

1986

Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement

Laird C. Kirkpatrick

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Kirkpatrick, Laird C., "Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement" (1986).
Minnesota Law Review. 1768.
<https://scholarship.law.umn.edu/mlr/1768>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement

Laird C. Kirkpatrick*

Then call them to our presence—face to face, and frowning brow
to brow, ourselves will hear the accuser and the accused freely speak
. . . .¹

INTRODUCTION

One of the most difficult and perplexing issues arising under the sixth amendment is the relationship between the confrontation clause and the law of hearsay. The clause guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”² The Supreme Court has interpreted “witnesses against” a criminal defendant to include hearsay declarants³ and has held that the confrontation clause imposes some restrictions on the use of hearsay in criminal cases.⁴

The 1970 decision of *Dutton v. Evans*⁵ established that hearsay possessing sufficient “indicia of reliability” may be ad-

* Professor of Law, University of Oregon. The author expresses appreciation to Richard D. Handley, a second-year student at the University of Oregon Law School, for his research assistance in the preparation of this Article.

1. W. SHAKESPEARE, RICHARD II, act 1, sc. 1 (J.D. Wilson ed. 1939).

2. U.S. CONST. amend. VI, cl. 2.

3. See, e.g., *California v. Green*, 399 U.S. 149 (1970); *Mattox v. United States*, 156 U.S. 237 (1895).

4. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (“The historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay.”).

If “witnesses against” were construed to mean only trial witnesses, the clause would place no restrictions on the admissibility of hearsay. If the clause, once interpreted to reach hearsay declarants, were applied literally, it would bar all hearsay, except in those cases in which the declarant is produced for cross-examination. The Court has rejected both extreme interpretations and has recognized exceptions to the right of confrontation to accommodate some forms of hearsay. See *id.* at 63; *Mattox v. United States*, 156 U.S. 237, 243 (1895).

5. 400 U.S. 74 (1970).

mitted, at least in some circumstances, without violating the defendant's right of confrontation.⁶ During the 1970's, lower courts struggled to define what types of hearsay met this constitutionally mandated "reliability" standard.⁷

A decade later, in *Ohio v. Roberts*,⁸ the Supreme Court attempted to add greater certainty to the "workaday world"⁹ of criminal trials by holding that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."¹⁰ At the same time, however, the Court created new uncertainties for prosecutors and lower courts by announcing that "[i]n the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."¹¹ In other words, if the hearsay declarant is not produced for cross-examination, a showing of unavailability will normally be required before the hearsay will be constitutionally admissible.

The Court appeared not to recognize the sweeping poten-

6. *Id.* at 89. For a discussion of the status of confrontation after *Dutton*, see Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process*, 6 CONN. L. REV. 529, 531-32 (1974); Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1405 (1972); Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151, 183 (1978); Natali, Green, Dutton and Chambers, *Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43, 54-57 (1975); Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 38 (1972); Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 81 (1971); Westen, *The Future of Confrontation*, 7 MICH. L. REV. 1185, 1185-86 (1979); Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32, 38-41 (1973); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 188 (1971).

7. See, e.g., *United States v. Lee*, 589 F.2d 980, 988 (9th Cir.) (affidavits from official stating that defendant had never worked for the CIA had sufficient indicia of reliability), *cert. denied*, 444 U.S. 969 (1979); *United States v. Mangan*, 575 F.2d 32, 44-45 (2d Cir.) (coconspirator's statement had indicia of reliability), *cert. denied*, 439 U.S. 931 (1978); *United States v. Wigerman*, 549 F.2d 1192, 1194 n.7 (8th Cir. 1977) (business records found reliable); *United States v. Kelley*, 526 F.2d 615, 620-21 (8th Cir. 1975) (sufficient indicia of reliability found for declaration against penal interest), *cert. denied*, 424 U.S. 971 (1976); *Phillips v. Neil*, 452 F.2d 337, 345-48 (6th Cir. 1971) (psychiatric diagnosis in medical record not bearing the name of the author or his qualifications does not have sufficient indicia of reliability), *cert. denied*, 409 U.S. 884 (1972); *State v. Lunn*, 82 N.M. 526, 530, 484 P.2d 368, 372 (N.M. Ct. App. 1971) (excited utterance of child witness to murder lacks indicia of reliability).

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

9. *Id.* at 66.

10. *Id.*

11. *Id.* at 65.

tial ramifications of such an unavailability requirement. If broadly applied, it would severely restrict the use by prosecutors of numerous hearsay exceptions that have traditionally been available.¹² The vast majority of hearsay exceptions, under both the common law and the Federal Rules of Evidence, do not contain a requirement that the unavailability of the declarant be shown.¹³

The unavailability requirement announced in *Roberts* raises doubts regarding the constitutional status in criminal prosecutions of the twenty-four hearsay exceptions set forth in Federal Rule of Evidence 803,¹⁴ and its state counterparts,¹⁵ which purport to apply regardless of the availability of the declarant.¹⁶ The unavailability requirement also calls into question the provisions of Federal Rule of Evidence 801(d)(2)(C), (D), and (E),¹⁷ which admit the statements of agents and cocon-

12. For example, a showing of unavailability of the declarant is not possible with respect to many types of business and official records, yet production of the declarant would negate the utility of the exception. See Lilly, *Notes On the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 225 (1984) ("[T]he broad application of a constitutional rule of preference [for in-court testimony] is likely to make profound changes in criminal trials.").

13. The twenty-four exceptions set forth in Fed. R. Evid. 803 apply regardless of the availability of the declarant. Only the five exceptions listed in Fed. R. Evid. 804(b) require a showing of unavailability. Admissions by agents or conspirators may also be received under Fed. R. Evid. 801(d)(2)(C), (D), and (E) without a showing of unavailability. At common law only a minority of the hearsay exceptions require a showing of unavailability. See C. MCCORMICK, MCCORMICK ON EVIDENCE § 253, at 753 (3d ed. 1984).

14. A direct constitutional clash is avoided by the introductory wording of Fed. R. Evid. 803, which does not state that evidence satisfying an exception listed therein is admissible, but merely that it is "not excluded by the hearsay rule." The Advisory Committee's note to article VIII of the Federal Rules of Evidence states:

In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.

FED. R. EVID. art. VIII, advisory committee note.

15. Twenty-seven states, the military, and Puerto Rico have adopted the Federal Rules of Evidence in various forms. See 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, *Note on State Adaptations of Federal Rules of Evidence; Military Rules of Evidence T-1* (1985).

16. FED. R. EVID. 803.

17. Fed. R. Evid. 801(d) provides:

A statement is not hearsay if . . . (2) . . . The statement is offered against a party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his

spirators without requiring a showing of unavailability.¹⁸ The five hearsay exceptions listed in Federal Rule of Evidence 804¹⁹ are relatively unaffected because they are already subject to an unavailability requirement within the rule that in most cases is sufficiently stringent to satisfy constitutional standards.²⁰

During the 1980's, lower courts have had difficulty applying the *Roberts* unavailability requirement to hearsay offered

agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 801(d).

The provisions of Fed. R. Evid. 801(d)(2)(A) and (B), admitting personal or adoptive admissions of criminal defendants are not affected because defendants are unavailable as a matter of law to be called as prosecution witnesses. See U.S. CONST. amend. V; C. MCCORMICK, *supra* note 13, § 130, at 315.

The provisions of Fed. R. Evid. 801(d)(1) admitting certain prior inconsistent statements, prior consistent statements, and prior statements of identification also presumably pass constitutional muster because these statements may be received only if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." FED. R. EVID. 801(d)(1).

18. Some courts addressing the impact of *Roberts* upon coconspirator admissions have held that unavailability must be shown, even though such statements are defined as not hearsay by the Federal Rules. See, e.g., *United States v. Inadi*, 748 F.2d 812, 819 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 2653 (1985) (No. 84-1580); *United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985); *United States v. Ordonez*, 737 F.2d 793, 802 (9th Cir. 1984); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981). Other courts have held that compliance with the rule admitting a coconspirator's statements, Fed. R. Evid. 801 (d)(2)(E), automatically satisfies the confrontation clause, without discussing the implications of *Roberts*. See, e.g., *United States v. Molt*, 772 U.S. 366, 368 (7th Cir. 1985); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied*, 459 U.S. 843 (1982); see also *United States v. Kiefer*, 694 F.2d 1109, 1113 (8th Cir. 1982) ("declarations admitted in conformity with the coconspirator rule generally do not violate a defendant's confrontation right, absent some unusual circumstance"). See generally *Lilly*, *supra* note 12. Professor Graham Lilly states: "Vicarious admissions, including those of a coconspirator, may constitute nonhearsay under the Federal Rules, but they surely come within the inner core of Constitutional concern. In short, *Roberts* applies full force." *Id.* at 229.

19. Fed. R. Evid. 804 establishes exceptions for former testimony, statements under belief of impending death, statements against interest, and statements of personal or family history, as well as a residual exception. FED. R. EVID. 804.

20. Fed. R. Evid. 804(a) provides:

under various exceptions.²¹ A recurring problem has been de-

“Unavailability as a witness” includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies 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.

FED. R. EVID 804(a).

Subpart (1) should satisfy the constitutional unavailability requirement if the exemption on ground of privilege is granted. Some commentators, however, argue that the interests protected by evidentiary privileges should not be deemed automatically superior to the confrontation rights of criminal defendants. *See, e.g., Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 581 n.38 (1978); Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska*, 73 MICH. L. REV. 1465, 1484-85 (1975). There is also a related argument that the prosecutor has an obligation to grant immunity to defense witnesses to prevent them from asserting the privilege against self-incrimination, thus making them available to testify at trial. To date, courts have been generally unreceptive to this contention. 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 486, at 1070-71 (1980).

Subparts (2) and (3) should also satisfy the constitutional unavailability standard. When a declarant's hearsay statement is being offered and unavailability is claimed under subpart (3) merely by virtue of the declarant's testimony as to the existence of a memory loss, it can be argued, however, that the confrontation clause may require some testing of that claim.

Subpart (4) contains the greatest potential conflict with the confrontation clause because the duration of a medical disability that would be sufficient to establish a witness's unavailability in a civil case may be less than that which would be required to protect the right of confrontation in a criminal case. Courts can of course avoid the potential conflict by interpreting the rule more stringently in criminal cases.

Subpart (5) not only satisfies but may go beyond the requirements of the confrontation clause. *See Mancusi v. Stubbs*, 408 U.S. 204, 212 (1972) (no apparent obligation to attempt to obtain the appearance of a witness by “other reasonable means” once the witness has been shown to be beyond the reach of process).

It should be noted that Fed. R. Evid. 804(a) does not purport to be an exhaustive listing of the grounds of evidentiary unavailability. If a court bases a finding of unavailability on an unlisted ground, such as the age of the potential witness, a separate constitutional analysis of the sufficiency of this ground will be required.

21. *See, e.g., United States v. Caputo*, 758 F.2d 944, 951 (3d Cir. 1985) (un-

termining what exemptions from the unavailability requirement should be recognized. The *Roberts* Court noted that the unavailability requirement is not absolute and that certain exemptions will be allowed, for example when "the utility of trial confrontation [is] remote."²²

This Article traces the historical and theoretical development of the unavailability requirement and identifies criteria for evaluating when exemptions from the unavailability requirement should be recognized by the courts. The Article then analyzes various hearsay exceptions recognized by the Federal Rules of Evidence in light of these criteria and concludes that many varieties of hearsay, particularly documentary hearsay, generally should be exempt from the unavailability requirement.

I. GENESIS OF THE UNAVAILABILITY REQUIREMENT

The requirement of showing unavailability or producing the hearsay declarant for cross-examination at trial has been a recurring theme in two lines of Supreme Court decisions extending back to the nineteenth century. For this reason, *Ohio v. Roberts* may have appeared to mark little departure from established precedent. Closer examination, however, reveals that these earlier lines of cases do not provide authority for the sweeping unavailability requirement set forth in *Roberts*.

The first line of cases involved hearsay that was subject to cross-examination at a prior hearing and that was received under the former testimony exception to the hearsay rule.²³ In

availability must be shown in order to admit evidence under coconspirator exception); *United States v. McClintock*, 748 F.2d 1278, 1291-92 (9th Cir. 1984) (unavailability must be shown in order to admit evidence under business records exception under facts of the case); *United States v. Panas*, 738 F.2d 278, 283-84 (8th Cir. 1984) (unavailability need not be shown to admit evidence under coconspirator exception); *United States v. Yakobov*, 712 F.2d 20, 24 n.4 (2d Cir. 1983) (open question whether certificate admissible pursuant to Fed. R. Evid. 803(10) would satisfy *Roberts* requirements); *United States v. Washington*, 688 F.2d 953, 959 (5th Cir. 1982) (business records should not be introduced upon retrial without compliance with the *Roberts* test); *United States v. Hans*, 684 F.2d 343, 346 (6th Cir. 1982) ("Clearly *Roberts* does not support exclusion of the instant checks" which were admissible pursuant to Rule 803(6) and 803(8)); *People v. Dement*, 661 P.2d 675, 680-82 (Colo. 1983) (unavailability must be shown when evidence is sought to be admitted under the excited utterance exception to the hearsay rule).

22. 448 U.S. at 65 n.7.

23. The former testimony exception is currently codified as Rule 804(b)(1) of the Federal Rules of Evidence.

1878, in the case of *Reynolds v. United States*,²⁴ the government had shown that it was unable to subpoena the defendant's wife, allegedly because of her concealment by the defendant. The Court therefore affirmed admission of the record of her testimony at the defendant's first trial against the defendant at his second trial.²⁵ Similarly, in the 1895 case of *Mattox v. United States*,²⁶ the Court approved admission of a court reporter's notes of prior testimony given by two prosecution witnesses at the defendant's earlier trial, because the record indicated the witnesses had subsequently died.²⁷ Five years later, however, in *Motes v. United States*,²⁸ the Court held it was error to admit a prosecution witness's preliminary hearing testimony when the witness's unavailability was due to the government's negligence in allowing him to escape from custody.²⁹

The leading recent case establishing unavailability as a constitutional prerequisite to the admission of former testimony in a criminal case is *Barber v. Page*.³⁰ In *Barber*, the trial court admitted a transcript of a codefendant's preliminary hearing testimony that inculpated Barber.³¹ The transcript was admitted after a showing that the codefendant, at the time of trial, was incarcerated in a federal prison in another state.³² Applying state evidence law, the court found the codefendant sufficiently unavailable to justify admitting the transcript under the former testimony exception to the hearsay rule.³³ The Supreme Court reversed, holding that regardless of whether the showing of unavailability was sufficient to meet state evidentiary standards, it was insufficient to meet the requirements of the confrontation clause.³⁴ The witness was beyond the subpoena power of the state and unable to return voluntarily, but

24. 98 U.S. 145 (1878).

25. *Id.* at 158. The Court stated:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.

Id.

26. 156 U.S. 237 (1895).

27. *Id.* at 244.

28. 178 U.S. 458 (1900).

29. *Id.* at 471.

30. 390 U.S. 719 (1968).

31. *Id.* at 720.

32. *Id.*

33. *Id.*

34. *Id.* at 721.

this was not a sufficient showing of constitutional unavailability. The Court stated: "[A] witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."³⁵ The Court discussed various methods state authorities could have used to produce witnesses incarcerated out-of-state, citing in particular the possibility of a writ of habeas corpus *ad testificandum* issued by a federal or state judge.³⁶

Mancusi v. Stubbs,³⁷ decided four years later, elaborated upon the nature of the government's "good faith" obligation to produce available prosecution witnesses. In *Mancusi*, the prosecution witness had become a permanent resident of Sweden by the time of the second trial. The state trial judge found the witness unavailable and admitted his testimony from the first trial. A federal court granted defendant's habeas corpus petition, finding an insufficient showing of the witness's unavailability. Although not retreating from recognition of a constitutional unavailability requirement, the Supreme Court stated:

[T]he State of Tennessee, so far as this record shows, was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government. . . . We therefore hold that the predicate of unavailability was sufficiently stronger here than in *Barber* that a federal habeas court was not warranted in upsetting the determination of the state trial court as to [the witness's] unavailability.³⁸

35. *Id.* at 724-25.

36. *Id.* at 724. The Court noted that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." *Id.* (quoting *Barber v. Page*, 381 F.2d 479, 481 (10th Cir. 1966) (Aldrich, J., dissenting)).

37. 408 U.S. 204 (1972).

38. *Id.* at 212-13. In *California v. Green*, 399 U.S. 149 (1970), the Court took a different approach, holding that unavailability need not be shown if the witness is produced at trial. In *Green*, after a prosecution witness claimed a lapse of memory during direct examination, the prosecutor offered his testimony given at the preliminary hearing. The evidence was received under a new provision of the California Evidence Code, which allowed prior inconsistent statements not only for impeachment but also as substantive evidence. Reversing the ruling of the California Supreme Court that this provision violated the confrontation clause, the Court stated:

If [the declarant] had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing. . . . [A]s a constitutional matter, it is untenable to construe the Confrontation Clause to permit the use of prior testimony to prove the State's case where the declarant never appears, but to bar that testimony where the declarant is

This line of cases demonstrates that one function of the confrontation clause is to impose a rule of preference for live testimony over transcripts so that the trier of fact will have an opportunity to evaluate the witnesses' demeanor. The clause compels a witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."³⁹

If unavailability of the declarant is shown, however, the Court will allow receipt of prior cross-examined testimony,⁴⁰ because three of the four concerns of the confrontation clause⁴¹ are satisfied by such hearsay. The witness has testified under oath, in the defendant's presence, and, most important, has been subject to cross-examination by the defendant. Only the opportunity to observe the witness's demeanor is lacking. In *Mattox*, the Court described this as an "incidental benefit" that must be sacrificed in order to protect the "rights of the public" to have criminals brought to justice in cases where "death has closed the mouth" of an essential witness.⁴²

present at the trial, exposed to the defendant and the trier of fact, and subject to cross-examination.

Id. at 166-67.

39. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

40. The Court has not held that cross-examination in a proceeding in which the defendant has a different motive would be sufficient. The Court has also not resolved whether a mere opportunity to cross-examine will necessarily satisfy confrontation requirements. See *Ohio v. Roberts*, 448 U.S. 56, 70-73 (1979).

41. In *Roberts*, the Court commented that "a primary interest secured by [the provision] is the right of cross-examination." *Id.* at 63 (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)). In a footnote, the *Roberts* Court cited three additional purposes of confrontation: first, it draws "out discrediting demeanor to be viewed by the factfinder;" second, it "undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial;" and third, it "insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." *Roberts*, 448 U.S. at 63 n.6.

42. *Mattox v. United States*, 156 U.S. 237, 243 (1895). The Court stated:

There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed

These former-testimony cases do not provide authority for the sweeping unavailability requirement set forth in *Roberts*. The Court had never previously extended the constitutional standard of unavailability developed in the former testimony cases to include *all* forms of hearsay. Former testimony is one of the few exceptions to the hearsay rule for which evidence law itself requires a showing of unavailability of the declarant.⁴³ In cases where the prosecutor is already required to show unavailability under controlling evidence rules, there may be little or no additional burden involved in satisfying constitutional standards of unavailability. It is, however, a substantial additional burden for prosecutors to show unavailability when no such showing is otherwise required. In the latter instance, the constitutional unavailability requirement can serve as a practical bar to the use of hearsay exceptions well established under applicable rules of evidence.⁴⁴

The second line of confrontation cases involved situations in which the hearsay declarant was not previously subject to cross-examination. In such cases, a requirement that available declarants be produced at trial furthers all four of the interests protected by the confrontation clause, not merely the interest in having the demeanor of prosecution witnesses evaluated by the trier of fact. Because uncross-examined hearsay is more suspect, the Court has not approved automatic admission of such hearsay, even if a showing of unavailability is made. Thus, with respect to uncross-examined hearsay, the confrontation clause can operate as a rule of exclusion rather than merely as a rule of preference.

In *Pointer v. Texas*,⁴⁵ the trial court admitted the transcript of a prosecution witness's testimony at a preliminary hearing. The Supreme Court found a violation of the defendant's right to confront witnesses against him. The Court held that the defendant did not have an adequate opportunity to cross-examine the witness prior to trial because the defendant was not represented by counsel at the preliminary hearing.⁴⁶ Therefore, pro-

the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

Id.

43. See FED. R. EVID. 804(a)(1); C. MCCORMICK, *supra* note 13, § 255, at 761-62.

44. See *supra* note 12.

45. 380 U.S. 400 (1965).

46. *Id.* at 407-08.

duction of the witness for cross-examination at trial was required.

In *Douglas v. Alabama*,⁴⁷ the prosecutor had been permitted to read to the jury a document purporting to be an accomplice's written confession, which inculpated the defendant, under the guise of refreshing the witness's recollection.⁴⁸ The Court found that this "created a situation in which the jury might improperly infer both that the statement had been made and that it was true."⁴⁹ The accomplice could not be cross-examined regarding the statement because he asserted the privilege against self-incrimination.⁵⁰ The absence of an opportunity for cross-examination at trial caused the Court to find a violation of the right of confrontation, even though the hearsay statements were not offered directly into evidence against the accused.⁵¹

Similarly, in *Bruton v. United States*,⁵² a codefendant's confession that implicated the defendant was offered at a joint trial, although subject to a limiting instruction that it was not to be considered against the defendant.⁵³ Because the jury might disregard this instruction and because the codefendant, having refused to take the stand, was not subject to cross-examination regarding the confession, the Court found the defendant's right of confrontation had been violated.⁵⁴

In *California v. Green*,⁵⁵ in addition to former testimony,⁵⁶ the prosecutor offered evidence of inculpatory statements that

47. 380 U.S. 415 (1965).

48. *Id.* at 416.

49. *Id.* at 419.

50. *Id.* at 416.

51. *Id.* at 419.

52. 391 U.S. 123 (1968).

53. *Id.* at 123-24.

54. *Id.* at 126; *cf.* *Parker v. Randolph*, 442 U.S. 62 (1979) (when defendant has confessed and his confession "interlocks" with and supports the confession of a nontestifying codefendant, the admission of the confessions, with proper limiting instructions, does not violate the confrontation clause); *Nelson v. O'Neil*, 402 U.S. 622, 627 (1971) (*Bruton* not controlling when codefendant takes stand, denies inculpatory statement, and testifies favorably to defendant. "*Bruton*, in other words, is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination."); *Harrington v. California*, 395 U.S. 250 (1969) (when confessions of three codefendants were admitted at trial, *Bruton* violation was harmless beyond a reasonable doubt since one of the three took the stand and was subject to cross-examination).

55. 399 U.S. 149 (1970).

56. *See supra* note 38.

a prosecution witness made to a police officer prior to trial.⁵⁷ The Court held that these hearsay statements could not be received in evidence unless the witness was able to be cross-examined regarding them at trial.⁵⁸ The Court remanded the case for a determination of whether the claimed memory lapse by the witness regarding the events that were the subject of his statements was sufficient to deprive the defendant of the right of confrontation.⁵⁹

In *Green*, it appeared that the Court might be moving toward a cross-examination requirement for all hearsay statements by available declarants.⁶⁰ The Court, however, went only so far as to hold that if the statement were subject to cross-examination either when made or at trial, the confrontation clause would be satisfied.⁶¹ Six months later, in *Dutton v. Evans*,⁶² the court retreated from any inference in *Green* that the sixth amendment imposes an absolute bar to uncross-examined hearsay from available declarants. The Court found no confrontation violation in the admission of the hearsay statement of a coconspirator against the defendant,⁶³ even though the statement was not cross-examined when made or at trial.⁶⁴ Moreover, the Court was untroubled by the fact that the prosecutor had made no showing of the unavailability of the hearsay declarant.⁶⁵

This second line of cases, involving uncross-examined hearsay, also fails to provide sufficient authority for an unavailability requirement of the scope announced in *Roberts*. None of these cases held that all hearsay not cross-examined at a prior proceeding must be subject to cross-examination at trial if the declarant is available. In fact, in other cases the Court has approved the admission of uncross-examined hearsay without a

57. *Green*, 399 U.S. at 151.

58. *Id.* at 164.

59. *Id.* at 170. On remand, the California Supreme Court found that the memory lapse did not impair *Green's* right of confrontation. *Green v. State*, 3 Cal. 3d 981, 989-91, 92 Cal. Rptr. 494, 499-500, 479 P.2d 998, 1003-04, *cert. dismissed*, 404 U.S. 801 (1971).

60. *See id.* at 174 (Harlan, J., concurring).

61. *Id.* at 164.

62. 400 U.S. 74 (1970).

63. Under Fed. R. Evid. 801(d)(2)(E), a coconspirator's statements are defined as not hearsay. *See supra* note 17. The Federal Rules of Evidence, however, were not in effect at the time of the *Dutton* decision, and coconspirator statements were considered hearsay at common law. *See infra* note 214 and accompanying text.

64. *Dutton*, 400 U.S. at 87-88.

65. *Id.* at 88-89.

showing of unavailability at trial.⁶⁶

Thus neither line of cases described above is authority for the sweeping unavailability requirement set forth in *Roberts*. Certainly the lower courts prior to 1980 did not interpret the applicable precedents as imposing such a broad unavailability requirement. A wide variety of hearsay was regularly admitted against criminal defendants without requiring either production of the declarant or a showing of declarant unavailability.⁶⁷ The Supreme Court denied certiorari in a number of these cases,⁶⁸ thereby reinforcing the widespread view that a showing of unavailability was not essential for many forms of hearsay to be admissible in criminal cases.

II. THE SEARCH FOR A LIMITING THEORY

The proposal of a constitutional unavailability requirement applicable to all varieties of hearsay was developed most explic-

66. In *Dowdell v. United States*, 221 U.S. 325 (1911), the Court approved a clerk's hearsay certification of the accuracy of a court record even though there was no showing of unavailability. The Court held that the confrontation clause did not prohibit the introduction of "[d]ocumentary evidence to establish collateral facts, admissible under the common law." *Id.* at 330. Similarly, in *Anderson v. United States*, 417 U.S. 211 (1974), the Court approved introduction of a court reporter's transcript to prove what testimony was given at a prior hearing, without requiring that the reporter be produced or shown to be unavailable. *Id.* at 220 n.11; *cf.* *Salinger v. United States*, 272 U.S. 542, 547-48 (1926) (approving admission of letters, bank deposit slips, and book entries although the Court apparently took the view that the various exhibits either were not offered for a hearsay purpose or qualified as admissions).

67. *See, e.g.*, *United States v. Grossman*, 614 F.2d 295, 296-97 (1st Cir. 1980) (catalog admitted to show value of stolen lighters); *United States v. Beecroft*, 608 F.2d 753, 761 (9th Cir. 1979) (credit report of Dun and Bradstreet admitted); *United States v. Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979) (college transcript admitted); *United States v. Ullrich*, 580 F.2d 765, 772 (5th Cir. 1978) (manufacturer's statement of origin of automobile admitted); *United States v. Wright*, 573 F.2d 681, 685 (1st Cir. 1978) (car rental payment slip admitted); *United States v. Evans*, 572 F.2d 455, 488 (5th Cir. 1978) (pocket calendar admitted); *United States v. Powers*, 572 F.2d 146, 154 (8th Cir. 1978) (records of out-of-state manufacture of firearms admitted); *United States v. Wigerman*, 549 F.2d 1192, 1193-94 (8th Cir. 1977) (motel registrations, car rentals, and airline shipments admitted); *United States v. Page*, 544 F.2d 982, 986-87 (8th Cir. 1976) (lease agreement involving a stolen car admitted); *United States v. Johnson*, 515 F.2d 730, 732 (7th Cir. 1975) ("Red Book" admitted to show value of automobile).

68. *See, e.g.*, *United States v. Lee*, 589 F.2d 980 (9th Cir.) (affidavit that defendant had never worked for CIA), *cert. denied*, 444 U.S. 969 (1979); *United States v. Colyer*, 571 F.2d 941 (5th Cir.) (banking records), *cert. denied*, 439 U.S. 933 (1978); *United States v. Lloyd*, 431 F.2d 160 (9th Cir.) (official records), *cert. denied*, 403 U.S. 911 (1970); *United States v. Sacco*, 428 F.2d 264 (9th Cir.) (alien registration documents), *cert. denied*, 400 U.S. 903 (1970).

itly by Justice Harlan in his concurring opinion in *California v. Green*.⁶⁹ Justice Harlan criticized the past approach of the Court as "indiscriminately [equating] 'confrontation' with 'cross-examination.'" ⁷⁰ As an alternative, he set forth his view that "the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial."⁷¹

Less than six months later, however, Justice Harlan repudiated this view. In his concurring opinion in *Dutton v. Evans*,⁷² he stated:

Nor am I now content with the position I took in concurrence in *California v. Green*

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 . . . and the exceptions to the hearsay rule for official statements, learned treatises, and trade reports.⁷³

A number of commentators, although supportive of Justice Harlan's original proposal that an unavailability requirement be made a component of confrontation jurisprudence, have shared his subsequent apprehensions that an across-the-board unavailability requirement would unduly limit the prosecution's use of hearsay in criminal cases.⁷⁴ Therefore, several of

69. 399 U.S. 149, 172 (1970) (Harlan, J., concurring).

70. *Id.*

71. *Id.* at 174 (emphasis in original).

72. 400 U.S. 74, 93 (1970) (Harlan, J., concurring).

73. *Id.* at 95-96.

74. See, e.g., Graham, *supra* note 6, at 192 ("Justice Harlan's concern [in repudiating the unavailability requirement] that the confrontation clause not require production of all available witnesses is also well taken."); Read, *supra* note 6, at 43 ("[R]equiring production of available witnesses . . . would hamper exceptions that excuse witnesses when their presence would be inconvenient or of small utility to the defendant."); Westen, *supra* note 20, at 615. Professor Westen states:

I believe that Justice Harlan was closer to the mark the first time. To be sure, there is something troubling about treating confrontation as a strict rule of preference; the prosecution can hardly be expected to present each and every item of evidence in the form of direct testimony simply because the declarant happens to be available to be produced in person. Surely there are some kinds of evidence, such as business records and statements from learned treatises, that should be admissible in hearsay or documentary form without violating the confrontation clause.

Id.; cf. Baker, *supra* note 6, at 542 ("Although there appears to be some historical support for the availability requirement, the history is at best so scanty

these writers have proposed interpretations of the confrontation clause that would narrow the meaning of "witnesses against" a criminal defendant and thereby allow certain forms of hearsay to be admitted without a showing of unavailability.

Professor Kenneth Graham proposed that "witnesses against" a defendant, within the meaning of the confrontation clause, be limited to "principal witnesses" for the prosecution, such as those necessary for the prosecution to survive a motion for acquittal based upon insufficiency of proof.⁷⁵ Hearsay statements by other declarants would not be excludable under the sixth amendment.⁷⁶

Although most observers would agree that important hearsay should be treated differently from unimportant hearsay for purposes of confrontation analysis, the difficulty is defining which hearsay declarants are "principal witnesses." Sometimes hearsay necessary to avoid a directed judgment of acquittal has far less significance in determining the outcome of a trial than hearsay that is cumulative or corroborative but still of great persuasive impact.⁷⁷ This approach would also create the anomaly that a defendant would have no sixth amendment right to cross-examine a nonprincipal witness, even though that witness has testified against him.

Professor Peter Westen suggested that "witnesses against" a defendant be limited to available declarants "whose statements the prosecution introduces into evidence against the accused *and* whom the prosecution can reasonably expect the defendant to wish to cross-examine at that time."⁷⁸ If it is not reasonable to expect the defendant to wish to cross-examine the hearsay declarant, then any right of the defendant to have the witness produced would be based on the compulsory pro-

that it is important that it not be used to interpret the clause in a manner that will have a rigidifying effect on future liberalization of the hearsay rules.").

75. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 129 (1972).

76. *Id.*

77. For example, a city directory might be introduced to establish that the crime occurred within the jurisdiction of the court, or a certificate might be received to prove that a bank was insured by the Federal Deposit Insurance Corporation, an essential element of a federal bank robbery prosecution. Cross-examination of such hearsay would seem far less significant than cross-examination of statements in an affidavit by an alleged eyewitness identifying the defendant as the bank robber, even though there is sufficient other evidence of identity to avoid a directed judgment of acquittal.

78. Westen, *supra* note 6, at 1206-07 (1979); see Westen, *supra* note 20, at 617-18.

cess clause rather than the confrontation clause.⁷⁹

It is unclear, however, why a criminal defendant's constitutional right should be defined by the prosecutor's state of mind. Such an approach could present serious practical concerns and invite defense stratagems to evade the limitations it provides.⁸⁰ An objective measure of the boundaries of confrontation would be easier for judges to apply.⁸¹

Professor Michael Graham proposed that "witnesses against" a defendant be limited to those witnesses who testify in court on behalf of the prosecution or who have made statements that are "accusatory" of the defendant.⁸² A nonaccusatory hearsay statement would not be excludable under the confrontation clause even if the available declarant were not produced, but it would still have to satisfy due process standards.⁸³

This proposal presents two difficulties. The first is determining when a statement is "accusatory."⁸⁴ The second is the

79. Westen, *supra* note 6, at 1207 n.86 (1979).

80. What if the defendant notified the prosecutor in advance of trial of a desire to cross-examine all hearsay declarants? Could the prosecutor "reasonably" disregard such a request? On what basis? Would this constitute impermissible prosecutorial second-guessing of defense strategy? Should the prosecutor or the court make the determination of whether the defendant has a legitimate basis for seeking to have the hearsay declarant produced for cross-examination? If the court should make the determination, why consider the state of mind of the prosecutor at all?

81. It can be argued that the standard adopted by the Court in *Roberts* represents a more objective version of Professor Westen's proposal. A judicial conclusion that "the utility of trial confrontation [is] remote" is in essence a finding that the defendant lacks a reasonable basis for seeking to cross-examine the hearsay declarant. The approach proposed by Westen will generally produce the same results as the criteria proposed in this Article. *See infra* textual discussion beginning at note 93. Westen states: "The same is true of business records, trade reports, treatises, and other regularly maintained forms of evidence; the defendant will ordinarily have no interest in examining those who write or compile them, and the burden of producing the writers or compilers may properly shift to the defendant." Westen, *supra* note 20, at 618-19.

82. Graham, *supra* note 6, at 192.

83. *Id.* at 195-97.

84. Graham states that a statement is "accusatory" if the declarant knew or could reasonably anticipate that the statement would assist the government in apprehending or prosecuting a person for a crime. *See id.* at 193-94. Determining what use of a statement the declarant could reasonably anticipate at the time the statement was made would present serious practical difficulties for courts.

This definition may also be both overinclusive and underinclusive. It would include a certificate by an Internal Revenue Service employee, offered in a tax evasion prosecution, stating that there is no record of tax returns hav-

fact that "nonaccusatory" hearsay statements can sometimes have enormous persuasive impact and be the decisive factor in an adjudication of guilt.⁸⁵ To exempt such statements from the right of confrontation may be too narrow a reading of the sixth amendment.

Although the *Roberts* opinion cited each of these writers in a footnote,⁸⁶ the Court refused to adopt any of their proposed interpretations, perhaps because of the difficulties described. Instead, the Court stated that "we have found no commentary suggesting that the Court has misidentified the basic interests to be accommodated."⁸⁷ Therefore, it pronounced that "we reject the invitation to overrule a near-century of jurisprudence,"⁸⁸ without recognizing the apparent extension of that jurisprudence inherent in the comprehensive unavailability requirement. The Court indicated that it favored continuation of the approach it has followed since *Mattox v. United States*,⁸⁹ whereby the right of confrontation must be balanced against "considerations of public policy and the necessities of the case."⁹⁰ The *Roberts* Court, however, had difficulty articulating the balance that must be struck. It stated as a broad proposition that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause *normally* requires a showing that he is unavailable."⁹¹ Then, in a terse and equivocal footnote, the Court added the following qualification: "A demonstration of unavailability, however, is not always required. In *Dutton v. Evans*, for example, the Court found the utility of trial confrontation so remote that it did not require

ing been filed by the defendant for specified years, even though there is little need to confront such a declarant. It would appear to exclude directly inculpatory statements made by a coconspirator to a government informant who was not expected ever to repeat such statements, even though there is considerable justification for allowing cross-examination of such a declarant.

85. For example, an entirely nonaccusatory hearsay statement that places the defendant at the scene of the crime may be the crucial piece of evidence that causes the jury to convict. Professor Graham cites the example of an excited utterance by a bystander to a bank robber—"Bill Bumber, please don't shoot me"—as being nonaccusatory, outside the confrontation clause, and admissible without producing the declarant or showing unavailability. *Id.* at 194-95. It is doubtful that a defendant convicted on the basis of such identification evidence could be persuaded that the hearsay declarant was not a witness against him.

86. *Ohio v. Roberts*, 448 U.S. 56, 66 n.9 (1980).

87. *Id.* at 68 n.9.

88. *Id.*

89. 156 U.S. 237 (1895).

90. *Id.* at 243.

91. *Roberts*, 448 U.S. at 66 (emphasis added).

the prosecution to produce a seemingly available witness."⁹²

Thus, the Court appears to have found no satisfactory way of resolving the confrontation/hearsay dilemma by reinterpreting the text of the sixth amendment. Instead, the Court has adopted a pragmatic approach, using the "utility of trial confrontation"⁹³ to determine whether an exemption from the unavailability requirement will be recognized.

III. CRITERIA FOR DETERMINING EXEMPTIONS FROM THE UNAVAILABILITY REQUIREMENT

One difficulty with the *Roberts* formulation is that it represents more a conclusion than a standard. On what basis should a court determine that the utility of trial confrontation is remote? Lower courts will need specific criteria against which to measure various forms of hearsay in order to determine whether an exemption from the unavailability requirement is justified. It is suggested that there are four criteria—centrality, reliability, susceptibility to testing by cross-examination, and the adequacy of alternatives to cross-examination—that are the most appropriate factors against which to measure various forms of hearsay.⁹⁴

A. CENTRALITY

The utility of confrontation will vary depending upon the

92. *Id.* at 65 n.7 (citation omitted). This footnote cited two law review articles: Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 43, 49 (1979) and *The Supreme Court 1970 Term*, 85 HARV. L. REV. 3, 194-95, 197-98 (1971). These articles, although providing some insight into the thinking of the Court, do not attempt to develop a comprehensive theory for defining what exemptions should be recognized from the unavailability requirement. In his article, Professor Frank Read stated that a rule of unavailability would "hamper exceptions that excuse witnesses when their presence would be inconvenient or of small utility to the defendant." Read, *supra* at 43. He also posed the questions:

Can the unavailability of the witness, under the facts, be excused because the inconvenience caused by producing him (as in business-records-exception cases), outweighs any possible benefit his presence could afford the accused? Is the witness a minor witness called to supply a technical, basically uncontested detail as opposed to a key prosecution witness?

Id. at 49. The second cited article observed: "The defendant is likely to waive his right to cross-examine the declarant in cases where the hearsay involves only perfunctory collateral matters or appears particularly reliable." *The Supreme Court, 1970 Term, supra*, at 195.

93. *Ohio v. Roberts*, 448 U.S. 56, 65 n.7 (1980).

94. Authority for recognition of these factors can be found in *Dutton v. Evans*, 400 U.S. 74 (1970). See *infra* textual discussion beginning note 103.

extent to which the hearsay statement bears directly on the central issues of the case. Cross-examination is less significant in circumstances in which the hearsay relates only to minor, collateral, or undisputed issues, or is merely cumulative evidence on a point already well established by other evidence. Experienced trial lawyers do not find it necessary to cross-examine every witness, particularly when those witnesses have testified only to tangential matters. A leading text on trial tactics states:

The decision whether or not to cross-examine a particular witness, and to what extent and with what aims and methods, calls for appraising the advantages and disadvantages and accepting a calculated risk. . . . That lawsuits are sometimes lost in cross-examination is reason enough to beware of an unyielding rule that you cross-examine every witness.⁹⁵

B. RELIABILITY

Reliability has long been viewed as the primary justification for recognizing exceptions to the hearsay rule.⁹⁶ It is also an appropriate factor to use in determining exemptions from the unavailability requirement. The circumstances assuring trustworthiness serve as a partial substitute for cross-examination. A primary purpose of confrontation is to protect a defendant from being convicted by unreliable evidence.⁹⁷ To the extent a high degree of reliability can be independently established, the utility of cross-examination is diminished. The more reliable the hearsay, the less likely it is to be qualified or repudiated by the declarant, no matter how skillful the cross-examination.⁹⁸

95. R. KEETON, TRIAL TACTICS AND METHODS 98 (2d ed. 1973).

96. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895).

97. See *Ohio v. Roberts*, 448 U.S. 56, 62-66 (1980); *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970).

98. When reliability is used as a criterion for determining whether hearsay should be exempt from the unavailability requirement, courts will presumably require a higher standard of reliability than would apply in determining the admissibility of hearsay once unavailability is shown. An evaluation of the reliability of the hearsay statement is the second prong of the test announced in *Roberts* and is to take place once the unavailability of the declarant has been demonstrated. See *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). If the same standard of reliability were used in determining an exemption from the constitutional unavailability requirement as in determining the admissibility of hearsay from an unavailable declarant, the two prongs of *Roberts* would collapse into one test.

Two standards of reliability appear justified as a matter of policy because of the different interests involved. Once unavailability of the hearsay declar-

C. SUSCEPTIBILITY TO TESTING BY CROSS-EXAMINATION

Even though Professor John Wigmore described cross-examination as the "greatest legal engine ever invented for the discovery of truth,"⁹⁹ it is simply not the case that all hearsay is equally susceptible to testing by cross-examination. In some cases, for example, whatever a hearsay declarant might say on cross-examination would be unlikely to have persuasive impact on the jury, given the motives of the declarant and the potential repercussions of candid testimony. Furthermore, in documentary records cases it is often foreseeable that the declarant will lack any current recollection of the recorded statement that would provide a reasonable basis for cross-examination. When an automobile assembly line worker enters a vehicle identification number onto an inventory list, or a sales clerk in a busy department store prepares a sales receipt, it is highly unlikely that such a declarant, if called to testify at trial a year or more later, would have sufficient memory of the matter recorded to make their recorded statement susceptible to testing by cross-examination.

Similarly, a court reporter's transcript, under normal circumstances, cannot be effectively tested by cross-examination of the court reporter. The transcript is hearsay because it is an out-of-court assertion by the court reporter regarding the testimony given at a prior hearing. If examined regarding it, however, the reporter is likely to respond simply that the transcript represents the reporter's best recollection of the testimony given. Presumably for this reason, the Supreme Court has approved the admission of transcripts of former testimony without requiring a showing of unavailability of the court reporter.¹⁰⁰

ant has been shown, the choice is between admitting the hearsay statement or losing its probative value entirely. When reliability is used as a factor in determining whether an exemption from the constitutional unavailability requirement should be recognized, however, the issue presented is whether to require the prosecutor to undertake the effort necessary to produce an available hearsay declarant in court. Courts are likely to apply a stricter standard of reliability in the latter circumstance.

99. 5 J. WIGMORE, EVIDENCE § 1367, at 32 (rev. ed. 1974).

100. In most of the former testimony cases, the testimony was proven by the court reporter's notes or transcript. *See, e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 60 (1980); *Mattox v. United States*, 156 U.S. 237, 240 (1895); *see also* *Anderson v. United States*, 417 U.S. 211, 220 n.11 (1974) (no confrontation violation in admitting transcript of election contest hearing).

D. ADEQUACY OF ALTERNATIVES TO CROSS-EXAMINATION

An assessment of the utility of confrontation requires an examination of the alternatives. Cross-examination is not the only method by which a criminal defendant may challenge the accuracy of a hearsay statement or the credibility of a hearsay declarant. Contradictory evidence may be introduced, which, in some cases, may provide an even more effective basis for challenge than cross-examination. For example, an error in a market report might be more convincingly demonstrated by showing a contrary figure in competing reports than by cross-examining the preparer or preparers of the report. Similarly, a statement in a learned treatise may be more effectively challenged by evidence from other treatises, or through the testimony of expert witnesses, rather than by cross-examining the author of the treatise.

Under modern evidence codes, a hearsay declarant can be impeached by extrinsic evidence as well as by cross-examination. Federal Rule of Evidence 806 provides:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.¹⁰¹

The availability of this procedure should be considered when courts evaluate the adequacy of alternatives to cross-examination.¹⁰²

Finally, in unusual circumstances, cross-examination of a person other than the declarant may provide an adequate basis for testing a hearsay statement. For example, a defendant may seek to attack the accuracy of a documentary record by challenging the reliability of the recording process. The actual declarant may be a low-level employee who made a routine entry and who has little knowledge regarding the overall recording procedures or the most significant factors that could affect the accuracy of the final record. If a witness familiar with the recording procedures is produced, such as a supervisor or agency head, cross-examination of that witness may provide an adequate substitute for cross-examination of the declarant.

101. FED. R. EVID. 806.

102. *But see* *Mattox v. United States*, 156 U.S. 237, 250 (1895) (approving refusal to allow impeachment of hearsay declarant by showing subsequent inconsistent statements).

E. *Dutton v. Evans*

The four criteria for assessing the utility of confrontation suggested above are consistent with *Dutton v. Evans*,¹⁰³ the only case cited in *Roberts* as presenting a situation in which the utility of trial confrontation was sufficiently remote to justify an exemption from the constitutional unavailability requirement.¹⁰⁴ In *Dutton*, the defendant, Evans, was convicted of first degree murder of three Georgia patrolmen.¹⁰⁵ He allegedly acted with two accomplices: Williams, who was tried separately prior to Evans, and Truett, who was granted immunity in exchange for his testimony against Williams and Evans.¹⁰⁶ At Evans's trial, the primary witness was Truett, who related in great detail Evans's involvement in the murders.¹⁰⁷ An additional witness was Shaw, a fellow prisoner of Williams.¹⁰⁸ Shaw testified, over a confrontation objection, that when Williams was returned to his cell after his arraignment on the murder charges, Shaw asked him: "How did you make out in court?"¹⁰⁹ Williams allegedly responded: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."¹¹⁰ The trial court admitted this statement under the Georgia coconspirator exception.¹¹¹

Following the Georgia Supreme Court's affirmance of the conviction,¹¹² Evans initiated a habeas corpus proceeding in federal court. The district court denied the writ,¹¹³ but the court of appeals reversed, finding a confrontation clause violation.¹¹⁴ In a 5-4 decision, the Supreme Court held that admission of the statement did not violate Evans's right of confrontation.¹¹⁵ There was, however, no majority opinion.

The plurality opinion¹¹⁶ expressly adopted the first two

103. 400 U.S. 74 (1970).

104. *Ohio v. Roberts*, 448 U.S. 56, 65 n.7 (1980).

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

106. *Id.*

107. *Id.* at 77.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 78.

112. *Evans v. State*, 222 Ga. 392, 407, 150 S.E.2d 240, 251, *cert. denied*, 385 U.S. 953 (1966).

113. *Evans v. Dutton*, 400 F.2d 826, 827 (5th Cir. 1968), *rev'd*, 400 U.S. 74 (1970).

114. *Id.*

115. *Dutton v. Evans*, 400 U.S. 74, 88 (1970).

116. The plurality opinion was written by Justice Stewart and joined by

suggested criteria, centrality and reliability, as a basis for its conclusion that introduction of the hearsay statement did not offend the confrontation clause.¹¹⁷ With regard to the centrality criterion, the plurality found the hearsay to be neither "crucial" nor "devastating,"¹¹⁸ and to be "of peripheral significance at most."¹¹⁹ The opinion noted that there were nineteen other witnesses besides Shaw who were called by the prosecution, and that the primary evidence of Evans's involvement in the murder was Truett's testimony.¹²⁰ Williams's hearsay statement, as related by Shaw, was likely to be viewed by the jury as merely cumulative, or at most, corroborative.

With regard to the reliability criterion, the plurality found four "indicia of reliability" that justified dispensing with confrontation under the facts of the case. First, Williams's statement was not an "express assertion about past fact," and thus "carried on its face a warning to the jury against giving the statement undue weight."¹²¹ Second, it was clear from other evidence that Williams was in a position to know whether or not Evans was involved in the murder.¹²² Third, there was little chance that Williams's statement was based on faulty recollection.¹²³ Fourth, Williams made the statement under circumstances which indicate "that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it."¹²⁴

Chief Justice Burger and Justices Blackmun and White. Justice Harlan filed a separate concurring opinion. *Id.* at 93.

117. *Id.* at 87-89. The authors of a leading treatise view the opinion as also being based on a third factor: whether the prosecutor has been guilty of misconduct or negligence in failing to produce the declarant or in the manner in which the jury was made aware of the hearsay statement. 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 800[04], at 800-26. Although the plurality did briefly discuss this factor, 400 U.S. at 87, it was not applicable to the facts of *Dutton*, and it can be questioned whether the confrontation clause is the appropriate vehicle for analyzing questions of prosecutorial misconduct.

118. *Dutton*, 400 U.S. at 87. It is clear that a hearsay statement may be found not "crucial" or "devastating" even though it is of sufficient importance that its admission cannot be categorized as harmless error. Only two of the four justices in the *Dutton* plurality were willing to decide the case on harmless error grounds. *See id.* at 90 (Blackmun, J., & Burger, C.J., concurring).

119. *Id.* at 87.

120. *Id.*

121. *Id.* at 88.

122. *Id.*

123. *Id.* at 89.

124. *Id.*

The *Dutton* plurality opinion also gave implicit recognition to the last two suggested criteria for evaluating the admissibility of hearsay statements. The plurality indicated its awareness that not all hearsay statements are susceptible to testing by cross-examination when it noted that "the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal."¹²⁵ Given the circumstances, the probative value of Williams's statement depended more on the credibility of Shaw's testimony that the statement was made than on anything Williams might have said on cross-examination.¹²⁶ Shaw, as the plurality was careful to note,¹²⁷ had been fully cross-examined at trial.

The plurality opinion also stated 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.'"¹²⁸ This pronouncement supports consideration of the adequacy of alternatives to cross-examination in determining whether the right to confrontation has been satisfied. If there are practical alternatives to cross-examination which enable the defendant to challenge the

125. *Id.* at 89. The unspoken premise underlying this assertion was that if Williams had been called as a witness and were willing to testify, it was entirely predictable that he might deny, qualify, or retract his statement. The plurality apparently took the view that the jury would be likely to find such testimony unpersuasive. Williams's statement inculcated himself as well as Evans, and because his conviction was on appeal, there was a possibility of a retrial.

The four dissenting justices expressed pointed disagreement with this view:

Thus we have a case with all the unanswered questions that the confrontation of witnesses through cross-examination is meant to aid in answering: What did the declarant say, and what did he mean, and was it the truth? If Williams had testified and been cross-examined, Evans' counsel could have fully explored these and other matters.

Id. at 104 (Marshall, J., dissenting).

126. The Fifth Circuit described Shaw's testimony as "somewhat incredible." *Evans v. Dutton*, 400 F.2d 826, 828 n.4 (5th Cir. 1968), *rev'd*, 400 U.S. 74 (1970). Justice Blackmun stated:

I am at a loss to understand how any normal jury, as we must assume this one to have been, could be led to believe, let alone be influenced by, this astonishing account by Shaw of his conversation with Williams in a normal voice through a closed hospital room door.

Dutton v. Evans, 400 U.S. 74, 91 (1970) (Blackmun, J., concurring).

127. *Dutton*, 400 U.S. at 87, 89.

128. *Id.* at 89 (quoting *California v. Green*, 399 U.S. 149, 161 (1970)).

truth of the hearsay statement, courts should include that factor in their determination of admissibility.

It is suggested that all four of these criteria—centrality, reliability, susceptibility to testing by cross-examination, and adequacy of alternatives to cross-examination—should be considered by courts when they attempt to determine whether production of an available hearsay declarant is required by the confrontation clause.¹²⁹ Whether any one of these factors should be found controlling will, of course, depend on the nature of the case.

IV. THE CONSTITUTIONAL UNAVAILABILITY REQUIREMENT AND THE FEDERAL RULES OF EVIDENCE

A remaining difficulty after *Roberts* is reconciling the Court's statement that a showing of unavailability will normally be required with the footnote allowing exemptions when the "utility of trial confrontation" is remote. The difficulty can

129. Apart from granting exemptions from the unavailability requirement based on application of these criteria, there is one other approach the Court could take that would avoid needless production of hearsay declarants, at least in those cases where they are unlikely to have sufficient recollection of the prior statement to justify cross-examination. The Court could recognize likely absence of memory as a ground of constitutional unavailability. In England, one ground of unavailability allowing a documentary record to be received in a criminal case is when the declarant "cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied." Police and Criminal Evidence Act, 1965, ch. 20, § 1(b).

Under the definition of unavailability in Fed. R. Evid. 804(a)(3), the witness must be produced to testify "to a lack of memory of the subject matter of his statement." FED. R. EVID. 804(a)(3). The Advisory Committee note to Rule 804 also states: "[I]t will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination." FED. R. EVID. 804 advisory committee note.

The Rule 803 exceptions, however, are not governed by the Rule 804(a) definition of unavailability, but only by the constitutional unavailability requirement to the extent it is applicable. There is no compelling reason why absence of recollection must be established, as a matter of constitutional law, by the testimony of the hearsay declarant. The Court has not yet squarely addressed the issues of memory loss as a ground of constitutional unavailability or how such memory loss must be established. See *California v. Green*, 399 U.S. 149, 168-69 (1970) ("Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture.").

be illustrated by an analysis of the twenty-four hearsay exceptions set forth in Federal Rule of Evidence 803.¹³⁰ Only fifteen are used with any degree of frequency in criminal prosecutions.¹³¹ With respect to six of these exceptions, the Court may indeed have intended to impose a constitutional unavailability requirement in criminal trials that would be applicable in most circumstances.¹³²

130. Fed. R. Evid. 803 includes the following subsections:

- (1) Present sense impression.
- (2) Excited utterance.
- (3) Then existing mental, emotional, or physical condition.
- (4) Statements for purposes of medical diagnosis or treatment.
- (5) Recorded recollection.
- (6) Records of regularly conducted activity.
- (7) Absence of entry in records kept in accordance with the provisions of paragraph (6).
- (8) Public records and reports.
- (9) Records of vital statistics.
- (10) Absence of public record or entry.
- (11) Records of religious organizations.
- (12) Marriage, baptismal, and similar certificates.
- (13) Family records.
- (14) Records of documents affecting an interest in property.
- (15) Statements in documents affecting an interest in property.
- (16) Statements in ancient documents.
- (17) Market reports, commercial publications.
- (18) Learned treatise.
- (19) Reputation concerning personal or family history.
- (20) Reputation concerning boundaries or general history.
- (21) Reputation as to character.
- (22) Judgment of previous conviction.
- (23) Judgment as to personal, family, or general history, or boundaries.
- (24) Other exceptions.

FED. R. EVID. 803.

131. These exceptions: present sense impressions; excited utterances; statements of mental, emotional, or physical condition; statements for purposes of medical diagnosis or treatment; recorded recollection; records of regularly conducted activity; absence of entry in records of regularly conducted activity; public records and reports; records of vital statistics; absence of public record or entry; market reports; learned treatises; reputation as to character; judgments of previous convictions; and the residual exception. This is not to say that the remaining Fed. R. Evid. 803 exceptions are never used by prosecutors. *See, e.g., United States v. Ruffin*, 575 F.2d 346, 357 (2d Cir. 1978) (in tax evasion prosecution, documents creating interest in real property held to be admissible under Fed. R. Evid. 803(14)).

132. It may be that the Court intended to impose a general unavailability requirement upon statements offered in criminal trials under the first four exceptions to the rule against hearsay. *See supra* note 130. It has been contended that these four exceptions have lesser reliability than some of the other exceptions. Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 25-38. In fact, during the drafting process, it was urged that they be included

With respect to the remaining nine exceptions, however, a requirement that the declarant be produced or be shown to be unavailable is inappropriate in most circumstances. Given the nature of the hearsay offered under these exceptions, the utility of trial confrontation is likely to be remote. Therefore, a showing of unavailability should not be rigidly imposed. These nine exceptions generally satisfy the criteria discussed in the preceding section, although there are some significant areas of potential conflict with the confrontation clause.

A. REPUTATION AS TO CHARACTER

Federal Rule of Evidence 803(21) establishes a hearsay exception for "[r]eputation of a person's character among his associates or in the community."¹³³ Reputation evidence is hearsay when offered to prove the truth of the alleged reputation because the character witness is testifying to a distilled version of what other members of the community have said about the individual in question.

Under the Federal Rules of Evidence, a prosecutor may use reputation evidence to rebut evidence of good character offered by a defendant,¹³⁴ to rebut evidence offered by the defendant regarding a pertinent character trait of a crime victim,¹³⁵ to re-

as part of Fed. R. Evid. 804, which requires its own showing of unavailability. *See id.*

The Court may also have intended that the residual exception set forth in Fed. R. Evid. 803(24) be generally subject to an unavailability requirement in criminal trials. To do so, however, would largely eliminate the distinction between Fed. R. Evid. 803(24) and Fed. R. Evid. 804(b)(5), which is virtually identical except that it contains its own unavailability requirement.

Whether the Court intended to require production of the declarant or a showing of unavailability in order to admit recorded recollection may be unimportant, because as a practical matter the testimony of the declarant is already required in order to establish the necessary foundation. The exception requires a showing that the witness has "insufficient recollection to enable him to testify fully and accurately" but that he "made or adopted" an accurate record of the matter at a time when "the matter was fresh in his memory." FED. R. EVID. 803(5). If the court finds that the witness has such a loss of memory that the witness cannot be effectively cross-examined regarding the earlier statement, then a showing of unavailability will have been made. On the other hand, if the court finds the witness has sufficient recollection to be subject to "full and effective" cross-examination, then the requirements of the confrontation clause will be satisfied. *See California v. Green*, 399 U.S. 149, 158 (1970); *United States v. Sawyer*, 607 F.2d 1190, 1193 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

133. FED. R. EVID. 803(21).

134. FED. R. EVID. 404(a)(1).

135. FED. R. EVID. 404(a)(2).

but evidence that the victim in a homicide case was the first aggressor,¹³⁶ to impeach a witness by showing that witness has an untruthful character,¹³⁷ or to rehabilitate a witness, previously impeached by evidence of untruthful character, by showing a reputation for truthful character.¹³⁸

Production of all the declarants who contributed to the witness's assessment of reputation would obviously be impracticable, even if they could all be identified. Moreover, such evidence has low susceptibility to testing by cross-examination. Cross-examination of the character witness regarding the basis for the witness's assessment of reputation, or production of opposing character witnesses, is likely to be far more effective than cross-examination of any of the multiple declarants whose statements compose the reputation. Application of an unavailability requirement to reputation evidence would effectively bar its use by prosecutors, thereby undermining the careful balance struck by the Federal Rule of Evidence that governs the admissibility of character evidence in criminal cases.¹³⁹

B. JUDGMENT OF PREVIOUS CONVICTION

Federal Rule of Evidence 803(22) creates an exception for a judgment of conviction for any crime "punishable by death or imprisonment in excess of one year," when offered "to prove any fact essential to sustain the judgment."¹⁴⁰ This exception is used when a prosecutor seeks not merely to prove the existence of a prior conviction, such as in a prosecution for being an ex-convict in possession of a firearm, but to prove the person convicted actually committed the underlying criminal act. A common utilization of this exception in criminal trials arises when a witness is impeached with a prior criminal conviction under Rule 609.¹⁴¹ For the conviction to have probative value

136. *Id.*

137. FED. R. EVID. 404(a)(3), 608(a).

138. *Id.*

139. *See* FED. R. EVID. 404, 405, 608(a).

140. FED. R. EVID. 803(22). That rule provides:

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Id.

141. *See* FED. R. EVID. 609; *see also* 4 D. LOUISELL & C. MUELLER, *supra*

as impeachment evidence, it must be offered to prove that the witness actually committed the crime, and therefore the witness's testimony should be viewed as less trustworthy.

When offered to prove a fact "essential to sustain the judgment," a judgment of conviction represents the hearsay conclusion of the previous trier of fact in the proceeding where the judgment was rendered. The confrontation clause should not be interpreted to require the production of the previous judge or jury to be cross-examined regarding the correctness of the conclusion of guilt.

The most serious potential conflict between this exception and the right of confrontation was perceived and obviated by the drafters of the Federal Rules, who added the qualifying phrase "but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused."¹⁴² This provision brings the rule into accord with *Kirby v. United States*,¹⁴³ in which the Court held it was error to convict the defendant of possessing stolen postage stamps when the only evidence introduced to prove they were stolen was the record of another trial in which a third person had been convicted of the theft.¹⁴⁴

C. RECORDS OF VITAL STATISTICS

Federal Rule of Evidence 803(9) provides for the admissibility of "records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to the requirements of law."¹⁴⁵ Records qualifying under this exception tend to have high reliability and low susceptibility to testing by cross-examination.¹⁴⁶

note 20, § 470, at 906-07 & n.31 (noting the omission of misdemeanor convictions permissible for impeachment under Fed. R. Evid. 609 as an "oversight").

142. FED. R. EVID. 803(22).

143. 174 U.S. 47 (1899).

144. *Id.* at 54.

145. FED. R. EVID. 803(9).

146. 4 D. LOISELL & C. MUELLER, *supra* note 20, § 457, at 777-78.

Records of vital statistics may be considered trustworthy for four reasons: First, the information is generally gathered by professional people in the discharge of public and professional duty and recorded and preserved by public employees in the ordinary course of their employment. Second, much of the information thus gathered and preserved relates to contemporary events and often reflects simple facts as to which there is little room for dispute, so risks of faulty memory and misperception are minimized. Third, births, marriages, and deaths mark occasions important in the lives of persons likely to supply the

In many cases, preparers will have little or no memory of a specific birth, death, or marriage. The documentary records they made will often be more accurate evidence of the event than any testimony they could provide. For these reasons, such records should generally be exempt from the unavailability requirement.¹⁴⁷

On the other hand, if such records are offered for a purpose other than to prove the birth, death, or marriage, there may be greater justification for allowing testing of the statement by cross-examination. For example, a conclusion as to the cause of death in a death certificate or a statement of paternity in a birth certificate will have less reliability and would present a greater danger of violating the right of confrontation.

D. PUBLIC RECORDS AND REPORTS

Federal Rule of Evidence 803(8) creates a hearsay exception for "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies."¹⁴⁸ A wide variety of such official records and reports have been admitted in criminal prosecutions without a showing of declarant unavailability, both before and after *Roberts*.¹⁴⁹ An exemption from the un-

information to the person reporting to the public agency, and ordinarily it may be expected that all persons involved will make an effort to be truthful and accurate. Fourth, often (although not by any means always) vital statistics are prepared before any thought is given to litigation, and the distortions which the prospect of litigation cause are thus absent.

Id.

147. In highly unusual circumstances, such as when evidence of the death of an alleged murder victim is uncertain, proof of death by a death certificate may be constitutionally impermissible. See *Stevens v. Bordenkircher*, 746 F.2d 342, 348-49 (6th Cir. 1984) (admission of death certificate without opportunity to cross-examine maker violated confrontation clause where identity of corpse was disputed, and certificate was based on information received from third person).

148. FED. R. EVID. 803(8). The exception applies to:

Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Id.

149. See, e.g., *United States v. King*, 590 F.2d 253, 255 (8th Cir. 1978) (vehicle title documents), *cert. denied*, 440 U.S. 973 (1979); *United States v. Down-*

availability requirement is justified in most cases, particularly for records and reports of the type described in category (A), which set forth "the activities of the office or agency."¹⁵⁰

Rule 803(8)'s greatest potential conflict with the confrontation clause arises with respect to records or reports of the types described in categories (B) and (C).¹⁵¹ The rule, however, prohibits prosecutors from introducing category (C) reports,¹⁵² and category (B) reports cannot be offered when they involve "matters observed by police officers and other law enforcement personnel."¹⁵³ These restrictions greatly limit potential confrontation clause problems. Some reports that are arguably admissible under category (B) may raise confrontation concerns if offered in a criminal proceeding to prove unlawful conduct by the defendant, even though the preparer was not a law enforcement officer.¹⁵⁴

Rule 803(8) presents several problems of interpretation. The boundary between categories (A) and (B) is imprecise,¹⁵⁵

ing, 454 F.2d 373, 376 (10th Cir. 1972) (letter from commanding officer of induction center stating that defendant failed to report); *United States v. Ketchum*, 445 F.2d 860, 860 (10th Cir. 1971) (photocopy of title certificate); *United States v. Sacco*, 428 F.2d 264, 271-72 (9th Cir.) (alien registration documents), *cert. denied*, 400 U.S. 903 (1970); *People v. Tenorio*, 197 Colo. 137, 143-44, 590 P.2d 952, 956-57 (1979) (fingerprint cards, prison photograph, and copy of burglary conviction); *People v. Smith*, 113 Ill. App. 3d 101, 103-04, 446 N.E.2d 575, 576-77 (1983) (Secretary of State's abstract of driver's license revocation); *Barnett v. State*, 429 N.E.2d 625, 628 (Ind. 1981) (conviction records); *State v. Karney*, 208 Kan. 677, 680-81, 494 P.2d 1204, 1209 (1972) (automobile registration certificate); *State v. Conway*, 70 Or. App. 721, 724, 690 P.2d 1128, 1129 (1984) (state police intoxilyzer certification), *rev. denied*, 298 Or. 704, 695 P.2d 1371 (1985).

150. FED. R. EVID. 803(8)(A). As one commentary noted:

[C]lause (A) [embraces] records of a simple factual nature which focus exclusively or at least primarily upon the functions of a public agency. A pristine example is the records of the Treasury, offered to prove receipts and disbursements of that Department. Another is the official transcript of a judicial proceeding, offered to prove that an officer of the court administered an oath to a witness. Yet another is the return of a marshal or similar officer, used to prove that he served papers upon a particular person at a particular place and time.

4 D. LOUISELL & C. MUELLER, *supra* note 20, § 455, at 724-25 (footnotes omitted).

151. For the text of Fed. R. Evid. 803(8)(B) and (C), see *supra* note 148.

152. See FED. R. EVID. 803(8)(C).

153. FED. R. EVID. 803(8)(B).

154. One example would be the report of a social worker for a public agency offered against a defendant in a child abuse prosecution to prove prior acts of abuse by the defendant.

155. Occasionally courts classify records under category (B) that more appropriately fit within category (A), thereby necessitating an analysis of the law enforcement report limitation. See, e.g., *United States v. Union Nacional de*

and the meaning of "law enforcement personnel" in category (B) is uncertain.¹⁵⁶ Furthermore, some courts have taken the position that the law enforcement report restriction is not absolute and have carved out an exception permitting law enforcement reports of a ministerial nature.¹⁵⁷

Regardless of how these evidentiary issues are resolved, the confrontation clause implications should be analyzed using the four criteria identified previously. Public records and reports generally have exceedingly high reliability.¹⁵⁸ Of particular importance to confrontation analysis is the susceptibility of the record or report to testing by cross-examination. The more routine the record or report, the less the justification for requiring confrontation of its preparer.¹⁵⁹ However, highly evalu-

Trabajadores, 576 F.2d 388, 391 (1st Cir. 1978) (return of service by U.S. Marshall); *State v. Smith*, 66 Or. App. 703, 675 P.2d 510, 512 (1984) (document certifying that breathalyzer equipment was in proper operating order).

156. Compare *United States v. Ruffin*, 575 F.2d 346, 356 (2d Cir. 1978) (IRS employees who record information routinely used in criminal prosecutions are "law enforcement personnel") and *United States v. Oates*, 560 F.2d 45, 68 (2d Cir. 1977) (full-time chemists of United States Customs Service are "law enforcement personnel") with *United States v. Hansen*, 583 F.2d 325, 333 (7th Cir.) (city building inspector not "law enforcement personnel") *cert. denied*, 439 U.S. 868 (1978).

157. See, e.g., *United States v. Orozco*, 590 F.2d 789, 793-94 (9th Cir. 1979) (license plate records of border crossings made by customs inspector), *cert. denied*, 439 U.S. 1049 (1978); *State v. Smith*, 66 Or. App. 703, 675 P.2d 510, 512 (1984) (document certifying that breathalyzer equipment was in proper order).

158. As one commentary noted:

Statements made in such records and reports are considered trustworthy because of the great public duty which attends the discharge of official functions. In effect it is presumed that public servants perform their official tasks carefully and without bias or corruption, and it is sometimes thought that the scrutiny and exposure surrounding governmental functions add further assurance that statements in public records are trustworthy. No doubt the repetitive routine underlying the preparation of many public documents adds a measure of protection against misstatement.

4 D. LOUISELL & C. MUELLER, *supra* note 20, § 454, at 719-20.

One of the few factors adversely affecting reliability is that Fed. R. Evid. 803(8) does not require that the record have been made near the time of the event recorded. One commentator has suggested that "[i]t is appropriate to impose a contemporaneity requirement on the admissibility of public records in criminal cases in order to enhance the reliability of such evidence." Alexander, *The Hearsay Exception for Public Records in Federal Criminal Trials*, 47 ALB. L. REV. 699, 716 n.86 (1983); see *State v. Kreck*, 86 Wash. 2d 112, 119, 542 P.2d 782, 787 (1975).

159. See, e.g., *State v. Caldwell*, 671 S.W.2d 459, 465 (Tenn.) (admitting U.S. Navy dental records to identify body—"Even if Dr. Moats had testified, he could have said little other than what was on the records themselves."), *cert. denied*, 105 S. Ct. 231 (1984).

ative reports, particularly when prepared in connection with the prosecution of a particular criminal case, may violate the right of confrontation in cases where the preparer is not produced.¹⁶⁰

E. RECORDS OF REGULARLY CONDUCTED ACTIVITY

Records of regularly conducted activity, commonly referred to as "business records," are frequently received in criminal prosecutions without production of the declarant or a showing of unavailability.¹⁶¹ Examples of business records that have been admitted include motel registration forms,¹⁶² warranty repair orders,¹⁶³ telephone records,¹⁶⁴ banking records,¹⁶⁵ hospital records,¹⁶⁶ dental records,¹⁶⁷ and employment

160. See, e.g., *Stewart v. Cowan*, 528 F.2d 79, 82 (6th Cir. 1976) (FBI ballistics report violated defendant's confrontation right); *Kienlen v. United States*, 437 F.2d 843, 849 (10th Cir. 1971) (psychiatric opinion in state hospital records violated defendant's right of confrontation); *Hartzog v. United States*, 217 F.2d 706, 709-10 (4th Cir. 1954) (error to admit IRS worksheets prepared specifically for prosecution of defendant); *Porter v. State*, 578 S.W.2d 742, 746-47 (Tex. Crim. App. 1979) (letters, reports, and documents, containing hearsay from a federal parole officer's file pertaining to defendant's supervision violated confrontation clause), *aff'd*, 623 S.W.2d 374 (Tex. 1981), *cert. denied*, 456 U.S. 965 (1982).

161. Fed. R. Evid. 803(6) provides for the admissibility of:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

If the business records constitute admissions of the defendant under Fed. R. Evid. 801(d)(2)(A) or (B), or if the declarant testifies and is subject to cross-examination at trial, see, e.g., *United States v. Foster*, 711 F.2d 871, 882 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1602 (1984), confrontation requirements will be satisfied without a showing of unavailability.

162. *United States v. Wigerman*, 549 F.2d 1192, 1193-94 (8th Cir. 1977).

163. *State v. Matousek*, 287 Minn. 344, 348-51, 178 N.W.2d 604, 608-09 (1970).

164. *United States v. Haili*, 443 F.2d 1295, 1298 (9th Cir. 1971).

165. *United States v. Lewis*, 759 F.2d 1316, 1329-30 (8th Cir. 1985); *United States v. Colyer*, 571 F.2d 941, 947 (5th Cir.), *cert. denied*, 439 U.S. 933 (1978).

166. *Butts v. Wainwright*, 575 F.2d 576, 578 (5th Cir. 1978).

167. *State v. Caldwell*, 671 S.W.2d 459, 465 (Tenn.), *cert. denied*, 105 S. Ct. 231 (1984).

records.¹⁶⁸

Records of regularly conducted activity are likely to satisfy the reliability criterion.¹⁶⁹ The foundation requirements¹⁷⁰ for the rule are designed to insure accuracy. It must be the "regular practice" of the business activity to make such records, they must be made "at or near the time" of the event, the information must come from a person "with knowledge," and they must be "kept in the course of a regularly conducted business activity."¹⁷¹ The custodian "or other qualified witness" must be produced to provide the necessary foundation and to be cross-examined regarding the method of preparation.¹⁷² Moreover, Federal Rule of Evidence 803(6) provides that records are to be excluded if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."¹⁷³

Records of regularly conducted activity also tend to lack susceptibility to testing by cross-examination because the declarant's recollection of the matter recorded will frequently be less trustworthy than the record itself. Occasionally, cross-examination of the witness who establishes the foundation for the records, or another witness familiar with the recording process, will provide the trier of fact with "a satisfactory basis for evalu-

168. *State v. Partee*, 32 Or. App. 117, 121-22, 573 P.2d 751, 753 (1978).

169. As one commentator noted:

Records of regularly conducted activities cannot fulfill the function of aiding the proper transaction of business unless accurate. The motive for following a routine of accuracy is great and the motive to falsify largely non-existent. More specifically, the reliability of business records is supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, and/or by a duty to make an accurate record as part of a continuing job or occupation.

M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803.6, at 813 (1982).

170. *See supra* note 161.

171. FED. R. EVID. 803(6).

172. *Id.*

173. *Id.* A frequent issue with respect to business records is that they may encompass multiple levels of hearsay. Fed. R. Evid. 803(6) is authority only for admitting statements in business records made by a declarant having a business duty to report. *See* 4 D. LOUISELL & C. MUELLER, *supra* note 20, § 448, at 681; *cf.* *Johnson v. Lutz*, 253 N.Y. 124, 128, 170 N.E. 517, 518 (1930) (police officer's memorandum inadmissible because contains statement of bystander having no duty to report). Hearsay statements made by persons not having a business duty to report will have to satisfy an independent hearsay exception. Fed. R. Evid. 805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules." FED. R. EVID. 805. In addition, such statements must be subjected to a separate confrontation analysis.

ating the truth of the prior statement"¹⁷⁴ that is a constitutionally adequate substitute for cross-examination of the declarant.¹⁷⁵

It is clear, however, that not all records qualifying for admission under Rule 803(6) satisfy the confrontation clause. A business record charging illegal activity by the defendant, such as the report of a store detective that he observed defendant shoplift, if offered without producing the declarant, would come dangerously close to "trial by affidavit," which the clause was intended to prevent.¹⁷⁶ Both before and after *Roberts*, courts have excluded various types of records of regularly conducted activity as violating the defendant's right of confrontation.¹⁷⁷

One factor bearing on whether a defendant should have the right to confront the preparer of a record of regularly conducted activity is whether it was prepared for law enforcement purposes.¹⁷⁸ The reasons for preparation may affect the record's reliability. As noted previously, Rule 803(8)(B) excludes reports in criminal cases of "matters observed by police officers and other law enforcement personnel."¹⁷⁹ A majority of courts considering the question have also read this limitation into Rule 803(6), in part to avoid potential conflict with the confrontation clause.¹⁸⁰ One commentator would go further and ex-

174. See *Dutton v. Evans*, 400 U.S. 74 (1970); *supra* text accompanying note 128.

175. See *supra* text following note 102.

176. "The primary objective of the [confrontation clause] 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 . . ." *Mattox v. United States*, 156 U.S. 237, 242 (1895).

177. See, e.g., *United States v. Ordonez*, 737 F.2d 793, 802 (9th Cir. 1983) (business ledger where no showing made of preparer's identity or unavailability); *Stewart v. Cowan*, 528 F.2d 79, 82 (6th Cir. 1976) (FBI ballistics report); *Phillips v. Neil*, 452 F.2d 337, 344-48 (6th Cir. 1971) (psychiatric opinion in medical records), *cert. denied*, 409 U.S. 884 (1972); *Gregory v. State*, 40 Md. App. 297, 325, 391 A.2d 437, 454 (1978) (same); *State v. Henderson*, 554 S.W.2d 117, 122 (Tenn. 1977) (laboratory report).

178. The fact that a business record was prepared for purposes of litigation may be considered by courts on the question of whether it should be excluded because the "circumstances of preparation indicate lack of trustworthiness." FED. R. EVID. 803(6); *Palmer v. Hoffman*, 318 U.S. 109, 111-15 (1943); *United States v. Ware*, 247 F.2d 698, 700 (7th Cir. 1957).

179. See *supra* text accompanying note 153.

180. See, e.g., *United States v. Sims*, 617 F.2d 1371, 1377 (9th Cir. 1980) ("[T]he plain language of Rule 803(8) makes it abundantly clear that it is the rule which covers reports made by law enforcement personnel."); *United States v. Cain*, 615 F.2d 380, 382 (5th Cir. 1980) ("[W]e conclude that statements inadmissible as public agency reports under Rule 803(8) may not be re-

clude business records prepared by a private organization such as a hospital if they were requested for law enforcement purposes or were otherwise "accusatory."¹⁸¹

The types of records of regularly recorded activity that raise the greatest confrontation concerns are evaluative records. Even though Rule 803(6) expressly allows "opinions" to be included, at least where they are trustworthy, records consisting largely of opinions or conclusions often have the least reliability and the greatest susceptibility to testing by cross-examination.¹⁸² Thus, in several cases courts have held that the receipt of medical records containing a psychiatric opinion regarding the defendant's mental condition violated the defendant's right of confrontation.¹⁸³ In a similar vein, in *United States v. McClintock*,¹⁸⁴ the Ninth Circuit held that appraisals of gemstones admitted under the business records exception violated the confrontation clause. The court commented that "because of the various means of evaluation and apparent subjective decisions that enter into the evaluation of gems, McClintock's confrontation of the preparers of the reports may have been valuable to his defense."¹⁸⁵

The issue most troubling to courts appears to be the admissibility of laboratory reports or reports of scientific tests or pro-

ceived merely because they satisfy Rule 803(6) and that section (6) does not open a back door for evidence excluded by section (8)."); *United States v. Oates*, 560 F.2d 45, 78-80, 83-84 (2d Cir. 1977) ("[I]n criminal cases reports of public agencies setting forth matters observed by police officers and other law enforcement personnel . . . cannot satisfy the standards of any hearsay exception if those reports are sought to be introduced against the accused."). See generally Annot., 56 A.L.R. FED. 168 (1982) (discussing admissibility over hearsay objection of police observations and investigative findings, offered by the government in criminal prosecutions, that are excluded from the public records exception to the hearsay rule).

181. M. GRAHAM, *supra* note 169, § 803.6, at 824-26 n.33.

182. Courts approving records of regularly conducted activity against a confrontation challenge have sometimes cited their nonevaluative nature as justification for doing so. See, e.g., *People v. Kirtdoll*, 391 Mich. 370, 385-89, 217 N.W.2d 37, 46-47 (1974) (rape victim's hospital record admitted in part because it did not involve subjective judgments such as diagnosis); *Hagenkord v. State*, 100 Wis. 2d 452, 478, 302 N.W.2d 421, 434 (1981) ("We hold only that hospital records bear such an unusual indicia of reliability and trustworthiness that, in circumstances where the evidence is clinical and nondiagnostic . . . such records satisfy the confrontation clause").

183. See *Phillips v. Neil*, 452 F.2d 337, 347-49 (6th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972); *Kienlen v. United States*, 437 F.2d 843, 848-49 (10th Cir. 1971); *Gregory v. State*, 40 Md. App. 297, 325-26, 391 A.2d 437, 454 (1978).

184. 748 F.2d 1278, 1291-92 (9th Cir. 1984).

185. *Id.* at 1292.

cedures.¹⁸⁶ A common-sense determination of the admissibility of such reports will generally be obtained by application of the four criteria discussed previously. The higher the reliability of the testing procedure, the lower the necessity for confrontation.¹⁸⁷ The greater the objectivity of the test, the less its susceptibility to testing by cross-examination.¹⁸⁸ As a practical matter, a favorable ruling on admissibility is likely to be facilitated by showing the qualifications of any declarant who is claimed to be an expert and by showing that the report was made available to the defendant in advance of trial.¹⁸⁹

186. Cases admitting such reports include: *Virgin Islands v. St. Ange*, 458 F.2d 981, 982 (3d Cir. 1972) (laboratory report finding presence of semen); *Montgomery v. Fogg*, 479 F. Supp. 363, 370-71 (S.D.N.Y. 1979) (autopsy report); *State v. Cosgrove*, 181 Conn. 562, 570-84, 436 A.2d 33, 38-44 (1980) (laboratory report identifying marijuana); *Howard v. United States*, 473 A.2d 835, 839-40 (D.C. App. 1984) (DEA chemical analysis); *Clark v. State*, — Ind. —, 436 N.E.2d 779, 781-82 (1982) (laboratory report regarding blood type on knife); *State v. Larochelle*, 112 N.H. 392, 396-97, 297 A.2d 223, 226 (1972) (chemical analyst's determination of blood alcohol level); *State v. Smith*, 312 N.C. 361, 323 S.E.2d 316, 328 (1984) (same); *State v. Robbins*, 512 S.W.2d 265, 267-68 (Tenn. 1974) (same); *State v. Kreck*, 86 Wash. 2d 112, 115-21, 542 P.2d 782, 784-88 (1975) (chemical blood analysis).

Cases excluding such reports include: *United States v. Oates*, 560 F.2d 45, 78-80 (2d Cir. 1977) (chemist's report); *Stewart v. Cowan*, 528 F.2d 79, 82-85 (6th Cir. 1976) (FBI ballistics report); *Commonwealth v. McCloud*, 457 Pa. 310, 315, 322 A.2d 653, 655-57 (1974) (autopsy report); *State v. Henderson*, 554 S.W.2d 117, 121-22 (Tenn. 1977) (laboratory analysis that substance is LSD). See generally Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 HASTINGS L.J. 621 (1979).

187. Courts should be particularly receptive to reports merely regarding maintenance of the testing equipment. See *People v. Black*, 84 Ill. App. 3d 1050, 1053, 406 N.E.2d 23, 25 (1980) (test decal on breathalyzer); *State v. Smith*, 66 Or. App. 703, 675 P.2d 510, 512 (1984) (certificate of breathalyzer inspection).

188. In *State v. Smith*, 312 N.C. 361, 323 S.E.2d 316, 323 (1984) the court noted: "In short, the scientific and technological advancements which have made possible this type of analysis have removed the necessity for a subjective determination of impairment, so appropriate for cross examination, and have increasingly removed the operator as a material element in the objective determination of blood alcohol concentration." *Id.*

189. A different approach to determining the admissibility of records of regularly conducted activity is suggested in *Pickett v. State*, 456 So. 2d 330 (Ala. Crim. App. 1982), where the court listed five factors to be used "in determining whether documentary evidence introduced without the opportunity for cross examination of its maker satisfies the requirements of the confrontation clause." *Id.* at 335. They are:

- (1) whether the evidence has high probability of reliability,
- (2) whether the evidence is "essentially documentary" or essentially testimonial,
- (3) whether the evidence is collateral, is used by the State only in rebuttal, or is probative of a material element of the offense, and if the last, whether the evidence is cumulative to that given by

F. ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY

Federal Rule of Evidence 803(7) also creates a hearsay exception which allows the *absence* of an entry in a business record to be used as proof that an event did *not* happen.¹⁹⁰ This is the converse of the situation covered by Rule 803(6). An example of reliance upon this exception in a criminal prosecution would be to prove theft of a rental car by offering records of the car agency showing the absence of any entry indicating return of the vehicle.¹⁹¹ Because hearsay offered under this exception is only indirect evidence of the matter sought to be proved, it carries "on its face a warning to the jury against giving the statement undue weight."¹⁹²

The declarant is the person or persons who made the records and failed to record a certain matter. If the nonrecording was intended to be an assertion regarding the nonexistence or nonoccurrence of the matter, it is hearsay and reliance on this exception is necessary.¹⁹³ In many cases, no assertion will have been intended by the declarant, and the evidence will not be hearsay as defined in Rule 801.¹⁹⁴

live witnesses, (4) whether the evidence connects the defendant directly to the offense charged, and (5) whether the defendant has an alternative to, or a prior opportunity for, cross examination.

Id. (citations omitted). The court commented that "[t]hese factors must be balanced against a defendant's rights secured by the confrontation clause." *Id.* at 335-36.

190. Fed. R. Evid. 803(7) provides an exception to the rule against hearsay for:

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with [Fed. R. Evid. 803(6)], to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(7).

191. See *United States v. De Georgia*, 420 F.2d 889, 892-94 (9th Cir. 1969) (decided prior to the adoption of the Federal Rules).

192. *Dutton v. Evans*, 400 U.S. 74, 88 (1980); see *supra* text accompanying note 121.

193. Under Fed. R. Evid. 801(a), conduct, presumably including failure to record, is hearsay only "if . . . intended . . . as an assertion." FED. R. EVID. 801(a).

194. The Advisory Committee's note to Fed. R. Evid. 803(7) states: "While probably not hearsay as defined in Rule 801, *supra*, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here." FED. R. EVID. 803(7) advisory committee note.

If no assertion was intended, there is little need to test the sincerity of the declarant by cross-examination. Even if an assertion was intended by the nonrecording of a certain matter, it is likely to have the same reliability as a recording of a matter under Rule 803(6). Thus, a similar standard of admissibility should apply. While dangers of faulty perception or recording may still exist, the rule requires exclusion of evidence offered under this exception if "the sources of information or other circumstances indicate lack of trustworthiness."¹⁹⁵ Thus, when the safeguards of the rule are properly enforced, evidence offered under this exception generally should be exempt from the unavailability requirement.

G. ABSENCE OF PUBLIC RECORD OR ENTRY

Federal Rule of Evidence 803(10) creates a hearsay exception for evidence in the form of a certificate or testimony that a "diligent search failed to disclose" a particular "record, report, statement, or data compilation, or entry," when offered to prove its absence or to prove "the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency."¹⁹⁶ This exception is frequently used by prosecutors to prove matters such as that tax returns were not filed,¹⁹⁷ a firearm was not registered,¹⁹⁸ or a person was never employed by a particular government agency.¹⁹⁹

When the evidence of absence of a public record or entry is offered by means of testimony, this exception is comparable to

195. FED. R. EVID. 803(6).

196. Fed. R. Evid. 803(10) provides an exception to the rule against hearsay for evidence:

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

FED. R. EVID. 803(10).

197. See, e.g., *United States v. Neff*, 615 F.2d 1235, 1241-42 (9th Cir.), cert. denied, 447 U.S. 925 (1980); *United States v. Johnson*, 577 F.2d 1304, 1312 (5th Cir. 1978).

198. See, e.g., *United States v. Combs*, 762 F.2d 1343, 1347-48 (9th Cir. 1985).

199. See, e.g., *United States v. Wilson*, 732 F.2d 404, 413 (5th Cir.), cert. denied, 105 S. Ct. 609 (1984); *United States v. Maschetta*, 673 F.2d 96, 100-01 (5th Cir. 1982); *United States v. Lee*, 589 F.2d 980, 987 (9th Cir.), cert. denied, 444 U.S. 969 (1979). See generally Annot., 70 A.L.R. FED. 198 (1984) (discussing admissibility of absence of public record under Rule 803(10)).

Federal Rule of Evidence 803(7), discussed above.²⁰⁰ The foundation witness can be examined regarding the thoroughness of the search, and the only confrontation issue relates to the assertion, if any, by the record keeper regarding the nonoccurrence or nonexistence of the matter by the failure to record it. Such hearsay should generally be exempt from the unavailability requirement.

The more difficult case arises when the government attempts to prove the "diligent search" for the public record or entry by means of a certificate from the public agency, as is permitted by the rule. Prior to *Roberts*, several courts approved the introduction of such certificates over a confrontation objection without requiring production of the declarant.²⁰¹ After *Roberts*, at least one court has held the matter to be an open question.²⁰²

Certificates offered under this exception should generally be admissible, provided they demonstrate rather than merely recite that the search was diligent, thereby enabling the court to evaluate their reliability. Normally the observation being made in the certificate is of such a simple nature that the chance of error is minimal. In cases where the nature of the search is complex, or the organization or maintenance of the records is confused, courts may find the statements in the certificate to be more susceptible to testing by cross-examination and refuse to grant an exemption from the unavailability requirement.

H. MARKET REPORTS, COMMERCIAL PUBLICATIONS

Federal Rule of Evidence 803(17) creates a hearsay exception for "market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."²⁰³ This exception allows the admission of evidence such as telephone directories, city directories, newspaper stock market reports, catalogs, and trade manuals containing valuations of goods such as automobiles.²⁰⁴ Such reports must be of a type "relied upon

200. See *supra* notes 190-94 and accompanying text.

201. *United States v. Neff*, 615 F.2d 1235, 1242-43 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980); *United States v. Lee*, 589 F.2d 980, 987-89 (9th Cir.), *cert. denied*, 444 U.S. 969 (1979); *United States v. Harris*, 551 F.2d 621, 622 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977).

202. *United States v. Yakobov*, 712 F.2d 20, 23-24 (2d Cir. 1983).

203. FED. R. EVID. 803(17).

204. See *id.* advisory committee note.

by the public or by persons in particular occupations,"²⁰⁵ and this tends to give them a high degree of reliability.²⁰⁶ There are also methods to challenge the accuracy of material in such reports that are likely to be more effective than cross-examination of their preparers. Substitutes for cross-examination include taking samples from the report and verifying their accuracy, offering testimony challenging the methods of preparation or contents of the report, and offering other reports containing contrary information. For these reasons, market reports should generally be exempt from the unavailability requirement.

The types of reports qualifying under this exception that are most likely to conflict with the confrontation clause are evaluative reports. The more a report consists of opinions as distinguished from facts, the less its reliability and the greater its susceptibility to testing by cross-examination. Furthermore, courts are more likely to require confrontation when the report, such as a credit report, pertains to a particular individual or enterprise rather than to a market or industry as a whole.

I. LEARNED TREATISES

Federal Rule of Evidence 803(18) creates a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice."²⁰⁷ Evidence may be offered under this exception only when the statements have been "called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination."²⁰⁸ Thus, before this exception may be utilized, there must always be an expert witness on

205. FED. R. EVID. 803(17).

206. See M. GRAHAM, *supra* note 169, § 803.17, at 863-64. Professor Michael Graham explains:

The basis of this exception is the high degree of reliability of items of this nature. General reliance by the public or a particular segment thereof upon the contents of the publication reinforces the motivation of the compiler to be accurate. Moreover no reason exists for the compiler to deceive. Necessity also plays a part in that in many instances it would be virtually impossible to produce the many people each having personal knowledge of a part of the matter compiled.

Id.

207. FED. R. EVID. 803(18).

208. *Id.*

the stand who can be examined regarding that witness's agreement or disagreement with the statements in the publication.

At common law, statements in learned treatises could be used only for impeachment of an expert witness.²⁰⁹ Under Rule 803(18), they may be received as substantive evidence as well. Presumably, any potential conflict between this exception and the confrontation clause would be obviated in a case where the prosecutor was willing to accept a limiting instruction that the statements in the publication were to be considered only for purposes of impeachment.

Even where the prosecutor is unwilling to accept such a limiting instruction, evidence offered under this exception generally should be exempt from the requirement that the prosecutor show the declarant is unavailable. The rule itself requires that the publication be established as a "reliable authority." There are other methods of challenging the accuracy of statements in a publication that will often be more effective than cross-examination of the author. They include testimony of other experts and, particularly, introduction of contradictory statements from other publications.

Courts may be unwilling to grant an exemption from the unavailability requirement to all hearsay offered under this rule because it is so broad. It allows statements not only from treatises but also from periodicals or pamphlets, which could have a lesser degree of reliability. Certain types of studies and reports by government agencies or private organizations may also be introduced under this exception.²¹⁰ One way to minimize potential conflict with the confrontation clause would be for courts to apply the same restrictions to hearsay offered under this exception that Rule 803(8) imposes upon public records and reports.²¹¹

V. ADMISSIONS OF AGENTS AND COCONSPIRATORS

A distinct but significant question is the impact of the *Roberts* unavailability requirement on the admissions of agents and coconspirators.²¹² *Roberts* purports to apply to hearsay state-

209. C. McCORMICK, *supra* note 13, § 321, at 900.

210. See 4 D. LOUISELL & C. MUELLER, *supra* note 20, § 466, at 858-60.

211. See *id.* at 860; see also *supra* notes 148-60 and accompanying text (discussing admissibility of public records and reports).

212. The Supreme Court will address the issue this term. See *United States v. Inadi*, 748 F.2d 812 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 2653 (1985) (No. 84-1580).

The Court has not yet addressed the issue that appears to be creating

ments, and Federal Rule of Evidence 801(d)(2)(C), (D), and (E) admits statements of agents and coconspirators because they are "not hearsay."²¹³ The categorization adopted by the drafters of the Federal Rules, however, is not controlling with respect to confrontation analysis. Common law generally treats statements of agents and coconspirators as hearsay receivable under the admissions exception to the hearsay rule,²¹⁴ and there is arguably greater justification for applying an unavailability requirement to such admissions than to the various categories of hearsay admissible as exceptions to the hearsay rule discussed above. Unlike the hearsay exceptions, the admissibility of statements of agents and coconspirators is not premised on a conclusion regarding their reliability.²¹⁵ Thus it is not sur-

greater division among the circuits, that is, the impact of the second prong of the *Roberts* test, the reliability requirement, upon admissions of agents and coconspirators. The Court has held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); see *supra* text accompanying note 10. Courts are divided regarding whether admissions of a coconspirator qualify under this standard or whether an ad hoc reliability analysis is required. See *Sanson v. United States*, 104 S. Ct. 3559, 3559-60 (1984) (White, J., dissenting) (denial of petition for certiorari). Compare *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981) (admission of statements by alleged coconspirators does not violate confrontation clause), *cert. denied*, 455 U.S. 843 (1982); *United States v. Peacock*, 654 F.2d 339, 349-50 (5th Cir. 1981) (reliability of coconspirator's statements inferred because they fall within firmly rooted hearsay exception), *cert. denied*, 464 U.S. 965 (1983); and *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972) (statements of "partner in crime" admissible), *cert. denied*, 409 U.S. 1128 (1973) with *United States v. Ammar*, 714 F.2d 238, 254-57 (3d Cir. 1983) ("no assumption that coconspirator's statement is *per se* trustworthy"), *cert. denied*, 464 U.S. 936 (1983); *United States v. Perez*, 658 F.2d 654, 660 & n.5 (9th Cir. 1981) (coconspirator exception does not automatically meet confrontation clause infirmities); *United States v. Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978) (*Dutton* mandates case by case examination of possible confrontation problems), *cert. denied*, 440 U.S. 917 (1979); and *United States v. Kelley*, 526 F.2d 615, 620-21 (8th Cir. 1975) (same), *cert. denied*, 424 U.S. 971 (1976).

213. See *supra* note 17.

214. 4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 801(d)(2)[01], at 801-134 to -139. In some cases, however, statements of coconspirators are not hearsay at all, but verbal acts in furtherance of the conspiracy. When the coconspirator's statements are not being offered to prove the truth of what is asserted, the confrontation clause should not affect their admissibility.

215. The Advisory Committee's note to Fed. R. Evid. 801(d)(2) states:

Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission.

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

Of course, some statements of agents or coconspirators have a high degree

prising that many courts and commentators have taken the position that the *Roberts* unavailability requirement governs the admissions of agents and coconspirators offered under Federal Rule of Evidence 801(d)(2)(C), (D), and (E).²¹⁶

As a practical matter, imposition of an unavailability requirement upon admissions of agents and coconspirators would have little impact in a significant percentage of cases because a showing of unavailability often can be made. Agents of criminal defendants, and particularly coconspirators, are frequently unlocatable, forgetful, unwilling to testify, or exempted from testifying based on the privilege against self-incrimination.

Given the frequency with which such declarants assert the privilege against self-incrimination, application of the unavailability requirement to admissions of agents and coconspirators might impose a needless burden upon prosecutors, by requiring them to bring declarants to court who obviously will assert the privilege. The standard of unavailability set forth in Rule 804(a)(1)²¹⁷ is generally interpreted as requiring production of any witness who claims a privilege so that the court can rule upon the claim.²¹⁸ Statements offered under Federal Rule of Evidence 801(d), however, are not subject to Federal Rule of Evidence 804(a) standards of unavailability, only to constitutional requirements. There is no reason why trial courts should not have discretion to find unavailability based upon reliable evidence other than in-court testimony establishing that the declarant, if called as a witness, would assert a valid privilege.²¹⁹

of reliability, and a trial court may make an ad hoc finding of reliability with respect to a particular statement. See generally Mueller, *The Federal Coconspirator Exception: Action, Assertion, Hearsay*, 12 HOFSTRA L. REV. 323, 355-63 (1984) (discussing the reliability of coconspirator's statements).

216. See *supra* note 18.

217. Fed. R. Evid. 804(a)(1), governing "Hearsay Exceptions: Declarant Unavailable," defines "unavailability as a witness" to include situations in which the declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement." FED. R. EVID. 804(a)(1).

218. 4 D. LOUISELL & C. MUELLER, *supra* note 20, § 486, at 1028; cf. *supra* note 129 (discussing lack of memory as a ground for foregoing production of declarant).

219. See *United States v. Inadi*, 748 F.2d 812, 820 n.7 (3d Cir. 1984), cert. granted, 105 S. Ct. 2653 (1985) (No. 84-1580). There the court states:

Of course, we decide this case on the basis of the record before us, where the declarant has not asserted the privilege before any judicial officer or anyone authorized to take oaths. We do not deal with any exceptional circumstance where the trial judge has a record—for example, in the form of an affidavit—that clearly establishes that the declarant would claim the privilege and that requiring him to appear

A showing of unavailability can be avoided entirely in those cases in which the statement of the agent or coconspirator is one in which the defendant "has manifested his adoption or belief in its truth."²²⁰ Such a statement can be offered as the adoptive admission of the defendant under Federal Rule of Evidence 801(d)(2)(B),²²¹ and a criminal defendant, as a matter of law, is unavailable to be called as a witness by the prosecutor.²²²

The *Roberts* opinion notes that an exemption to the requirement of showing unavailability will be recognized in those cases in which "the utility of trial confrontation [is] remote."²²³ The four criteria suggested earlier should be useful in identifying such cases, although exceptionally high reliability is less likely to be found in situations involving admissions of agents and coconspirators. If the statement is not sufficiently central to the prosecution's case, production of the declarant should be unnecessary.²²⁴ In some cases, the statement may lack susceptibility to testing by cross-examination, such as when it involves the recording of matters about which the declarant is unlikely to have an independent, current recollection. Production of the declarant should also be unnecessary in those cases in which other alternatives, such as allowing impeachment of the declarant by extrinsic evidence, are found to be adequate substitutes for cross-examination.

CONCLUSION

The Supreme Court's decision in *Ohio v. Roberts* adds greater certainty to the law of confrontation in situations when the declarant is shown to be unavailable or is produced at trial. It creates new doubts, however, concerning the constitutional status of hearsay, admissible under established exceptions to the rule against hearsay, when no showing of declarant unavailability is made. In stating that a showing of unavailability "nor-

in court would be a meaningless formality. Thus, there is an ambit of discretion reserved to the district judge contingent on the specific facts of the case.

Id.

220. FED. R. EVID. 801(d)(2)(B).

221. *Id.* Fed. R. Evid. 801(d)(2)(B) provides that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement of which he has manifested his adoption or belief in its truth." *Id.*

222. See *supra* note 20.

223. *Ohio v. Roberts*, 448 U.S. 56, 65 n.7 (1980).

224. See *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970); *supra* text accompanying notes 117-20.

mally" will be required, the Court gave insufficient attention to the numerous and widely used hearsay exceptions, particularly those governing documentary hearsay, for which an unavailability requirement is generally inappropriate.

This Article has attempted to identify those exceptions and to delineate the categories of hearsay that may be received under them without offending the confrontation clause. It has also described the relevant criteria to be applied to all hearsay in determining whether an exemption from the unavailability requirement should be recognized.

State courts and lower federal courts now have the burden of resolving, in varying factual contexts, the tension between the confrontation clause and evidentiary provisions admitting hearsay without a showing of unavailability. Despite Professor Alexander Bickel's assertion that "the lower courts can act in constitutional matters as stop-gap or relatively ministerial decision-makers only,"²²⁵ their role is likely to assume special importance in developing the jurisprudence of confrontation because of the complexity and multiform nature of hearsay law.²²⁶ In cases in which the confrontation issue is addressed, courts should recognize that prosecutors need clear guidelines for determining when hearsay will be admissible in criminal cases. Now that the standard for determining reliability has been clarified by *Roberts's* presumptive equation of reliability with "well established" hearsay exceptions,²²⁷ the unavailability requirement poses the greatest area of uncertainty for pros-

225. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 198 (1962).

226. See *Ohio v. Roberts*, 448 U.S. 56, 62 (1980). The Court stated:

The basic rule against hearsay . . . is riddled with exceptions developed over three centuries. . . . These exceptions vary among jurisdictions as to number, nature and detail. . . . But every set of exceptions seems to fit an apt description offered more than forty years ago: "An old fashioned crazy quilt made of patches cut from a group of paintings made by cubists, futurists and surrealists."

Id. (citations omitted).

Lower courts often are able to avoid the confrontation issue entirely by interpreting the hearsay exceptions more narrowly in criminal cases. A leading authority has commented:

In a criminal case . . . the hearsay rule enjoys a "special sacrosanctity," and is employed far more stringently "in spite of the repeated judicial protestations that civil and criminal trials are governed by the same rules of evidence." . . . [T]he trial judge's discretion to admit hearsay evidence against a criminal defendant is decidedly curtailed.

4 J. WEINSTEIN & M. BERGER, *supra* note 15, ¶ 800[03], at 800-18 (footnotes omitted).

227. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); see *supra* text accompanying note 10.

ecutors seeking to offer hearsay in criminal cases. With respect to this aspect of confrontation, constitutional error is easily avoidable if it is made clearer to prosecutors under what circumstances production of available hearsay declarants, or a showing of their unavailability, will be required.

The greatest degree of certainty would be provided by a rule exempting from the unavailability requirement all hearsay qualifying for admission under designated hearsay exceptions. Such an approach is not always possible, however, given the wide diversity of hearsay statements that qualify for admission under a single exception. Hearsay clearly admissible in civil cases may fall short of sixth amendment standards.

Nonetheless, courts can provide useful precedential guidance by adopting two alternate approaches. First, they can judicially define categories of hearsay that will be exempt from the unavailability requirement, even though the identified category may be narrower than the hearsay exception under which it is offered. Second, they can indicate presumptive approval of hearsay offered under specified exceptions, such as the ones suggested in this Article, absent unusual circumstances. If courts focus on the values underlying the confrontation clause, as well as the need for greater future predictability, they should be able to develop a confrontation jurisprudence that responds to the diversity and subtleties of hearsay law, without imposing either continuing uncertainties or unnecessary evidentiary burdens upon the prosecutor.

