chance of the effort's success when confrontation is implicated. Unlike compulsory process, confrontation requires the prosecution to initiate the procedure for locating witnesses against the defendant regardless of any request from the defendant.[147] Thus, it is obvious that the success of an effort to locate a witness in the confrontation context cannot be traced back to the defendant. Also, the risk of the loss of reliable evidence is on the prosecution when confrontation is implicated because it is the party that seeks to benefit from the witness' presence at trial.[148] The probability that a search would be futile should excuse the prosecution from making an effort under the compulsory process clause, but not under the confrontation clause.[149]

The compulsory process clause requires the defendant to show that the requested witness' testimony will be both material and necessary to his defense.[150] Until the defendant makes such a showing, the prosecution is not required to make the witness available at trial.[151] Similarly, in *Dutton*[152] and *Roberts*[153] the Supreme Court stated that if testimony admitted against the defendant is not crucial or confrontation of the testimony would not be useful, the prosecution would not be required to make an effort to secure the witness' presence at trial. Once again the policy interests served by requiring the defendant to establish that a witness' testimony is material and necessary

146. *Id.* at 279.

147. The confrontation clause puts the burden of producing witnesses against the defendant on the prosecution. *See Roberts*, 448 U.S. at 74-75. *See also* Westen, *Unified Theory, supra* note 7, at 603 n. 103. Westen points out this distinction between compulsory process and confrontation but considers it of little significance. This note interprets the distinction as crucial. However, Professor Westen's work mainly addresses the order of evidence at a criminal trial. This note addresses prosecutorial efforts to procure witnesses prior to trial. Therefore, we do not reach different conclusions but are merely addressing confrontation from different aspects.

148. Westen, *Unified Theory, supra* note 7, at 603.

149 "The duty of good-faith effort would be meaningless indeed if that effort were required only in circumstances where success was guaranteed." *Roberts*, 448 U.S. at 80, (Brennan, J., dissenting).

150. *Valenzuela-Bernal*, ___ U.S. at ___, 102 S.Ct. at 3446.

151. *Id.* at 3446-47.

152. *See supra* note 60 and accompanying text.

153. *Roberts*, 448 U.S. at 65 n. 7.

are apparent under the compulsory process clause, but absent in the confrontation clause context.

The defendant's obligation under the compulsory process clause, to show the materiality and necessity of the testimony, strikes a balance between the constitutional interest of providing the defendant with an adequate defense and the public interest in efficient law enforcement.[154] Unless the defendant demonstrates that a witness is material and necessary, his interest in that witness is too speculative to require the prosecution to spend time, money, and effort searching for the witness.[155] Flexibility is needed in this regard to prevent abuse by the defendant.[156] The defendant must therefore establish that the witness he desires is material and necessary before his constitutional right to compulsory process outweighs the public interest in efficient law enforcement.

The policy concerns, which require the defense to establish the importance of a particular witness before requiring any effort on the part of the prosecution to bring the witness to trial, are not present when the defendant's confrontation right is implicated. The defendant's interest in the witnesses against him is not speculative.[157] It should be presumed that a defendant will wish to cross-examine witnesses against him because the prosecution would not present the witness' testimony if it was not important.[158] Even if a defendant chooses not to cross-examine a witness against him the live direct examination of the declarant serves a purpose of confrontation by enabling the jury to judge the witness' demeanor.[159] Under the compulsory process scheme, policy concerns support placing the burden of establishing the materiality and necessity of the testimony upon the defendant. However, no such policy concerns exist under the confrontation clause, and the burden should remain on the prosecution.

The factors derived from the Burger Court limit the situations where a good-faith effort is required in a manner that is of little use

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154. Westen, *II, supra* note 7, at 278-79.

155. *Id.*

156. *Id.* at 278.

157. "[M]ost out-of-court statements are less reliable than in-court testimony, the defendant usually has an interest in being able to produce and examine the declarant about the truth of his statements." Westen, *Unified Theory, supra* note 7, at 617.

158. *See supra* note 133.

159. *See* 5 J. WIGMORE ON EVIDENCE § 1365 (Chadbourne rev. 1974) (observation of the witness' demeanor by the jury, while not crucial, is an aspect of confrontation).

to a prosecutor.[160] The factors are complex and difficult to apply prior to trial, which is when the prosecutor must determine whether to search for a witness. The factors shift the burden regarding the admissability of hearsay from the prosecution to the defendant.[161] While such a shift may be rationalized under compulsory process, it cannot be reconciled with the confrontation clause.[162] The following proposal avoids these shortcomings. It does not require a prosecutor to examine and analyze the substance of the out-of-court declaration, thereby limiting the need for pre-trial speculation. It presumes that the burden of establishing unavailability is on the prosecution unless the confrontation clause is not implicated by the witness' absence. The proposal also provides guidelines for the state to insure that once confrontation is implicated the actions by the prosecution meet the good-faith standard.

V. PROPOSAL FOR REFORM

A. *Identifying When the Good-Faith Effort Must Be Made*

Analysis of *when* an effort is required of the prosecution to locate a witness necessitates examining the language of the sixth amendment. The confrontation clause provides that the defendant, in all "criminal prosecutions," must be "confronted" with the "witnesses against him."[163] The terms, "criminal prosecution" and "confront," have been interpreted narrowly by the courts. "Criminal prosecution" does not include quasi-criminal proceedings.[164] Nor does a defendant have

160. *See supra* notes 126-34 and accompany text.

161. *See supra* notes 135-39 and accompany text.

162. *See supra* notes 140-66 and accompany text. Some commentators have spotted a recent trend in confrontation decisions by the Burger Court toward applying the less stringent due process (fundamental fairness) standard. The notewriter assumes that the Burger Court has applied the same sixth amendment standard as the Warren Court (*see Barber*, 390 U.S. 719; Berger v. California, 393 U.S. 314 (1969)) because the present Supreme Court has never expressly overruled the Warren Court's analysis of confrontation. Yet, the writer admits that this trend could account for the inconsistencies between the holdings of the Burger and Warren Courts. For further analysis of the due process approach see, *Dutton*, 400 U.S. at 93-100 (Harlan, J., concurring); California v. Green, 399 U.S. 149, 171-89 (Harlan, J., concurring; *cf.* Burger, C.J., concurring separately); Pointer v. Texas, 380 U.S. 400, 408-09 (Harlan, J., concurring); Snyder v. Massachusetts, 291 U.S. 97 (1934). For post-Harlan analysis, see *Roberts*, 448 U.S. at 62-65; Manson v. Brathwaite, 432 U.S. 98 (1977); Chambers v. Mississippi, 410 U.S. 284 (1973); Jaffe, *supra* note 7, at 236-46; Westen, *Confrontation, supra* note 7, at 1198-1203.

163. *See supra* note 1.

164. Graham, *supra* note 7, at 126-27.

a right to confront witnesses who provide evidence at the investigating or arresting stages of the prosecution. Confrontation is a right to confront witnesses only at trial.[165] The term, "confront," simply means that the defendant and his accusers come face-to-face at trial,[166] enabling the defendant to cross-examine him.[167]

The key to establishing when a prosecutor must make an effort to locate a witness is identifying what declarants are "witnesses against" the defendant.[168] The prosecution has no duty to initiate a search for a declarant who is not considered a "witness against" the defendant. In *Dutton*, Justice Harlan stated in his concurrence that it would unduly burden the prosecution if all evidence had to be presented by live testimony.[169] Harlan's main concern was with the admissability of business records.[170] The confrontation clause, however, does not require that all evidence be presented in the form of live testimony. The defendant's confrontation rights are implicated only when the prosecutor seeks to introduce the testimony of a "witness against" the accused.[171] If a witness is adverse to the defendant, then

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165. *Barber*, 390 U.S. at 725. However, there are some isolated, non-criminal proceedings where courts have held that due process requires the right of confrontation be supplied. *See* Morissey v. Brewer, 408 U.S. 471 (1972) (parole revocation hearing); Tichnell v. State, ___ Md. ___, ___, 457 A.2d 991, 996 (1981) (post-conviction sentencing hearing).

166. Flewallen v. Faulkner, 677 F.2d 610 (7th Cir. 1982), *cert. denied*, ___ U.S. ___ (1983) (court held merely bringing witnesses to trial was enough—prosecution not required to call witnesses to the stand).

167. For purposes of this note, the meaning of the term "to confront" is simple. However, a great debate has centered on what exactly the term means. This debate involves the reliability aspect of confrontation and is, therefore, beyond the scope of this note.

168. Several commentators have interpreted what type of declarants fall into the category of "witnesses against" the defendant. This proposal is a mixture of three different approaches. For further analysis *see* Graham, *supra* note 7, at 125-44; Seidelson, *supra* note 7, at 92-95; Westen, *Unified Theory, supra* note 7, at 601-13.

169. *Dutton*, 400 U.S. at 95-96 (Harlan, J., concurring). *Dutton* is the most difficult decision to reconcile with any theory. Indeed, Professor Graham's theory, which tried to accomodate the ruling in *Dutton*, was rejected by Professor Westen. *See* Westen, *Unified Theory, supra* note 7, at 604 n. 105.

170. In his concurrence in *Dutton* Justice Harlan stated:

> A rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant. Examples which come to mind are the Business Records Act, 28 U.S.C. §§ 1732-1733, and the exceptions to the hearsay rule for official statements, learned treatises, and trade reports.

Dutton, 400 U.S. at 95-96 (Harlan, J., concurring).

171. One may wonder why any problem exists because regardless of the

the prosecutor must satisfy the confrontation clause by making a good-faith effort to produce the witness at trial. The prosecution must therefore be able to identify witnesses against the defendant.

Generally, a declarant is categorized as a "witness against" the defendant if the prosecution uses the witness' testimony against the accused.[172] Instead of attempting to analyze the substance of the testimony, the prosecutor must merely determine whether he intends to benefit from the witness' testimony. If so, then the confrontation clause is implicated.[173] Therefore, unless the prosecution intends to rely on the hearsay statement, the declarant is not a "witness against" the defendant and the declarant need not be presented at trial.

Next, a declarant is a "witness against" the defendant only if the declaration is testimonial in form.[174] This requirement provides a basis for allowing the prosecution to present incriminating evidence in documentary form without violating the defendant's confrontation right. The case of *United States v. Hans*[175] provides an excellent example. In *Hans* the defendant was charged with tax evasion. The government's case focused on 180 workmen's compensation checks, which the client-payees indorsed to the defendant, who kept one-third for legal fees.[176] The government produced sixty of the clients as live witnesses.[177] However, the government simply introduced the remaining checks without producing the client-payees or demonstrating their

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classification of a witness the defendant has a constitutional right to have the witness present at trial either through his confrontation right or his compulsory process right. However, if the witness is adverse to the accused, the defendant has no burden and can expect to be confronted with the witness at trial. On the other hand, if the witness sought is favorable to the accused, the defendant has the heavy burden of initiating the process by identifying the witness. The defendant must also show that the witness is both material and necessary. *See supra* notes 151-66 and accompanying text. Also, the jurisdiction may impose limits on the number of witnesses a defendant may request. Moreover, if the witness is in the defendant's favor, the defendant will not be able to use cross-examination-type questions and this seriously handicaps the defendant. *See* Hoover v. Beto, 439 F.2d 913, 924 (5th Cir. 1971), *rev'd* 467 F.2d 516 (5th Cir. 1972), *cert. denied*, 409 U.S. 1086 (1972); *accord* State v. Fisher, 222 Kan. 76, 563 P.2d 1012 (1977); *contra Flewallen*, 677 F.2d 610 (court found defendant not prejudiced simply because he could not use cross-examination-type questions).

172. Westen, *Unified Theory, supra* note 7, at 604-05.

173. *See* Westen, *Unified Theory, supra* note 7, at 604. *See also supra* notes 126-34 and accompanying text.

174. Similarly, self-incriminating evidence must be testimonial before the defendant's fifth amendment right is implicated. United States v. Wade, 388 U.S. 218 (1967).

175. 684 F.2d 343 (6th Cir. 1982) *rev'g*, 496 F. Supp. 957 (S.D. Ohio 1980).

176. *Id.* at 344-45.

177. *Id.*

unavailability.[178] The district court stated that the checks represented testimony of the fee arrangement between the client and defendant and held that the balance of the checks would not be admissable unless the government either produced the payees as live witnesses or demonstrated their unavailability.[179] On appeal, the sixth circuit reversed, finding that the checks were properly admissable under the business record exception to hearsay.[180] Since the checks were objective evidence and not testimonial, the sixth amendment right of confrontation was not implicated by the absence of live testimony.[181] Thus, a person is a witness against the defendant only if he can be linked to evidence that is testimonial.[182]

Finally, the testimony of a "witness against" the defendant must be accusatory. Evidence such as business records, while inculpatory at the time of the trial, were no doubt memorialized in an "inocuous and non-accusatory" manner prior to trial.[183] Business records are thus created *anti litem motam.*[184] In addition, testimony concerning the admissability of evidence is non-accusatory if it does not address an issue regarding the defendant's guilt.[185] *United States v. Beasley*[186] provides an illustration of the accusatory concept. In *Beasley*, part of the prosecution's case was based on latent prints lifted from a demand note. The laboratory technician who processed the fingerprints was not present at trial, but an expert who identified the fingerprints as belonging to the defendant testified in open court. The court found that the testimony of the technician, had he been present, would not have been accusatory.[187] The technician's work did not link the defendant to the

178. *Id.* at 345.

179. *United States v. Hans*, 496 F. Supp. at 960.

180. FED. R. EVID. 803(6), 803(8).

181. *Hans*, 684 F.2d at 345.

182. In regard to the testimonial requirement, the sixth amendment right to counsel is in some situations complemented by the right of confrontation. In Gilbert v. California, 388 U.S. 263 (1967), the Court held that the defendant had no right to have counsel present during the taking of handwriting exemplars because it was not a critical stage of the prosecution. The Court reasoned that the defendant will have an opportunity at trial to cross-examine the experts. The implication is that the "critical stage" occurs at trial, when experts use the evidence to inculpate the accused. Therefore, where the defendant's right to counsel is not implicated he still may be protected through his confrontation rights at trial. *See* United States v. Wade, 388 U.S. 218 (1967).

183. Seidelson, *supra* note 7, at 92.

184. "At a time when the declarant had no motive to distort the truth. Before suit brought, before controversy instituted. Also, before the controversy arose." BLACK'S LAW DICTIONARY 118 (5th ed. 1979).

185. Graham, *supra* note 7, at 127.

186. 438 F. 3d 1279 (6th Cir. 1971), *cert. denied,* 404 U.S. 866 (1971).

187. *Id.* at 1281.

prints. The expert's testimony was accusatory because it was relevant to an issue concerning the defendant's guilt, and the prosecution correctly produced him as a live witness at trial.[188]

The application of the proposal to an actual case illustrates its simplicity and effectiveness. In *State v. Spikes*,[189] the defendant was arrested for aggravated robbery. A portion of the prosecution's evidence included the hospital report of the victim's injuries. This evidence was admitted over the defendant's confrontation objection.[190] The intermediate appellate court reversed, finding that the defendant's sixth amendment right had been violated by the admission of the hospital records because the unavailability of the document's preparers was not established.[191] The Ohio Supreme Court found that under the facts of the case the utility of confrontation was slight.[192] In its discussion, the court relied on *Dutton* after comparing the *Dutton* facts with those of the case at bar.[193] *Roberts* was also discussed and cited for the proposition that a demonstration of unavailability is not always necessary.[194] Finally, the court cited *Snyder v. Massachusettes*[195] to support its finding that the constitution was not intended to let the guilty go free. Due to the court's reliance on the imprecise and speculative "utility of confrontation" factor, its analysis was unnecessarily complex.

Application of the proposal discussed herein illustrates that the defendant's confrontation rights were not violated, not because the utility of confrontation was slight, but because those who prepared the records were not "witnesses against" the defendant. It is true that the records were evidence of the defendant's guilt and that they were relied upon by the prosecution. However, the records were *ante litem motam*[196] and, therefore, not accusatory. The medical records established that the victim sustained injuries but they did not link the defendant to the injuries. Such an analysis could have reduced the court's discussion from three pages to one paragraph. Therefore, the most effective and least complex analysis initially centers on whether the defendant's confrontation right was implicated.

The defendant has a constitutional right to come face-to-face with

188. *Id.*
189. 67 Ohio St. 2d 405, 423 N.E.2d 1122 (1981), cert denied, 456 U.S. 979 (1982).
190. *Id.* at ____, 423 N.E.2d at 1125. In Ohio, an element of aggravated robbery requires the state to show serious bodily injury to the victim.
191. *Id.*
192. *Id.* at ____, 423 N.E.2d at 1128.
193. *Id.*
194. *Id.* at ____, 423 N.E.2d at 1126.
195. 291 U.S. 97, 122 (1042).
196. *See supra* note 191.

the witnesses against him only at trial. The right to confrontation is implicated only if the prosecution relies on the witness to prove an issue of the defendant's guilt, and the evidence must be testimonial and accusatory in form. Once the prosecutor can identify when the confrontation clause is implicated, thereby requiring him to produce or demonstrate the unavailability of a witness, it is necessary to analyze the extent of the effort required.

B. *The Scope of the Good-Faith Effort*

The criminal defendant has a constitutional right to expect the prosecutor to make a good-faith effort to locate and secure the presence of witnesses against him.[197] The presence or absence of a good-faith effort is a question of fact and is best resolved on a case by case basis. However, the meaning of "good-faith" in the confrontation context involves certain standards. In most cases, the effort must be reasonably intense and it must be timely.[198]

Case law provides some guidance regarding the kind of efforts necessary to meet the good-faith standard. The type of efforts used to procure a witness' presence at trial may be diverse and may vary[199] from a phone call[200] to an overnight vigil.[201] The important factor is the intensity of the effort. The mere issuance of subpoenas should not discharge the prosecution's duty.[202] Most courts require that a systematic[203] series of efforts be pursued.[204] Attempts at locating witnesses that require little time and effort, such as phoning or issuing subpoenas, are immediately suspect unless complemented by other efforts or pursued in a systematic fashion.[205] The prosecution must

197. *Barber*, 390 U.S. at 725.

198. Western, *II*, *supra* note 7, at 279-80.

199. *See supra* note 110 and accompanying text.

200. *See infra* note 212.

201. Commonwealth v. Blair, ___ Pa. ___, ___, 331 A.2d 213, 215 (1975).

202. State v. Armes, 607 S.W.2d 234, 237 (Tenn. 1980) (issuance of subpoenas alone did not discharge the prosecutor's duty under the confrontation clause).

203. A good-faith effort requires "a thorough, painstaking and systematic attempt to locate a witness." Fresneda v. State, 483 P.2d 1011, 1017 (Alaska 1971).

204. *Compare* People v. Beyea, 38 Cal. App.3d 176, 191, 113 Cal. Rptr. 254, 263 (1974)(prosecution made good-faith effort by visiting the witness' home and place of business) *with* State v. Pereda, 111 Ariz. 344, ___, 529 P.2d 695, 697 (1974)(phone calls alone not sufficient where prosecutor could have visited the witness' residence).

205. *See* People v. Arroyo, 54 N.Y.2d 567, 431 N.E.2d 271 (1982)(September 11, the witness appeared at a preliminary hearing; February 2, prosecution called witness to confirm trial date; February 4, detective called on witness personally to insure her presence at trial; February 5, witness did not appear for trial; court held, good-faith effort satisfied after trial continued for a week to search for the witness); *but see*

actively seek, and in most cases, attempt to make personal contact with the witness.[206]

The state should also document its efforts through affidavits, time sheets or other objective evidence, effectively building a record of its search for the witness. This enables the judge to make an objective ruling without speculation. Furthermore, making a record of the state's attempts to locate a witness acts as an additional safeguard of the defendant's confrontation right. Confrontation requires the prosecution to act on its own initiative and the defendant usually has no control over the prosecution's search.[207] Since the defendant's constitutional right is controlled by his adversary, documentation of the prosecutorial efforts should be required.[208]

CONCLUSION

The confrontation clause protects the defendant by requiring the prosecution to present testimonial evidence through live witnesses. This enables the defendant to be confronted with his accusers so he can cross-examine them at trial. Live testimony, however, is at times impossible. If a witness against the defendant is unavailable to testify at trial and his testimony has been memorialized, then the prosecution should be able to admit the testimony in written form. To protect the integrity of the confrontation clause in this situation, the Warren Court determined that prior to the admission of hearsay, the pros-

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Fresneda, 483 P.2d at 1016 (Alaska 1971)(court held, state did not meet good-faith effort required; search for the witness begun seven days prior to trial not far enough in advance to amount to a diligent search).

206. State v. Gray, ___ Mo.App. ___, 616 S.W.2d 102 (1981)(prosecutor made a series of phone calls to the witness until personally contacting him but witness still did not show up—held this was not a sufficient effort).

207. This is distinguished from compulsory process, where the defendant has the burden of supplying the prosecution with the location of the witness. Under the compulsory process scheme, if the defendant supplies the prosecution with a name and address, but the prosecution never pursues the lead, it is a patent example of a lack of prosecutorial good-faith. Under the confrontation clause, however, the search for a witness is almost exclusively at the descretion of the prosecution. *See supra* notes 151-55 and accompanying text.

208. *See* Valenzuela v. Griffin, 654 F.2d 707, 710 (10th Cir. 1981)(evidence of efforts by prosecution must be placed in the record; conclusory statements by prosecutor not sufficient to establish good-faith effort); *cf.* Harrison v. United States, ___ D.C. App. ___, ___, 435 A.2d 734, 736 n.5 (1981)(efforts made by prosecution should be repeated for the record along with an explanation of why the efforts failed); *but see* United States v. Sindona, 636 F.2d 792, 804 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1980)(affidavits of prosecution's efforts to locate the witness are desireable but an oral presentation by prosecutor was not fatal).

ecution must make a good-faith effort to locate and produce the hearsay-declarant at trial. The good-faith standard has been recognized by the Burger Court, but recent decisions indicate that there are exceptions to the good-faith requirement.

Since 1970, the Burger Court has set out factors that effectively limit when the good-faith effort is required. No good-faith effort is necessary if the hearsay is not crucial to the prosecution, devastating to the accused, or if confrontation would be of little use to the defendant. Furthermore, in situations where the witness' location is unknown, the prosecutor need not search for him if it is unlikely that the search would produce the witness. However, these limiting factors are very speculative and difficult for the prosecutor to apply prior to trial. The factors also require the defendant to show how he has been prejudiced by the absence of live testimony instead of requiring the prosecution to justify its use of hearsay evidence.

Instead of establishing factors that require speculation and analysis of the substance of the hearsay, the problems associated with such an approach can be avoided by examining the language of the confrontation clause. If a hearsay statement was made by a "witness against" the defendant, the prosecution must make a reasonably intense effort to produce the declarant at trial. If the declarant is not a "witness against" the defendant then confrontation is not implicated and the defendant has no right to expect that the evidence against him will be introduced through live testimony.

The prosecutor's inquiry does not center on the substance nor substantive effect of the hearsay at issue. The prosecution must determine if the hearsay-declarant is a "witness against" the defendant. A declarant is a "witness against" the defendant if the state plans to utilize his testimony to prove the defendant's guilt. In addition, the declaration must be accusatory and testimonial in form. Such an analysis avoids examining the substance of the testimony, and the burden remains with the prosecution to justify its use of the hearsay in lieu of live testimony. Finally, these determinations are not complex and can be made by the prosecution prior to trial.

BRIAN J. HURLEY