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The confrontation clause of the sixth amendment provides that criminal defendants have the right to be confronted with the witnesses against them.[1] One category of cases commonly arising under the confrontation clause involves the admissibility of out-of-court statements.[2] These cases address the question of whether a nontestifying declarant's out-of-court statement that is admissible under an exception to the hearsay rule may be admitted under the confrontation clause. The question implicates the confrontation clause's core value of allowing criminal defendants to confront witnesses against them.[3]

Recent cases have produced uncertainty about the complex relationship between the confrontation clause and the hearsay

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1. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

2. The United States Supreme Court explained in *California v. Green* that confrontation clause cases fall into two broad categories. 399 U.S. 149, 157 (1970). One category involves the admission of out-of-court statements, and the other involves the legal or court-imposed restrictions on the scope of cross-examination. *Id.* Because the first category involves the "literal right to 'confront' the witness" at trial, it implicates the "core of the values furthered by the Confrontation Clause." *Id. See also* Ohio v. Roberts, 448 U.S. 56, 66, 70-71 (1980) (concluding that questioning of a witness as a hostile witness had been the functional equivalent of cross-examination and therefore substantially complied with the confrontation requirement); Dutton v. Evans, 400 U.S. 74, 86, 89 (1970) (finding that purpose of confrontation clause to aid jury in determining accuracy is satisfied if out-of-court statement has sufficient indicia of reliability).

3. *See* Delaware v. Fensterer, 474 U.S. 15, 19-20 (1985) (per curiam) (suggesting that a witness's lapse of memory "may so frustrate any opportunity for cross-examination" that admission of direct testimony would violate confrontation clause); *supra* note 2.

rule.[4] Confrontation clause analysis focuses on whether the declarant of an admissible hearsay statement testifies in court, whether the declarant is available but does not testify, or whether the declarant is unavailable.[5] If the declarant does not testify, confrontation clause analysis then inquires as to the reliability or trustworthiness of the out-of-court statement.[6] The United States Supreme Court has stated that for confrontation clause purposes reliability may be inferred when the statement falls within a "firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness."[7] Despite the implication that the confrontation clause and the hearsay rule serve the same function, the Court has nevertheless stated that the confrontation clause is not a codification of the hearsay rule.[8] The problem therefore remains of defining the relationship between the confrontation clause and the hearsay rule by reconciling the availability and reliability concerns of the confrontation clause with the availability and reliability concerns expressed in the exceptions to the hearsay rule.

Additional concerns further muddle the problem. When concepts of the importance of the testimony, the utility of cross-examination, and the burden on the prosecution of producing an available declarant or establishing unavailability are added to traditional reliability confrontation clause analysis, and the concepts of necessity and the adversary system are addressed in the hearsay analysis, the state of the relationship moves from complex, to confusing, to downright confused. At an operational level, many parts of the relationship create little real controversy even though their theoretical underpinnings are unclear. In other areas, however, the confusion has led to significant litigation.

Recent legislative responses to the revelation of widespread child sexual abuse[9] will result in courts examining with increasing regularity the relationship between the confrontation clause and the hearsay rule. This Article addresses the state of the relationship between the confrontation clause, the hearsay rule, and child sexual abuse prosecutions. Part I of the Article presents a hypothetical case of child sexual abuse and introduces six hearsay statements, each of which requires exami-

4. *See infra* notes 118-72 and accompanying text.
5. *See infra* notes 68-202 and accompanying text.
6. Ohio v. Roberts, 448 U.S. at 66.
7. *Id.*
8. California v. Green, 399 U.S. 149, 155 (1970).
9. *See infra* notes 50, 184.

nation under the hearsay rule and the confrontation clause for admission into evidence. Part II considers the admissibility of the statements under traditional hearsay exceptions, residual and special statutory exceptions emphasizing particularized guarantees of trustworthiness, and statutory exceptions for videotaped statements. Part III of the Article, focusing on the factors of availability of the hearsay declarant and reliability of the hearsay statement, discusses the current interpretation of the confrontation clause and addresses the confrontation clause issues attendant to admitting hearsay statements in evidence. Part IV discusses the dilemma created by the Supreme Court's most recent pronouncement on the requirements of the confrontation clause with respect to the admissibility of hearsay statements. It discusses the problems with commentators' suggested interpretations of the confrontation clause and specifically addresses the confrontation clause issues in child sexual abuse prosecution. Part V proposes a new interpretation of the confrontation clause that limits application of the confrontation clause to the admissibility of hearsay statements that were accusatory when made. The Article concludes that current confrontation clause analysis is flawed and that the Article's suggested approach would better serve the purposes of the confrontation clause while avoiding constitutionalizing the hearsay rule and its exceptions.

I. HYPOTHETICAL CASE

A mother leaves her six-year-old daughter, Alice, in the custody of the mother's live-in boyfriend, Sam. Eight hours after Alice returns to her mother's care, her mother asks her how she enjoyed her time with Sam. Alice tells her mother that Sam touched her genital area. Alice's mother is unsure whether to believe her. She confronts Sam, but he denies the incident. The mother takes no further action. Five days later the mother again leaves Alice in Sam's custody. This time Sam attempts anal intercourse. Fifteen minutes after the attempt, Alice, still in a state of fear, anger, and pain, runs out of the house and sees her mother walking up the sidewalk. Using language uncharacteristically crude for most six-year-old girls, Alice screams that Sam has sexually assaulted her. Alice and her mother hurry to a nearby police station where Alice excitedly repeats her accusation to the desk officer. Twenty minutes later, after calming considerably, Alice repeats her accusation in a videotaped interview conducted by a member of the local

child sexual abuse task force. A police officer then takes Alice and her mother to a hospital emergency room for an examination. Alice tells the doctor that a few days ago Sam touched her genital area and that today he attempted anal intercourse. A medical examination reveals trauma in the rectal area. Three weeks before Sam's trial, a police officer conducts a videotaped interview of Alice for use at trial. Neither side has an attorney present at the videotaping.

For Alice's out-of-court hearsay statements to be admissible in a criminal prosecution of Sam, her statements must meet the requirements of both a hearsay exception and the confrontation clause. Admission of the statements may be critical to Sam's successful prosecution.

II. APPLICABILITY OF HEARSAY EXCEPTIONS TO ALICE'S OUT-OF-COURT STATEMENTS

A. HEARSAY EXCEPTIONS UNDER THE FEDERAL RULES OF EVIDENCE

Under the Federal Rules of Evidence, which codify firmly rooted common law hearsay exceptions, several hearsay exceptions may apply to Alice's statements, regardless of Alice's availability to testify at trial. Alice's two statements to her mother and her statement to the desk officer, for example, must be analyzed under the hearsay exceptions for present sense impressions and excited utterances. Federal Rule of Evidence 803 provides a hearsay exception for a present sense impression, which is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[10] Alice's first statement to her mother, which described the touching, obviously was not a present sense impression because it was made at least eight hours after the event. Likewise, but less obviously, Alice's second statement to her mother, which described the attempted anal intercourse, was not a present sense impression because Alice did not make it while perceiving the event, and fifteen minutes is too long to fall within the "immediately thereafter" provision of the rule.[11] Thus, neither statement to

10. FED. R. EVID. 803(1).

11. *See* Hilyer v. Howat Concrete Co., 578 F.2d 422, 426 n.7 (D.C. Cir. 1978) (indicating that a statement made 15 minutes after the event is likely inadmissible under the present sense impression exception, which allows only a slight lapse of time between event and statement).

Alice's mother would be admissible under the exception for present sense impressions.

Federal Rule of Evidence 803 also provides a hearsay exception for an excited utterance, which is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[12] Admissibility of Alice's first statement is more likely under this exception than under the present sense impression exception because lapse of time between the startling event and the out-of-court statement, although relevant to show the excited nature of the statement, is not dispositive.[13] Nor is it dispositive that Alice made her statement in response to her mother's inquiry.[14] Rather, these are only factors which the trial court must consider in deciding whether to admit the statement under the excited utterance exception. Other factors include the declarant's age; her physical, mental, and, most importantly, emotional condition when making the statement; the circumstances of the event; and the statement's subject matter.[15] Courts applying the excited utterance exception must find that the statement was spontaneous rather than the product of deliberation.[16] Although courts have been liberal in child sexual abuse cases in admitting hearsay statements under the excited utterance exception,[17] it is doubtful that Alice's first statement to her mother would be admitted. Because Alice made the statement calmly in response to her mother's general question eight hours after the event, it is difficult to characterize the statement as spontaneous.

Alice's second statement to her mother and her statement to the desk officer, on the other hand, fall clearly within the excited utterance exception. Made while in a state of fear, anger, and pain, both statements were spontaneous rather than deliberate.

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12. FED. R. EVID. 803(2).

13. State v. Ramirez, 46 Wash. App. 223, 230, 730 P.2d 98, 102 (1986) (holding admissible under a state statute a victim's statement to her mother made five hours after startling event and recognizing that five hours might not defeat the "spontaneous declaration" element of the excited utterance exception); *see infra* note 17.

14. *See infra* notes 56-61 and accompanying text.

15. *See infra* notes 36-45 and accompanying text.

16. FED. R. EVID. 803(2).

17. *See* State v. Myatt, 237 Kan. 17, 23, 697 P.2d 836, 842 (1985) ("Courts have thus tended to stretch existing hearsay exceptions to accommodate a child victim's out-of-court statements because they are deemed uniquely necessary and trustworthy.").

Alice's videotaped statement to the child sexual abuse task force member twenty minutes after arriving at the police station does not meet the requirements of any traditional hearsay exception. Federal Rule of Evidence 803 provides a hearsay exception for public records.[18] The public records exception, however, does not apply in criminal cases to matters observed by law enforcement personnel.[19] Because the task force member may properly be considered law enforcement personnel, Alice's videotaped statement is not admissible under the exception. Moreover, no second-level hearsay exception applies to Alice's statement.[20] Alice was sufficiently calm after her twenty-minute wait to preclude admission of her statement as an excited utterance. Thus, neither Alice nor the task force member may present the statement at trial.

Alice's videotaped statement to the police three weeks before trial likewise fails to meet the requirements of any hearsay exception. The public records exception does not apply because Alice made the statement to a police officer for use in a criminal case.[21] Nor does the excited utterance exception apply because Alice was certainly not sufficiently excited three weeks before trial.[22] Thus, neither Alice nor the police officer may present the statement at trial.

Alice's statement to the emergency room doctor must be evaluated in light of the medical diagnosis or treatment exception. Federal Rule of Evidence 803 provides for admissibility of statements of past or present physical condition made for purposes of medical diagnosis or treatment.[23] Two possible barriers to admissibility exist in Alice's case. The medical diagnosis or treatment exception assumes that the statements are reliable because the declarant is aware of the importance of telling the truth to secure proper medical care.[24] It is questionable

18. FED. R. EVID. 803(8).

19. FED. R. EVID. 803(8)(B). The public records exception excepts from the hearsay prohibition "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies." FED. R. EVID. 803(8). The exception, however, excludes "in criminal cases matters observed by police officers and other law enforcement personnel." *Id.* at 803(8)(B).

20. *But see infra* note 26.

21. *See supra* note 19.

22. *See supra* note 16 and accompanying text.

23. FED. R. EVID. 803(4).

24. United States v. Iron Shell, 633 F.2d 77, 83-84 (8th Cir. 1980) (explaining that patient has a strong motive to tell the truth "because diagnosis or treatment will depend in part upon what the patient says"), *cert. denied*, 450 U.S. 1001 (1981).

whether Alice at the age of six was so aware. The part of the statement identifying Sam as the alleged offender, moreover, usually would be relevant to medical diagnosis or treatment[25] only if treatment included removing Alice from the threat of future sexual abuse by Sam or obtaining information useful for future psychological counseling of Alice. The clear trend of authority is to admit identifying statements in child sexual abuse prosecutions.[26]

Alice's statements to her mother, the desk officer, the task force member, the doctor, and the police officer three weeks before trial each possess indicia of reliability because they describe an embarrassing fact that a child would not normally convey unless true and they are cries for help.[27] Nevertheless, no traditional common law hearsay exception applies to embar-

25. The identity of the alleged perpetrator may be relevant to medical diagnosis or treatment if an examination of the perpetrator would assist in determining the presence of venereal disease.

26. *See, e.g.*, People v. Wilkins, 134 Mich. App. 39, 45, 349 N.W.2d 815, 817-18 (1984) (upholding the admission of a sexually abused child's statement to her doctor identifying the child's stepfather as the perpetrator); *see also* United States v. Renville, 779 F.2d 430, 436-37 (8th Cir. 1985) ("Statements by a child abuse victim . . . that the abuser is a member of the victim's immediate household *are* reasonably pertinent to treatment. . . . The exact nature and extent of the psychological problems which ensue from child abuse often depend on the identity of the abuser.") (emphasis in original); Goldade v. State, 674 P.2d 721, 726 (Wyo. 1983) ("It is apparent from the testimony of the physician . . . that he was involved in attempting to diagnose and, if diagnosed, to then treat child abuse, not simply bruises on the little girl's face. The identity of the person causing those injuries is a pertinent fact in these circumstances."), *cert. denied*, 467 U.S. 1253 (1984).

The successful prosecution of child sexual abuse cases should not be permitted to distort the hearsay exception for statements for medical diagnosis or treatment. Almost anything is relevant to the diagnosis or treatment of psychological well being, and far too many untrustworthy statements are relevant to preventing repetition of the abuse. Federal Rule of Evidence 803(4) should remain restricted to statements pertinent to physical medical diagnosis or treatment. Courts may admit other statements possessing adequate indicia of trustworthiness under the residual hearsay exceptions of Federal Rules of Evidence 803(24) and 804(b)(5) and, most importantly, specific hearsay exceptions applicable solely in child sexual abuse prosecutions.

Moreover, the medical diagnosis or treatment exception should not be extended to statements made to social workers, such as Alice's statement to the task force member. Although such extension is possible, *see, e.g.*, United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987) (extending residual exceptions to child's out-of-court statement made to social worker), it is inadvisable.

27. Alleged incidents of false accusations of child sexual abuse have led to the formation of a group called Victims of Child Abuse Laws (VOCAL). This group claims to have members in 48 states. For a discussion of VOCAL, see Dorschner, *A Question of Innocence*, Miami Herald, July 28, 1985 (Tropic Magazine), at 23.

rasing statements or cries for help. The closest analogy in common law is the admissibility of prompt complaints in rape or sexual abuse cases to corroborate the in-court testimony of the complainant. Prompt complaint evidence, however, traditionally is limited to the fact of the complaint and excludes any reference to the identity of the offender or the details of the offense.[28]

Alice's statements possess additional indicia of reliability because they describe events that a six-year-old girl is not likely to know may occur between an adult male and a young girl. The statements possess further indicia of reliability because Alice used language that was atypical of a six-year-old girl living in most communities in this country. Nevertheless, no traditional hearsay exception exists for statements of a young child that are reliable because their contents or language are unlikely to have been said or used by a six-year-old child. It is thus likely in our hypothetical case that under the Federal Rules of Evidence hearsay exceptions, without regard to Alice's availability as a witness at Sam's trial, some but not all of Alice's statement will be admitted in evidence.

B. PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS

As noted above,[29] three of Alice's statements are likely to be admissible under common law or Federal Rules of Evidence hearsay exceptions even if Alice is available to testify at Sam's trial. Alice's other statements would not meet the requirements of any traditional hearsay exception in the Federal Rules and therefore would be inadmissible. Two avenues remain, however, for the admission of these hearsay statements. One is found in the residual exceptions to the hearsay rule, which are available under the Federal Rules of Evidence and some state evidence codes modeled on the Federal Rules.[30] The other is found in special statutory hearsay exceptions for child sexual abuse prosecutions.[31]

1. Residual Exceptions to the Hearsay Rule

A child's hearsay statement may be admissible under the

28. Graham, *The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence*, 19 WILLAMETTE L. REV. 489, 492 (1983).

29. *See supra* notes 10-28 and accompanying text.

30. FED. R. EVID. 803(24), 804(b)(5); *see also* REV. UNIF. R. EVID. 803(24), 804(b)(6) (1974) (containing same language as Federal Rules).

31. *See infra* note 50.

residual exceptions to the hearsay rule, codified in Federal Rules of Evidence 803(24) and 804(b)(5).[32] These two Rules are identical except Rule 804(b)(5) requires that the declarant be unavailable to testify at trial.[33] Both Rules contain several requirements that hearsay statements must meet to be admissible.[34]

The most significant requirement is that the statement possess circumstantial guarantees of trustworthiness equivalent to those of statements admitted under one of the traditional hearsay exceptions.[35] Courts consider several criteria in evaluating the trustworthiness of a hearsay statement, including the credibility of the statement and the declarant at the time of the statement in light of the declarant's personal knowledge,[36] the availability of time to fabricate,[37] the declarant's bias,[38] and the

32. *See, e.g.*, United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987) (holding admissible a child victim's hearsay statements to social worker under FED. R. EVID. 803(4), 803(24)); United States v. Dorian, 803 F.2d 1439, 1446 (8th Cir. 1986) (holding admissible a child sex abuse victim's hearsay statements, testified to by the foster mother, under FED. R. EVID. 803(24)).

33. *Compare* FED. R. EVID. 803(24) (applying when declarant is available to testify at trial) *with* FED. R. EVID. 804(b)(5) (applying when declarant is unavailable to testify at trial).

34. Hearsay statements must meet the following requirements to be admissible: (1) the hearsay statement must possess guarantees of trustworthiness equivalent to that of statements admitted under the specific exceptions; (2) the hearsay statement must be offered as evidence of a material fact; (3) the hearsay statement must be more probative on the point it supports than any other evidence which the proponent can reasonably obtain; (4) admission of the hearsay statement must be in accord with the general purposes of the rules of evidence; and (5) the proponent of the hearsay statement must give sufficient notice. FED. R. EVID. 803(24), 804(b)(5). *See also* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803.24, at 923-25 (2d ed. 1986) (describing the five express requirements contained in FED. R. EVID. 803(24) and 804(b)(5)).

35. Traditional hearsay exceptions are the first 23 exceptions in FED. R. EVID. 803 and the first four exceptions in FED. R. EVID. 804(b). FED. R. EVID. 803(24) advisory committee's note.

36. *See, e.g.*, United States v. Barlow, 693 F.2d 954, 962 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) ("[T]he trial court should consider the declarant's relationship with both the defendant and the government, . . . the extent to which the testimony reflects the declarant's personal knowledge, and the existence of corroborating evidence available for cross-examination.").

37. A court is more likely to admit statements made soon after the event than statements made long after the event, and it is more likely to admit initial statements than subsequent statements. *See supra* notes 10 & 16 and accompanying text. Nevertheless, although time and sequence are important, they are not dispositive because delay in reporting and vacillation are commonly associated with complaints of child sexual abuse. *See supra* note 17 and accompanying text.

38. *See, e.g.*, United States v. Barlow, 693 F.2d at 962 (considering "declarant's motivation to testify").

suggestiveness created by leading questions.[39] Courts further consider other, corroborating factors arising after the statement was made, including the credibility of the person testifying to the statement,[40] the availability of the declarant at trial for cross-examination (obviously not applicable to Rule 804(b)(5) evaluation),[41] whether the declarant has recanted or reaffirmed the statement,[42] and the existence of corroborating physical evidence.[43] In child sexual abuse cases, courts should also consider whether the child's statement discloses an embarrassing event that a child would not normally relate unless true, is a cry for help, employs appropriate childlike language, or describes a sexual act beyond a child's normal experience.[44] Also relevant

39. *Compare* State v. Myatt, 237 Kan. 17, 22, 697 P.2d 836, 841 (1985) ("[I]t is highly unlikely that a child will persist in lying to his or her parents, or other figures of authority about sexual abuse.") *with* State v. Ryan, 103 Wash. 2d 165, 176, 691 P.2d 197, 205 (1984) ("[The mothers'] relationship to their children is understandably of a character which makes their objectivity questionable.").

The problem of suggestiveness by an authority figure, particularly a mother involved in a custody dispute, should not be underestimated. A child's complaint of sexual abuse might have resulted from a desire to please, from fear, or from uncritical acceptance of what the child thinks the authority figure believes has happened. Very young children especially might over time accept the suggested event as true and recall it as if it had really occurred. *See* Dorschner, *supra* note 27, at 11-13 (describing questionable accusations as " 'epidemic' " and quoting Dianne Schetky, a child psychiatrist in Connecticut, as stating about false accusations: "A child can be very impressionable. They want to believe their parents. And if Mommy says Daddy abused you . . . the child is not per se lying. He is brainwashed. . . . Children are very suggestible. I have seen interviews where the interrogators put words in the child's mouth.").

40. *See, e.g., Barlow*, 693 F.2d at 962 (evaluating credibility of declarant who was given immunity from prosecution to testify).

41. *See supra* note 33.

42. *See, e.g., Barlow*, 693 F.2d at 962.

43. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 324.1, at 908-09 (3d ed. 1984).

44. *See* State v. Myatt, 237 Kan. 17, 22, 697 P.2d 836, 841 (1985) ("[C]hildren do not have enough knowledge about sexual matters to lie about them."). *See generally* Comment, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 827 (1983). Courts should hold a hearing on the issue of reliability before admitting the statement:

> [T]he court should thoroughly question the person who will testify concerning the child's out-of-court statement, any other persons who heard the statement, any persons who have knowledge of the circumstances surrounding the alleged sexual assault, and, if possible, the child. During the questioning, the court should attempt to determine: (1) the time lapse between the alleged sexual act and the child's recital of the statement; (2) whether the statement was made in response to a leading question; (3) whether either the child or the hearsay witness has any bias against the defendant or any motive for fabricating

are the child's age and maturity, the nature and duration of the sexual contact, the child's physical and mental condition when the statement was made, and the relationship of the child and the accused.[45]

The residual exceptions also require a need for introduction of the hearsay statement.[46] The statement must be more probative on the point for which it is offered than any other reasonably procurable evidence.[47] The reasonableness of procuring alternative proof depends on the fact at issue considered in light of its posture in the total litigation.[48] If the child testifies fully at trial about the relevant events, introduction of the hearsay statement may not be necessary.[49]

> the statement or implicating the accused; (4) whether the statement was made while the child was still upset or in pain because of the incident; (5) whether the terminology of the statement was likely to have been used by a child the age of the alleged victim; and (6) whether any event that occurred between the time of the alleged act and the time the statement was made could have accounted for the contents of the statement.

Id.

45. *Myatt*, 237 Kan. at 25, 697 P.2d at 843. Courts should determine reliability and trustworthiness on a case-by-case basis:

> Such factors as the age of the child; his or her physical and mental condition; the circumstances of the alleged event; the language used by the child; the presence of corroborative physical evidence; the relationship of the accused to the child; the child's family, school, and peer relationships; [and] any motive to falsify or distort the event . . . can be examined.

Id.

46. FED. R. EVID. 803(24)(B), 804(b)(5)(B).

47. *Id.*

48. *See* M. GRAHAM, *supra* note 34, § 803.24, at 924-25.

49. The residual exceptions also require that the statement be offered as evidence of a material fact. FED. R. EVID. 803(24)(A), 804(b)(5)(A). This requirement probably means that the fact the statement is offered to prove must be both relevant and substantially important to the outcome of the litigation. *See* FED. R. EVID. 401; Huff v. White Motor Corp., 609 F.2d 286, 294 & n.13 (7th Cir. 1979).

The residual exceptions further require that admission of the statement serve the interests of justice and the general purposes of the Rules of Evidence. FED. R. EVID. 803(24), 804(b)(5)(C). This requirement, however, has little practical importance in determining admissibility of hearsay statements. *See* Yasser, *Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 TEX. TECH. L. REV. 587, 595 (1980) (noting requirement that the interests of justice be served has not been a recurring justification for exclusion in the caselaw).

Finally, the residual exceptions require that the proponent of the hearsay evidence provide fair notice to the adverse party. FED. R. EVID. 803(24), 804(b)(5). Courts generally enforce the notice requirement before trial but dispense with it if admission would apparently not prejudice the opponent and the need for admission arises on the eve of or during the course of trial. *See*

2. Special Statutory Hearsay Exceptions

Alice's statements may also be admissible if the state has a statute allowing admission of child victim hearsay statements under certain circumstances. At least twenty states have enacted hearsay exception statutes applicable in prosecutions for child sexual abuse.[50] These statutes permit admissibility of child victims' hearsay statements when the equivalent circum-

generally Yasser, *supra*, at 595-97, 601-03 (discussing split in caselaw regarding rigid enforcement of the advance notice requirement). Courts may avoid prejudice by granting the opponent a continuance to prepare to meet or contest the introduction of the hearsay statement. *See, e.g.*, United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978) (finding three-day recess met the purpose of the advance notice requirement, even though pretrial notice had not been given).

50. *See* ALASKA STAT. § 12.40.110 (1987) (requiring that circumstances of the statement indicate its reliability); ARIZ. REV. STAT. ANN. § 13-1416 (1987) (requiring that time, content, and circumstances of statement provide sufficient indicia of reliability); ARK. STAT. ANN. § 28-1001: Rule 803(25) (1985) (requiring that statement possess a reasonable likelihood of trustworthiness); CAL. EVID. CODE § 1228 (West Supp. 1987) (requiring no significant inconsistencies between defendant's confession and child's statement that would render the statement unreliable); COLO. REV. STAT. § 13-25-129 (1986) (requiring that time, content, and circumstances of the statement indicate its reliability); FLA. STAT. ANN. § 90.803(23) (West Supp. 1987) (requiring that time, content, and circumstances of the statement provide sufficient safeguards of reliability); IDAHO CODE § 19-3024 (1987) (requiring that time, content, and circumstances of the statement provide sufficient indicia of reliability); ILL. ANN. STAT. ch. 38, ¶ 115-10 (Smith-Hurd 1987) (no express requirement of reliability); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1987) (requiring that time, content, and circumstances of the statement provide sufficient indications of reliability); KAN. STAT. ANN. § 60-460(dd) (Supp. 1986) (requiring that child be apparently reliable); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1987) (no express requirement of reliability); MINN. STAT. §§ 260.156, 595.02(3) (1986) (requiring that circumstances of the statement and reliability of the listener provide sufficient indicia of reliability); MISS. CODE ANN. § 13-1-403 (Supp. 1987) (requiring that time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness); MO. ANN. STAT. § 491.075 (Vernon 1987) (requiring that time, content, and circumstances provide sufficient indicia of reliability); OKLA. STAT. ANN. tit. 12, § 2803.1 (West 1987) (requiring that time, content, and circumstances of the statement provide sufficient guarantees of reliability); 42 PA. CONS. STAT. ANN. § 5986 (Purdon 1987) (requiring that time, content, and circumstances of the statement provide sufficient guarantees of reliability); S.D. CODIFIED LAWS ANN. § 19-16-38 (1987) (requiring that time, content, and circumstances of the statement provide sufficient guarantees of reliability); TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 1988) (requiring that statement is reliable based on time, content, and circumstances); UTAH CODE ANN. § 76-5-411 (1987) (requiring that age and maturity of child, nature and duration of abuse, relationship of child to abuser, and reliability of child indicate that justice will be best served by admission); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987) (requiring that time, content, and circumstances of the statement provide sufficient guarantees of reliability).

stantial guarantees of trustworthiness required by Rules 803(24) and 804(b)(5) (sometimes referred to as *indicia of reliability*) are present.[51] Accordingly, under these statutory hearsay exceptions, hearsay statements need not fall under a traditional hearsay exception to be admissible; they only need possess circumstantial guarantees of trustworthiness equivalent to those possessed by hearsay statements admissible under traditional hearsay exceptions.

Although state statutes differ in the procedures they establish for determining the admissibility of child testimony,[52] they generally require an ad hoc determination that the nontestifying child's statement possesses the particularized guarantees of trustworthiness required under the confrontation clause,[53] an issue that turns on the facts of the case.[54] Courts base their ad hoc assessment on the totality of the surrounding circumstances, including corroborating facts such as physical evidence, inconsistent facts, and the assessed credibility of the declarant, all considered in the light of the traditional, firmly rooted ex-

51. For cases in which courts held admissible child hearsay statements under such statutes, see People *ex rel.* K.L.M. v. Marshall, 146 Ill. App. 3d 489, 493-97, 496 N.E.2d 1262, 1265-68 (1986) (statement admissible under ILL. ANN. STAT. ch. 37, ¶ 704-6-(4)(C) (1983)); State v. Nelson, 725 P.2d 1353, 1355 (Utah 1986) (statement admissible under Utah statutory hearsay exception); State v. Hancock, 46 Wash. App. 672, 675-79, 731 P.2d 1133, 1135-37 (1987) (statement admissible under WASH. REV. CODE ANN. § 9A.44.120 (1987)); State v. Ramirez, 46 Wash. App. 223, 229-32, 730 P.2d 98, 101-03 (1986) (statement admissible under special hearsay exception).

52. *Compare* FLA. STAT. ANN. § 90.803(23) (West 1979 & Supp. 1987) (making admissible in civil or criminal proceedings statements showing sufficient reliability when child is unavailable and other corroborative evidence exists or when child testifies and requiring in criminal cases notice to defendant of use of statement) *with* KAN. STAT. ANN. § 60.460(dd) (Supp. 1986) (making admissible, in criminal proceedings or a proceeding to determine whether child is in need of care, "apparently reliable" statements when the child is unavailable and was not "induced to make the statement falsely by use of threats or promises") *and* WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987) (making admissible in criminal and dependency proceedings statements showing sufficient indicia of reliability when child is unavailable and corroborative evidence of the act exists or child testifies).

Kansas also enacted a hearsay exception, applicable in civil and criminal proceedings, that permits a party to introduce, subject to satisfaction of specified requirements indicative of trustworthiness, statements of an unavailable declarant that relate to a recently perceived event or condition. *See* KAN. STAT. ANN. § 60.460(d) (Supp. 1986).

53. The "particularized guarantees of trustworthiness" notion for admissibility first appeared in Ohio v. Roberts, 448 U.S. 56, 66 (1980), discussed *infra* notes 118-43 and accompanying text.

54. For criteria used in determining admissibility, *see supra* notes 35-45 and accompanying text.

ceptions to the hearsay rule. Particularly important in assessing the trustworthiness of a young child's hearsay statement are some of the same factors examined under the residual exceptions to the hearsay rule that reduce the likelihood of fabrication.[55]

State v. Ryan[56] illustrates the Supreme Court of Washington's search for particularized guarantees of trustworthiness. In *Ryan* two children, when questioned about the source of candy in their possession, first told one story to their respective mothers then later recanted the story and stated that the defendant had given it to them for permitting sexual contact.[57] In reversing the trial court's admission of the hearsay statements,[58] the court considered it important that both children initially made the statements to only one person.[59] The fact that both mothers solicited the statements after learning that sexual contact possibly had occurred also strongly influenced the court.[60] Implicit in the court's reasoning is the belief that children are susceptible to suggestion from loved ones or authority figures.[61]

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55. *See supra* note 44 and accompanying text. The Washington statutory hearsay exception for child abuse prosecutions, in its search for particularized guarantees of trustworthiness, requires consideration of the time, content, and circumstances of the statement. *See* WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987). The Kansas statute demands consideration of whether the statement was made by the declarant at a time when the matter had been recently perceived, whether the statement was made in good faith prior to the commencement of the action, and whether the statement was made with no incentive to falsify or distort. *See* KAN. STAT. ANN. § 60.460(d) (Supp. 1986). Another Kansas statute requires that the court consider whether the child was induced by threats or promises to falsely make the statement. *See* KAN. STAT. ANN. § 60.460(dd) (Supp. 1986). The Florida statute mandates consideration of the mental and physical age and maturity of the child. *See* FLA. STAT. ANN. § 90.803(23) (West 1979 & Supp. 1987).

56. 103 Wash. 2d 165, 691 P.2d 197 (1984).

57. *Id.* at 168-69, 691 P.2d at 201.

58. *Id.* at 177, 691 P.2d at 206.

59. *Id.* at 176, 691 P.2d at 205.

60. *Id.*

61. The *Ryan* court said:

> Applying the *Parris* factors to the circumstances of the present case, the statements cannot be deemed sufficiently trustworthy to deprive the defendant of his right of confrontation. First, there was a motive to lie, and each child initially told a different version of the source of the candy they were not supposed to have. Second, all the record reveals about the character of the children is the parties' stipulation that the children were incompetent witnesses due to their tender years. Third, the initial statements of the children were made to one person, although subsequent repetitions were heard by others. Fourth, the statements were not made spontaneously, but in response

Under special statutory hearsay exceptions, proponents often succeed in introducing a child's initial statement describing the sexual contact as well as additional statements made immediately after the initial statement. They are less successful, however, in introducing a child's statement to a police officer, social worker,[62] or anyone else specially trained to interview children because courts do not usually find that such statements possess equivalent circumstantial guarantees of trustworthiness. The normal timing of interviews, their investigative function, the frequent use of suggestive questions by a person in authority, and the existence of earlier statements by the child relating to the sexual contact all militate against admissibility. As a result Alice's first statement to her mother and any statements to Alice's examining doctor not otherwise admissible under Rule 803(4) would be admissible under the special statutory exceptions. In contrast, neither the statement to the child sexual abuse task force member nor the videotaped statement taken by the police officer three weeks before trial should qualify under the special statutory hearsay exceptions because of their lack of circumstantial guarantees of trustworthiness.

C. Ex Parte Videotaped Statements

Alice's statements to the child sexual abuse task force member and the police officer three weeks before trial might be admissible if the state has a statute providing for admissibility of videotaped statements. Texas, for example, in an attempt to relieve the trauma or emotional distress that a child witness faces in testifying against the accused in open court, enacted a statute, subsequently held unconstitutional,[63] providing for ex parte videotaping of the child victim's statement and for admissibility of the videotaped statement in court as an exception to

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to questioning. Fifth, as regards timing, both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children *before* the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.

Id. (emphasis in original).

62. *But see* United States v. DeNoyer, 811 F.2d 436, 439 (8th Cir. 1987) (hearsay statement made to social worker by child admissible).

63. *See* Long v. State, 694 S.W.2d 185, 193 (Tex. Ct. App. 1985), *aff'd*, 56 U.S.L.W. 2031, 2031 (Tex. Sup. Ct. July 1, 1987) (No. 867-85) (en banc) (state petitioning for discretionary review; opinion subject to revision or withdrawal from permanent law report).

the hearsay rule.[64] The statute required, however, that the child be made available for the defendant to call and examine and presumably cross-examine if the defendant chose to do so.[65] The Texas statute apparently assumed that the availability of the hearsay declarant to be called and examined by the accused at trial satisfies the right of confrontation.

The Texas statute raised many concerns, the most important of which is its almost certain unconstitutionality under the confrontation clause.[66] This Article returns to the Texas statute and other similar, recently enacted statutes after discussing the Supreme Court decisions concerning the confrontation clause and the hearsay rule.

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64. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 (Vernon Supp. 1987), *held unconstitutional by Long*, 694 S.W.2d at 193. The statute provided:

> Sec. 2. (a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:
>
> (1) no attorney for either party was present when the statement was made;
>
> (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
>
> (3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;
>
> (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
>
> (5) every voice on the recording is identified;
>
> (6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;
>
> (7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and
>
> (8) the child is available to testify.
>
> (b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

Id.

65. *Id.* The prosecution need not call the child during its case in chief. *Id.*

66. In *Long*, 649 S.W.2d at 193, the Texas Court of Appeals held that TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 (Vernon Supp. 1987) was unconstitutional. *See infra* notes 314-27 and accompanying text. Several recent law review articles explore the confrontation clause implications of the videotape statutes for child sexual abuse prosecutions. *See* Comment, *Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom*, 18 ST. MARY'S L.J. 279, 311-18 (1986); Note, *Does the Child Witness Videotape Statute Violate the Confrontation Clause?: Article 38.071, Texas Code of Criminal Procedure*, 17 TEX. TECH L. REV. 1669, 1681-85 (1986); Note, *Televised Testimony vs. the Confrontation Clause . . . The Use of Videotapes in the Prosecution of Child Sexual Abuse*, 23 HOUS. L. REV. 1215, 1234-39 (1986). These articles, however, are incomplete because they do not discuss the recent case of United States v. Inadi, 475 U.S. 387 (1986), discussed *infra* notes 144-66 and accompanying text.

III. THE CONFRONTATION CLAUSE: CURRENT INTERPRETATION

Even if Alice's out-of-court statements satisfy a hearsay exception, they are inadmissible in a criminal prosecution against Sam unless they satisfy confrontation clause[67] requirements as well. The sixth amendment right to confront adverse witnesses is not absolute. If the right were absolute, it would preclude admission of all out-of-court statements made by an unavailable witness, even if the statements met the requirements of a hearsay exception. Instead, the confrontation clause permits the admission of hearsay statements depending on the availability of the declarant and the reliability of the statement. The availability analysis questions whether the declarant testifies in court, is available but does not testify, or is unavailable. The reliability analysis is required when the declarant does not testify in court about the subject matter of the hearsay statement. These two factors, availability and reliability, are discussed in turn.

A. AVAILABILITY OF DECLARANT

1. Testifying Witness

To be a testifying witness under availability analysis, a witness must actually testify at trial concerning the witnessed event. If a witness claims not to recall, asserts a privilege, or is unable or unwilling to testify, the witness is in fact unavailable and considered nontestifying.[68] Testifying witness analysis therefore concentrates on whether the testimony is consistent or inconsistent with prior out-of-court statements.

a. *Prior Inconsistent Statements*

Out-of-court statements are generally not admissible as substantive evidence unless they meet the requirements of a traditional hearsay exception[69] or a residual hearsay exception.[70] If the out-of-court statements are also prior inconsistent statements, however, they may nevertheless be admissible under the nonhearsay exemption for prior inconsistent state-

67. U.S. CONST. amend. VI.

68. *See* FED. R. EVID. 804(a); *infra* note 173 and accompanying text.

69. The traditional hearsay exceptions are codified in FED. R. EVID. 803(1)-(23) and 804(b)(1)-(4).

70. FED. R. EVID. 803(24), 804(b)(5).

ments[71] or the hearsay exception provided in some jurisdictions for prior inconsistent statements.[72]

If a witness testifies inconsistently with a prior out-of-court statement, the prosecution may seek to introduce the prior statement not only to impeach the witness but also as substantive evidence. The prosecution may use the hearsay exemption for prior inconsistent statements in the Federal Rules of Evidence to do so, but only when the statement was made under oath in a trial, hearing, deposition, or other proceeding.[73] California's rules of evidence, however, are more relaxed. Section 1235 of California's Evidence Code provides for the substantive admissibility of all prior inconsistent statements of a testifying declarant provided the declarant has an opportunity at trial to admit, deny, or explain the statements.[74]

Even if admissible under evidentiary rules, however, prior inconsistent statements still face confrontation clause scrutiny. In *California v. Green*[75] the United States Supreme Court considered the application of the confrontation clause to the admissibility of prior inconsistent statements as substantive evidence under section 1235 of the California Evidence Code.[76] In *Green* John Green was convicted of supplying marijuana to Melvin Porter, a minor.[77] Porter identified Green as his supplier at the preliminary hearing and in an oral, unsworn statement to a police officer.[78] At trial, however, Porter was evasive and uncooperative.[79] He claimed that he could not recall who supplied him with marijuana because he was under the influence of LSD at the time of the transaction.[80] The trial court admitted both prior statements under section 1235 of the California Evidence

71. Under the exemption for prior inconsistent statements, a statement is defined as not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

FED. R. EVID. 801(d)(1).

72. *See, e.g.*, CAL. EVID. CODE § 1235 (West Supp. 1987).

73. *See supra* note 71.

74. § 1235.

75. 399 U.S. 149 (1970).

76. *See supra* note 74 and accompanying text.

77. 399 U.S. at 151-53.

78. *Id.* at 151.

79. *Id.*

80. *Id.* at 152.

Code.[81] The California Supreme Court affirmed the reversal of the defendant's conviction by the district court on appeal on the ground that admission of the prior statement as substantive evidence violated his right of confrontation.[82] The United States Supreme Court vacated the judgment, upholding the constitutional validity of section 1235.[83]

The Court in *Green* identified three purposes of confrontation: to insure that declarants give their statements under oath, to provide an opportunity for cross-examination, and to allow the jury to assess the declarant's demeanor.[84] Even though none of these protections was available at the time the declarant made the out-of-court statement, the Court nevertheless found that each of the purposes of confrontation was satisfied when the declarant testified concerning the statement at trial and admission of the prior inconsistent statement would therefore not violate the confrontation clause.[85] Moreover, the Court concluded that "the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial."[86]

The Court in *Green* expressly declined to decide whether Porter's prior statement to the police officer was admissible because at trial Porter claimed a lack of recollection of the underlying event.[87] This raised the issue of whether the defendant was "assured of full and effective cross-examination at the time of trial."[88] Expressing its reluctance to decide the issue without the state court's opinion, the Court remanded for a factual conclusion as to whether the declarant's lack of recollection precluded full and effective cross-examination at trial.[89]

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81. *Id.*
82. *Id.* at 153.
83. *Id.* at 170.
84. *Id.* at 156.
85. *Id.* at 158-60.
86. *Id.* at 159. The witness in *Green* admitted making the prior inconsistent statements. *Id.* at 152. In Nelson v. O'Neil, 402 U.S. 622 (1971), the Supreme Court held that the confrontation clause is satisfied with respect to a prior inconsistent statement if the witness has recollection and is subject to cross-examination, even if the witness denies at trial making the prior statement. *Id.* at 629-30.
87. 399 U.S. at 168-70.
88. *Id.* at 169; *see supra* note 86 and accompanying text.
89. 399 U.S. at 168-70. For a discussion of the question that was reserved in *Green*, see M. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 143-49 (1985).

b. *Prior Consistent Statements*

The *Green* holding, approving the admissibility of prior inconsistent statements, applies to prior consistent statements as well, provided the declarant is available for cross-examination. Although admissibility of a declarant's prior consistent statements would not violate the confrontation clause, evidentiary rules nevertheless present obstacles to the statements' admissibility. Under the Federal Rules of Evidence, prior consistent statements are admissible only when offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.[90] The express or implied charge usually arises during cross-examination. It can also arise during the opponent's case in chief. In either event, the rules provide only a limited window of admissibility for prior consistent statements.

The common law doctrine of prompt complaint[91] affords prior consistent statements an alternative avenue of admissibility not available under the Federal Rules of Evidence. The prompt complaint doctrine provides that when a testifying complainant accuses someone of a sexual offense, the fact that the complainant promptly complained of the occurrence is admissible when the declarant or someone who heard the complaining statement testifies to it. The statement of prompt complaint is admitted to corroborate the in-court testimony of the complainant under the theory that the evidence of prompt complaint rebuts the inference of fabrication that a jury might otherwise draw from a failure to promptly complain.[92] Admissibility of a prompt complaint is limited to the fact of the complaint and does not extend to a description of the incident or the name of the offender.[93]

In sum, if a declarant testifies at trial, prior inconsistent statements are admissible as substantive evidence under the Federal Rules of Evidence if given under oath at a formal proceeding or under California's evidentiary rules if the declarant merely testifies at trial concerning the statements. Further, under *Green*, admissibility of prior inconsistent statements does not violate the confrontation clause as long as the declarant tes-

90. FED. R. EVID. 801(d)(1)(B).

91. *See generally* Graham, *The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence*, 19 WILLAMETTE L. REV. 489, 489-92 (1983).

92. *Id.* at 492-93.

93. Graham, *supra* note 91, at 493.

tifies at trial. Prior consistent statements likewise do not violate the confrontation clause under *Green*, but they are less likely to be admissible under the hearsay rule and its exceptions.

2. Available But Nontestifying Witness

If a declarant is available but does not testify at trial, further confrontation clause analysis is necessary. Six months after *Green*, in *Dutton v. Evans*,[94] the Supreme Court held that a defendant's right of confrontation was not violated when the trial court admitted, under a Georgia co-conspirator hearsay exception, an out-of-court declaration of a nontestifying but available witness.[95] In *Evans* three men, Truett, Williams, and Evans, were charged with the murder of three police officers. The prosecution granted Truett immunity in return for his testimony.[96] Williams and Evans were indicted for the murders and tried separately.[97] At Evans's trial Truett's testimony was the most damaging of the prosecution's evidence. Truett testified that he, Williams, and Evans were stealing a car when three police officers confronted them; they seized a gun from one of the officers and used it to murder all three.[98] One of Williams's fellow prisoners, a man named Shaw, also testified. Shaw said that when Williams returned to the cell after arraignment, Shaw asked Williams how he had fared in court.[99] According to Shaw, Williams responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."[100] Although Williams was available to either side, he was not called to testify at Evans's trial. Defense counsel objected to Shaw's testimony on the grounds that it was hearsay and that it violated Evans's right of confrontation.[101]

The trial court admitted the testimony pursuant to the Georgia statutory co-conspirator hearsay exception[102] and overruled the confrontation clause objection.[103] Defense counsel then cross-examined Shaw at length. Evans was convicted and

94. 400 U.S. 74 (1970) (Stewart, J., plurality opinion).
95. *Id.* at 88.
96. *Id.* at 76.
97. *Id.*
98. *Id.* at 77.
99. *Id.*
100. *Id.*
101. *Id.* at 77-78.
102. GA. CODE ANN. § 24-3-5 (1982).
103. *Evans*, 400 U.S. at 78.

ultimately appealed the verdict to the Supreme Court.[104]

In a five-to-four decision, the Supreme Court upheld Evans's conviction. Justice Stewart, writing the Court's plurality opinion, began with a careful reminder that the confrontation clause did not codify the common law hearsay rule and its exceptions nor did it render all hearsay inadmissible.[105] Justice Stewart indicated that the issue before the Court concerned the "mission"[106] of the confrontation clause, which would be satisfied if the trier of fact had " 'a satisfactory basis for evaluating the truth of the prior statement.' "[107]

In so defining the issue, Justice Stewart departed from the Court's analysis in *Green*. In *Green* the Court focused on whether the declarant's lack of recollection at trial "so affected" the defendant's opportunity to cross-examine as to deprive the defendant of his right of confrontation.[108] In *Evans* the defendant had no opportunity to even attempt cross-examination of the declarant because the declarant was physically absent from trial. According to Justice Stewart, however, the issue in *Evans* was no longer the existence of an opportunity for full and effective cross-examination, but whether the fact finder had " 'a satisfactory basis for evaluating the truth of the prior statement.' "[109]

Although Justice Stewart's opinion is abstruse, he apparently looked to three factors to determine whether the jury had a satisfactory basis for evaluating the truth of the out-of-court statement. Justice Stewart considered the statement's probative impact, the certainty that the statement was made, and the

104. On direct appeal the Georgia courts upheld Evans's conviction. *Id.* at 76 (citing Evans v. State, 222 Ga. 392, 407, 150 S.E.2d 240, 251 (1966)). A federal district court denied Evans's writ of habeas corpus, *id.* (noting the district court's opinion is unreported), but the Fifth Circuit reversed, holding that admission of Shaw's testimony under the Georgia co-conspirator hearsay exception violated Evans's right of confrontation. *Id.* (citing 400 F.2d 826, 827, 832 (5th Cir. 1968)).

105. *Id.* at 80, 86 & n.17 (citing Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 (1966)).

106. *Id.* at 89.

107. *Id.* (quoting California v. Green, 399 U.S. 149, 161 (1970)). Of course, a hearsay statement is admissible if it is used to prove something other than the truth of the matter asserted. *See* Tennessee v. Street, 471 U.S. 409, 415-17 (1985) (distinguishing *Roberts* and *Evans* and holding that an accomplice's confession was admissible for the nonhearsay purpose of rebutting defendant's testimony that his own confession was obtained through coercion).

108. *See supra* notes 75-89 and accompanying text.

109. *See supra* note 107.

indicia of reliability surrounding the statement.[110]

With respect to probative impact, Justice Stewart noted in an introductory remark that the evidence under consideration was not "in any sense 'crucial' or 'devastating.' "[111] Regarding certainty that the statement was made, Justice Stewart concluded that the defendant's opportunity to cross-examine the witness who reported the statement, while the witness was under oath and in the presence of the ultimate trier of fact, provided a sufficient guarantee of certainty that the statement was made.[112] Finally, addressing the reliability of the statement, Justice Stewart found that Williams's statement possessed those indicia of reliability "widely viewed as determinative" of whether a statement should be placed before the jury without confrontation of the declarant.[113] The statement, containing no express assertion of past fact, "carried on its face a warning to the jury against giving the statement undue weight."[114] Williams had well-established personal knowledge of the facts surrounding the murder. It was unlikely that Williams had faulty recollection of the crime. The circumstances under which Williams made the statement negated any motive to misrepresent. Although in *Green* the Court had quoted Wigmore's characterization of cross-examination as the " 'greatest legal engine ever invented for the discovery of

110. *Evans*, 400 U.S. at 88-89. Justice Stewart wrote:

> First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose 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. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

Id.

111. *Id.* at 87.

112. *Id.* at 88.

113. *Id.* at 89.

114. *Id.* at 88.

truth,' "[115] in *Evans* Justice Stewart summarily dismissed as "wholly unreal"[116] the possibility that cross-examination of Williams would have aided the jury in determining whether his statement might have been untrustworthy.

Justice Stewart's plurality opinion in *Evans* is exceptionally unclear concerning the standard a court should apply to determine the constitutional admissibility of an out-of-court statement of an available but nontestifying declarant. Although Justice Stewart looked to three factors—probativeness, certainty, and reliability[117]—to determine whether the trier of fact had a satisfactory basis for evaluating the truth of the prior statement, he failed to advise lower courts how to properly weigh each factor. For example, it is not clear whether Justice Stewart, by noting that the challenged statement was neither crucial nor devastating, intended that the incremental probative value of the evidence and its importance to the litigation should be independently evaluated in the confrontation analysis, or whether he merely meant that any error in admitting Williams's statement was harmless. Moreover, even

115. 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (J. McNaughton rev. 1961)).

116. 400 U.S. at 89.

117. The various tests of *Evans* for determining the presence of adequate guarantees of trustworthiness were summarized in Park v. Huff, 493 F.2d 923, 931 (5th Cir. 1974), *rev'd on rehearing*, 506 F.2d 849 (5th Cir. 1975), *cert. denied*, 423 U.S. 824 (1975), as follows:

> (1) Does the trier of fact have "a satisfactory basis for evaluating the truth of the prior statement"? (2) How "real" is the possibility that cross examination "could conceivably have shown the jury that the statement, though made, might have been unreliable"? (3) What "indicia of reliability" were present to permit the testimony to be placed before the jury although there was no confrontation of the declarant?

Id. (citations omitted). See also United States v. Fleishman, 684 F.2d 1329, 1339 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982), in which the court summarized the reliability factors discussed in Dutton v. Evans, 400 U.S. at 88-91, and United States v. Perez, 658 F.2d 654, 661 (9th Cir. 1981), as follows:

> (1) whether the declaration contained assertions of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime. The reliability factors discussed in *Dutton*, however, are not to be considered exhaustive, nor are all factors required to be present in order to admit the declarations. An additional factor, sometimes discussed and its relevance debated, is whether the testimony of the coconspirator was "crucial" or "devastating."

Fleishman, 684 F.2d at 1339 (citations omitted).

if Justice Stewart intended incremental probative value to be a relevant criterion, his opinion does not indicate whether all crucial hearsay statements must be excluded or may be admitted if indicia of reliability are adequately established.

In *Ohio v. Roberts*,[118] a case involving the admissibility of former testimony of an unavailable declarant, the Court in dicta addressed questions left open in *Evans* concerning the admissibility of a hearsay statement of an available but nontestifying declarant. In *Roberts* the defendant was charged with forgery of a check in Bernard Isaacs's name and with possession of stolen credit cards belonging to Isaacs and his wife.[119] At a preliminary hearing, defense counsel called Isaacs's daughter, Anita, to establish that she had permitted the defendant to use her apartment and to attempt to elicit her admission that she had given the defendant the checks and the credit cards without informing him that she did not have permission to use them.[120] Anita denied giving the defendant the items.[121] In preparation for trial, the government issued five subpoenas to Anita for four different trial dates.[122] She was not at her residence and did not appear at the trial.[123]

At trial the defendant testified that Anita had given him her parents' checks and credit cards.[124] On rebuttal the state offered the preliminary hearing transcript of Anita's testimony,[125] relying on an Ohio rule of evidence permitting a party to use the preliminary examination testimony of a witness who "cannot for any reason be produced at the trial."[126] The court received the preliminary hearing testimony into evidence.[127] Defendant was convicted[128] and ultimately appealed the decision to the Supreme Court.[129]

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118. 448 U.S. 56 (1980).
119. *Id.* at 58.
120. *Id.*
121. *Id.*
122. *Id.* at 59.
123. *Id.*
124. *Id.*
125. *Id.*
126. OHIO REV. CODE ANN. § 2945.49 (Anderson 1987). The trial court determined at a voir dire hearing that Anita was unavailable because no one knew her whereabouts. *Roberts*, 448 U.S. at 59-60.
127. *Roberts*, 448 U.S. at 60.
128. *Id.*
129. The defendant in *Roberts* first appealed to the Ohio Court of Appeals, which reversed the conviction and held that the state had made insufficient efforts to find Anita. *Id.* The Ohio Supreme Court affirmed the reversal on a different ground concluding that the trial court reasonably could have inferred

The Supreme Court upheld the conviction and found the preliminary hearing testimony admissible.[130] The Court reasoned that the confrontation clause establishes a preference for a face-to-face confrontation with respect to former testimony.[131] Thus, the prosecution must produce the declarant or establish the declarant's unavailability.[132] Moreover, the *Roberts* Court held that every hearsay statement of either an available or unavailable witness, whether or not crucial or devastating to the case, must possess indicia of reliability to be admitted.[133] The Court reaffirmed the conclusion in *Green* that prior consistent and inconsistent statements of a witness testifying at trial possess the necessary indicia of reliability, because the declarant is under oath, testifying before the trier of fact, and subject to cross-examination.[134]

The Court noted that although in *Roberts* the trial court at the preliminary hearing did not declare Anita a hostile witness, the defense counsel nevertheless explored her perception of events and her veracity in detail.[135] Thus, the *Roberts* Court found that the defense counsel's method of direct examination gave Anita's testimony the indicia of reliability necessary to satisfy the confrontation clause.[136]

The *Roberts* Court added confusion to confrontation clause analysis by introducing a two-prong test in discussing the issue of nontestifying or unavailable declarants. The Court stated:

> *[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability."* Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[137]

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from testimony at voir dire that the state had exercised due diligence in seeking to procure Anita's attendance at trial. State v. Roberts, 55 Ohio St. 2d 191, 195, 378 N.E.2d 492, 495 (1978), *rev'd*, 448 U.S. 56 (1980). The Ohio Supreme Court held that the transcript was inadmissible because the mere opportunity to cross-examine at a preliminary hearing did not afford the defendant his constitutional right of confrontation for purposes of trial. *Id.* at 197, 378 N.E.2d at 496.

130. *Roberts*, 448 U.S. at 77.
131. *Id.* at 63 (citing California v. Green, 399 U.S. 149, 157 (1970)).
132. *Id.* at 65.
133. *Id.* at 65-66.
134. *Id.* at 73.
135. *Id.*
136. *Id.*
137. *Id.* at 66 (emphasis added).

Taken literally, the *Roberts* Court's first prong, availability, would mean that every hearsay statement meeting a firmly rooted hearsay exception of Federal Rule of Evidence 803, and every statement exempt as not hearsay under Federal Rule of Evidence 801(d)(2), normally would require either production of the declarant, or a showing of unavailability before the statement would be admissible in evidence against the accused.[138]

Several factors, however, indicate that the *Roberts* Court did not contemplate such a radical change in practice. First, the Court interpreted the confrontation clause in the context of discussing the former testimony hearsay exception of Federal Rule of Evidence 804(b)(1). The former testimony exception requires unavailability both at common law[139] and under the Federal Rules of Evidence.[140] The casual nature of the Court's comment with respect to unavailability, in the context of a hearsay exception already requiring unavailability, belied any intention to make a radical change in the law. More importantly, in *Roberts* the Court clearly stated that while the confrontation clause normally requires a showing of unavailability, competing interests such as "public policy and the necessities of the case" may warrant dispensing with confrontation at trial.[141] The opinion also indicated that parties need not demonstrate unavailability or produce the declarant when the utility of con-

138. *See* Reardon v. Manson, 617 F. Supp. 932, 937-39 (D. Conn. 1985), *rev'd*, 806 F.2d 39 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1903 (1987) (nontestifying witness's hearsay statements inadmissible when they do not possess sufficient indicia of reliability and the state made no effort to show the declarant's unavailability pursuant to *Roberts*); People v. Kendrick, 104 Ill. App. 3d 426, 430-33, 432 N.E.2d 1054, 1058-60 (1982) (applying *Roberts* to find hearsay statements admissible); State v. Osborne, 82 Or. App. 229, 239-40, 728 P.2d 551, 558 (1986) (co-conspirator's hearsay statements held admissible against defendant when the declarant was unavailable and the statements had sufficient indicia of reliability); *see also* United States v. Hines, 23 M.J. 125, 128-33 (C.M.A. 1986) (military court decision applying *Roberts* to a sex offense case); State v. Hieb, 107 Wash. 2d 97, 111, 727 P.2d 239, 247 (1986) (en banc) (admission of child's hearsay statement held harmless error when medical testimony pointed overwhelmingly to guilt even though declarant's unavailability was not shown); State v. Myren, 133 Wis. 2d 430, 440-42, 395 N.W.2d 818, 823-24 (Wis. Ct. App. 1986), *review denied*, 134 Wis. 2d 458, 401 N.W.2d 10 (Wis. 1987) (admission of accomplice's oral confession that lacked particularized guarantees of trustworthiness and implicated defendant was harmless error).

139. *See, e.g.*, State v. Carr, 67 S.D. 481, 483-84, 294 N.W. 174, 174-75 (1940); State v. Ortego, 22 Wash. 2d 552, 556, 157 P.2d 320, 322 (1945) (en banc).

140. *See* FED. R. EVID. 804(b)(1).

141. *Roberts*, 448 U.S. at 64 (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

frontation is remote.[142] Finally, it would be completely out of character with other Supreme Court decisions, including *Evans*, to read the language of *Roberts* to require either unavailability or production with respect to almost every hearsay statement offered against a criminal defendant under Federal Rule of Evidence 803.[143]

Six years later, in *United States v. Inadi*,[144] the Supreme Court addressed the question whether the statement in *Roberts* that "the Confrontation Clause normally requires a showing that [the declarant] is unavailable"[145] applies to co-conspirator hearsay statements. Inadi was charged with conspiring to manufacture and distribute methamphetamine.[146] Part of the evidence against him consisted of taped conversations between various participants in the conspiracy.[147] Inadi sought to exclude the recorded statements of the unindicted co-conspirators, including one Lazaro, on confrontation clause grounds, contending that admissibility required a showing that the declarants were unavailable.[148] The district court admitted the statements under the hearsay co-conspirator exemption, condi-

142. *Id.* at 65 n.7.

143. It is interesting to note that, generally speaking, neither the state courts, the United States Courts of Appeals, nor the leading commentators on the Federal Rules of Evidence construed *Roberts* as ushering in a radical change. For example, in *United States v. Yakobov*, the Second Circuit held that evidence of the absence of a public record may be introduced against the criminal defendant under Federal Rule of Evidence 803(10) without production of the available records custodian or any other available witness. 712 F.2d 20, 27 (2d Cir. 1983). In *United States v. Massa*, the Eighth Circuit construed *Roberts* as follows:

> We read *Roberts* . . . to place the burden on the government to make available for cross-examination a witness whose out-of-court statements it is using against the defendant. The [*Roberts*] Court stated: "[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good faith effort* to obtain his presence at trial . . . ." Thus, it is the government's burden to obtain the available hearsay declarant's presence at trial, although it need not call the witness to testify.

740 F.2d 629, 640 n.6 (8th Cir. 1984) (quoting *Roberts*, 448 U.S. at 74) (emphasis in original), *cert. denied*, 471 U.S. 1115 (1985).

144. 475 U.S. 387 (1986).

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

146. *Inadi*, 475 U.S. at 388-89.

147. *Id.* at 390.

148. *Id.* Inadi also protested admission of the statements on the ground that they did not satisfy the hearsay co-conspirator exemption of Federal Rule of Evidence 801(d)(2)(E), which exempts from the hearsay bar statements by a co-conspirator of a party made "during the course and in furtherance of the conspiracy" when offered against the party.

tioned on the prosecution's commitment to produce Lazaro.[149] The government subpoenaed Lazaro but he failed to appear, and defense counsel made no effort to secure his presence.[150] The district court overruled Inadi's renewed confrontation clause objections.[151] Inadi appealed his conviction.[152]

The United States Supreme Court upheld the verdict.[153] The Court held that the confrontation clause does not always require a showing of the hearsay declarant's unavailability.[154] The Court noted that *Roberts* did not support such a requirement because that opinion simply reaffirmed the longstanding rule that subjects the prior testimony of a nontestifying witness to unavailability analysis.[155]

More specifically, the *Inadi* Court held that the *Roberts* requirement of declarant unavailability did not apply to co-conspirator statements. Co-conspirator statements derive much of their value from having been made in a context very different from trial and are usually irreplaceable as substantive evidence even if the declarant testifies at trial.[156] Their admission into

149. *Id.*

150. *Id.*

151. *Id.*

152. The Third Circuit Court of Appeals reversed Inadi's conviction, holding in reliance on *Roberts* that although Federal Rule of Evidence 801(d)(2)(E) had been satisfied, the confrontation clause established an independent requirement that the prosecution, as a condition to admission of any out-of-court statements, must show the declarant's unavailability. United States v. Inadi, 748 F.2d 812, 818 (3d Cir. 1984), *rev'd*, 475 U.S. 387 (1986).

153. *Inadi*, 475 U.S. at 400.

154. *Id.*

155. *Id.* at 394; *see* United States v. Lopez, 803 F.2d 969, 974 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1958 (1987) (holding that according to *Inadi* unavailability is no longer a prerequisite to admissibility).

156. The *Inadi* Court noted:

> Because [co-conspirator statements] are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. When the Government—as here—offers the statement of one drug dealer to another in furtherance of an illegal conspiracy, the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.
>
> In addition, the relative positions of the parties will have changed substantially between the time of the statements and the trial. The declarant and the defendant will have changed from partners in an illegal conspiracy to suspects or defendants in a criminal trial, each with information potentially damaging to the other. The declarant

evidence furthers the confrontation clause's mission of advancing the " 'truth-determining process.' "[157]

In addition, the Court concluded that an unavailability rule would accomplish little.[158] Under such a rule, the co-conspirator statements would be admissible if the declarants are either unavailable or produced by the prosecution.[159] Moreover, an unavailability rule is unlikely "to produce much testimony that adds anything to the 'truth-determining process' over and above what would be produced without such a rule"[160] because presumably only those declarants that neither side believes will be particularly helpful will not have been subpoenaed as witnesses.[161]

The Court further noted that in contrast to the slight benefits, an unavailability rule would impose significant burdens.[162] Because the co-conspirator rule is the most frequently used hearsay exception, adding the declarant unavailability test to the decisions subject to appellate review "would impose a substantial burden on the entire criminal justice system."[163] Furthermore, an unavailability rule would place "a significant practical burden on the prosecution"[164] by requiring the prosecution to identify all co-conspirator declarants, locate them, and attempt to ensure their availability for trial.[165] In short, the *In-*

himself may be facing indictment or trial, in which case he has little incentive to aid the prosecution, and yet will be equally wary of coming to the aid of his former partners in crime. In that situation, it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force.

These points distinguish co-conspirators' statements from the statements involved in *Roberts* and our other prior testimony cases. Those cases rested in part on the strong similarities between the prior judicial proceedings and the trial. No such strong similarities exist between co-conspirator statements and live testimony at trial. To the contrary, co-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence.

Id. at 395-96.

157. *Id.* at 396 (quoting Tennessee v. Street, 471 U.S. 409, 415 (1985)).

158. *Id.* According to the Court, "the unavailability rule cannot be defended as a constitutional 'better evidence' rule, because it does not actually serve to exclude anything, unless the prosecution makes the mistake of not producing an otherwise available witness." *Id.*

159. *Id.*

160. *Id.*; *see infra* note 252 and accompanying text.

161. *See infra* note 252.

162. *Inadi*, 475 U.S. at 398-400.

163. *Id.* at 399.

164. *Id.*

165. *Id.*

adi Court concluded that considerations of reliability and necessity as well as those of benefit and burden dictate that the confrontation clause does not mandate an initial showing of declarant unavailability before a statement of a co-conspirator is admissible.[166]

Although both *Evans* and *Inadi* involved the co-conspirator hearsay exception, the Court's analysis in *Inadi* evinces significant theoretical development over the intervening sixteen years. *Evans* is a confused opinion focusing on reliability of the hearsay statement, not on production of an available declarant. The *Evans* Court combined assessments of reliability and necessity with benefit and burden to conclude that an obviously reliable statement that is not "crucial" or "devastating" is admissible despite the absence of an available declarant.[167] The Court in *Evans* used language one expects in a harmless error opinion.

The *Inadi* opinion, however, shares none of the *Evans* opinion's harmless error ring. The *Inadi* decision includes no discussion of the cumulative nature of the challenged statement or its otherwise unimportant nature in the case. In fact, the *Inadi* Court explicitly and implicitly recognized that co-conspirator hearsay statements meeting the requirements of the Federal Rule of Evidence 801(d)(2)(E) co-conspirator exemption are highly probative and critical in the prosecution of many cases.[168]

Moreover, the *Inadi* Court addressed reliability and necessity, as well as benefit and burden, in the context of deciding

166. The *Inadi* Court concluded:

> An unavailability rule would impose all of these burdens even if neither the prosecution nor the defense wished to examine the declarant at trial. Any marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarants who are available, willing to testify, hostile to the defense and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarants, cannot support an unavailability rule. We hold today that the Confrontation Clause does not embody such a rule.

Id. at 399-400.

The Court in *Inadi* also suggested that the right of the accused to produce an available out-of-court declarant to testify under the compulsory process clause, U.S. CONST. amend. VI, is relevant to determining under the confrontation clause whether the prosecution in the first instance must produce the declarant. 475 U.S. at 397. This is especially troubling and is discussed further in connection with the application of the Texas videotaping statute for victims of child sexual abuse. *See infra* text accompanying notes 330-38.

167. *See supra* notes 110-17 and accompanying text.

168. *See Inadi*, 475 U.S. at 396-400.

whether the confrontation clause requires the production of an available declarant,[169] not in the context of determining whether a hearsay statement of a declarant not called to testify at trial, available or not, is sufficiently trustworthy to be admissible. Whereas the *Evans* Court used the *Roberts* Court's indicia of reliability requirement to determine whether a hearsay statement of a nontestifying declarant was sufficiently trustworthy to pass constitutional muster,[170] the *Inadi* Court used the same requirement to decide whether an available declarant must be called to satisfy the confrontation clause.[171] It is questionable whether reliability should be the cornerstone of determining whether unavailability must be shown when reliability under *Roberts* is an independent requirement imposed by the confrontation clause whenever the declarant does not testify.[172]

3. Unavailable Declarant

Under *Roberts*, admissible hearsay statements of unavailable declarants satisfy the confrontation clause if they possess adequate indicia of reliability.[173] In determining unavailability, the important factor is the availability of the declarant's testimony, not the declarant's physical presence in court. A witness's testimony may be unavailable at trial for many reasons, most important among them incompetence, the Federal Rules of Evidence grounds for unavailability, the danger of severe psychological injury to a child victim from testifying, and an unwillingness or inability to testify.

a. *Incompetency*

All witnesses, including child witnesses, must be competent before they may testify.[174] Rule 603 of the Federal Rules of Ev-

169. *Id.*

170. *See supra* notes 107-08 and accompanying text.

171. *Inadi*, 475 U.S. at 392-96.

172. It is not surprising that the single notion of indicia of reliability is hard pressed to fulfill two functions simultaneously. If reliability, however, is not the appropriate test for requiring unavailability, what is? *See infra* notes 351-94 and accompanying text.

173. *See supra* notes 133-36 and accompanying text.

174. FED. R. EVID. 601. Federal Rule of Evidence 601 eliminated all grounds of witness incompetency with respect to a charge, claim, or defense as to which federal law provides the rule of decision, except those specifically recognized in the Federal Rules of Evidence. The following characteristics are not grounds of incompetency: age, religious belief, mental incapacity, color of skin, moral incapacity, conviction of a crime, marital relationship, and connection with the litigation as a party, attorney, or interested person. *See* FED. R.

idence requires that witnesses declare that they will testify truthfully by oath or affirmation,[175] and Federal Rule of Evidence 602 requires that witnesses possess personal knowledge of the witnessed event.[176] Together these rules require that witnesses have the physical and mental capacity to understand the duty to tell the truth, to distinguish between the truth and a lie or fantasy,[177] and to accurately perceive, record, and recollect impressions of facts. In addition, witnesses must possess the capacity of narration—the ability to comprehend questions and express themselves understandably—with the aid of an interpreter when necessary.[178] Competency requires no other

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EVID. 601 advisory committee's note. Long ago regarded as grounds of incompetency, if such matters survive today, they do so in most instances as avenues for impeachment of the witness. Overall, Federal Rule of Evidence 601 closely reflects the common law.

175. FED. R. EVID. 603 states: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

176. FED. R. EVID. 602 states:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Id.

177. Recommendations have been made to permit a child to testify without taking an oath or giving an affirmation that he or she will testify truthfully. *Contra* FED. R. EVID. 603 (requiring witnesses to affirm they will testify truthfully). The apparent purpose of the recommendation is to avoid a judicial determination of whether the child knows the difference between the truth and a lie or fantasy. It is suggested that a witness who does not understand the difference between the truth and a lie or fantasy or the obligation to tell the truth should not be permitted to testify.

Attempts to eliminate taking the oath while requiring some understanding by the child of the duty to tell the truth likewise are unsatisfactory. Section 90.605(2) of the Florida Statutes, for example, states: "In the court's discretion, a child may testify without taking the oath if the court determines the child understands the duty to tell the truth or the duty not to lie." FLA. STAT. ANN. § 90.605(2) (West Supp. 1987). If the child understands the duty to tell the truth, the child can most certainly take an oath or give an affirmation. Moreover, the court has to decide whether the child knows the difference between the truth and a lie as part of the process of determining whether the child understands the duty to tell the truth or not to lie. The wisdom of the Florida statute is subject to challenge.

178. *See* FED. R. EVID. 604 (requiring interpreters to take an oath or affirm that they will testify truthfully). See also FLA. STAT. ANN. § 90.606(1)(a), (b) (West Supp. 1987), which provides:

> (1)(a) When a judge determines that a witness cannot hear or understand the English language, or cannot express himself in English suf-

personal qualifications.[179]

When the witness's capacity is questioned, the ultimate determination is whether the witness is so bereft of powers of observation, recordation, recollection, and narration that a reasonable juror cannot believe that the witness possessed personal knowledge of the event or told the truth. That test of competency requires minimum credibility.[180] Courts tend to resolve doubts about minimum credibility of a witness, including a child witness, in favor of permitting the jury to hear the testimony and judge the witness's credibility for itself.[181]

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ficiently to be understood, an interpreter who is duly qualified to interpret for the witness shall be sworn to do so.

(b) This section is not limited to persons who speak a language other than English, but applies also to the language and descriptions of any person, such as a child or person who is mentally or developmentally disabled, who cannot be reasonably understood, or who cannot understand questioning, without the aid of an interpreter.

Id.

179. The Rules specify no mental qualification. The Advisory Committee's Note reasons that standards of mental capacity have proved elusive. FED. R. EVID. 601 advisory committee's note. Although mental incapacity is not a specified ground of incompetency, if a witness's mental capacity has been seriously questioned, his or her testimony may still be excluded under Federal Rule of Evidence 602 on the ground that no reasonable juror could believe the witness possesses personal knowledge or under Federal Rule of Evidence 603 on the ground that no reasonable juror could believe the witness understands the difference between the truth and a lie or fantasy and understands the duty to tell the truth.

180. 3 J. WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 601[01] (1987). Regarding competency and credibility, Weinstein states:

> If competency is defined as the minimum standard of credibility necessary to permit any reasonable man to put any credence in a witness's testimony, then a witness must be competent as to the matters he is expected to testify about; it is the court's obligation to insure that he meets that minimum standard. In making this determination the court will still be deciding competency. It would, however, in view of the way the rule is cast, probably be more accurate to say that the court will decide not competency but minimum credibility. This requirement of minimum credibility is just one aspect of the requirement of minimum probative force—i.e., relevancy. Regardless of terminology, the trial judge may exclude all or a part of the witness' testimony on the ground that no one could reasonably believe the witness could have observed, remembered, communicated or told the truth with respect to the event in question.

Id. (footnotes omitted).

181. *Kentucky v. Stincer* summarizes three issues the judge is required to resolve under Kentucky law when a child's competency to testify is raised: "whether the child is capable of observing and recollecting facts, whether the child is capable of narrating those facts to a court or jury, and whether the child has a moral sense of the obligation to tell the truth." 107 S. Ct. 2658, 2664-65 (1987).

A preliminary hearing, especially with respect to children, is sometimes

b. *Unavailability*

Federal Rule of Evidence 804(a) provides five possible grounds of unavailability of a competent witness's testimony.[182] Under subsection (a)(1), a witness who is exempt from testifying about the subject matter of the statement on the grounds of privilege is unavailable. The court must allow the claim of privilege before the witness is considered unavailable. Under subsection (a)(2), a witness who persists in refusing to testify concerning the subject matter of the statement despite a court order is unavailable. Silence resulting from misplaced reliance on a privilege without making a claim or despite a court's denial of an asserted claim of privilege constitutes unavailability under this subsection. Under subsection (a)(3), a witness who testifies to a lack of memory of the subject matter of her statement is unavailable. Failed memory unavailability extends not only to witnesses who truly lack recollection but also to those who feign lack of recollection due to, for example, an unwill-

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held in chambers with only the judge, the witness, and a court reporter present. On other occasions the attorneys for both sides are also present while the parties are excluded. Whether the criminal defendant has a constitutional right to be present when his lawyer is present was decided in the negative in *Stincer*, *id.* at 2658, 2667-68.

182. Federal Rule of Evidence 804(a) provides:

> "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).

Federal Rule of Evidence 804, consistent with the common law, *see, e.g.*, *supra* note 139, provides that certain hearsay statements are admissible only if the declarant is unavailable. Regarding hearsay statements admissible solely pursuant to such an exception, it is thus possible that the statement of an available but nontestifying declarant would be admissible when offered by the prosecution under the confrontation clause but not under the hearsay rule and its exceptions.

ingness or inability to confront the defendant face-to-face. Under subsection (a)(4), a witness who is unable to be present or to testify at the hearing because of death or a then-existing physical or mental illness or infirmity is unavailable. In criminal cases, if the government's witness is only temporarily unavailable, the confrontation clause may require resort to a continuance. Finally, under subsection (a)(5), in both civil and criminal cases, a declarant whose presence cannot be secured by process or other reasonable means is unavailable. In criminal cases, the confrontation clause requires that the government make a good faith effort[183] to obtain the presence of the witness at trial, beyond a mere showing of an inability to compel appearance by subpoena, before prior testimony is admissible as a substitute for testimony.

c. *Severe Psychological Injury*

Efforts to shield child witnesses from potential injury from face-to-face confrontation with the defendant at trial have resulted in statutes permitting the introduction of a child's testimony through closed circuit television or videotaped statements.[184] Those statutes generally require that the child

183. Ohio v. Roberts, 448 U.S. 56, 74 (1980).

184. *See, e.g.*, ALA. CODE § 15-25-2 (Supp. 1986) (videotaped deposition of victims or witnesses under age 16); ALA. CODE § 15-25-3 (Supp. 1986) (testimony of witnesses or victims under age 16 by closed circuit equipment); ARIZ. REV. STAT. ANN. § 12-2312 (West 1982) (videotaped testimony of minor witnesses); CAL. PENAL CODE § 1346 (West Supp. 1988) (videotaped preliminary hearing testimony for victims age 15 or less); CAL. PENAL CODE § 1347 (West Supp. 1988) (testimony of victims age 10 or under by two-way closed circuit television); COLO. REV. STAT. § 18-6-401.3 (1986) (admissibility of videotaped depositions for victims of child abuse); DEL. CODE ANN. tit. 11, § 3511 (Supp. 1986) (videotaped depositions of child witnesses under age 12); FLA. STAT. ANN. § 92.53 (West Supp. 1987) (videotaped deposition of child victim); FLA. STAT. ANN. § 92.54 (West Supp. 1987) (testimony of child victim through closed circuit television); HAW. R. EVID. 616 (videotaped testimony of child victim); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1987) (testimony of child by videotape or closed circuit television); IOWA CODE ANN. § 910A.14 (West Supp. 1987) (testimony of child by closed circuit television); KAN. STAT. ANN. § 22-3434 (Supp. 1986) (videotaped testimony of child victims); KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1986) (videotaped testimony of child victim); LA. REV. STAT. ANN. § 15:283 (West Supp. 1987) (closed circuit television); MASS. ANN. LAWS ch. 278, § 16D (Law. Co-op. Supp. 1987) (videotaped or closed circuit transmission of child witness's testimony); MINN. STAT. § 260.156 (1986) (video, audio, or other recorded statement of child victim); MISS. CODE ANN. § 13-1-407 (Supp. 1987) (child's videotaped testimony); N.J. STAT. ANN. § 2A:84A-32.4 (Supp. 1987) (testimony of child victim by closed circuit television); N.M. STAT. ANN. § 30-9-17 (1984) (videotaped depositions for victims under 16 years of age); N.Y. CRIM. PROC. LAW §§ 65.00-.30 (Supp. 1988) (testi-

be unavailable to testify and establish standards of unavailability for child witnesses.[185] Two Florida statutes, for example, provide that a child witness is unavailable upon the court's finding that a substantial likelihood exists that a child victim or witness of sexual abuse "would suffer at least moderate emotional or mental distress if required to testify in open court."[186] A Maine statute provides that a child witness is unavailable if the court finds "that the mental or physical well-being of that person will more likely than not be harmed if that person were to testify in open court."[187] A New Mexico court rule provides for unavailability "upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm."[188] Finally, a California statute provides that a witness is unavailable on the ground of physical or mental illness or infirmity if expert testimony "establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma."[189]

It is doubtful whether any of those statutory standards are sufficient to constitute unavailability under the confrontation clause. The confrontation clause probably requires a showing of greater likelihood of severe psychological injury. A Florida statute that creates a hearsay exception for statements of child victims of sexual abuse provides for unavailability on a showing of substantial likelihood of "severe emotional or mental harm."[190] The Florida statutes permitting videotaped or closed circuit television testimony, however, require only a substantial likelihood of "moderate emotional or mental distress."[191] The requirement of only moderate emotional or mental distress for videotaped or closed circuit television testimony in comparison with the requirement of severe emotional or mental harm for a child victim hearsay exception is probably based on the mis-

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mony of child victim by closed circuit television); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1987) (videotape of deposition or testimony at preliminary hearing for use at trial).

185. *See infra* notes 186-89 and accompanying text. *But see* KAN. STAT. ANN. § 22-3434 (Supp. 1986), discussed *infra* note 313.

186. *See* FLA. STAT. ANN. §§ 92.53, 92.54 (West Supp. 1987).

187. ME. REV. STAT. ANN. tit. 15, § 1205(1) (Supp. 1987).

188. N.M. SUP. CT. R. 10-217.

189. CAL. EVID. CODE § 240 (West Supp. 1987). An expert witness is defined for this purpose to include physicians, surgeons, and psychiatrists. *Id.*

190. FLA. STAT. ANN. § 90.803(23) (West Supp. 1987).

191. *See supra* note 186 and accompanying text.

taken and inappropriate notion that the confrontation clause requirement of unavailability can vary depending on the trustworthiness of the testimony—the more trustworthy the testimony, the less strenuous the showing needed to establish unavailability.

Witnesses who testify in open court often suffer some emotional distress. Many, if not most, rape victims suffer severe emotional distress or trauma while testifying, especially when face-to-face with the accused. Presumably, so do many other groups of victims. Unavailability requires more than merely showing the possibility of emotional distress or trauma, even more than showing a likelihood that such emotional distress or trauma will be substantial or severe: a showing of a substantial likelihood of severe emotional or mental harm is required.[192]

A California court held that to find a witness unavailable because of emotional distress or trauma, the potential psychological injury must render the witness's appearance " 'relatively impossible.' "[193] Under the more onerous *relative impossibility* standard, the court must find that the emotional distress or trauma that the child witness is likely to suffer as a result of testifying against the defendant in open court is significantly more severe than the emotional distress or trauma that other witnesses often suffer.[194] Applying that standard, it is ex-

192. Attorneys and psychologists, including the author, that were present at a conference on child sexual abuse unanimously reported that a great majority of children are capable of testifying at trial without much difficulty. *See, e.g.*, Berliner, *The Child Witness: The Progress and Emerging Limitations*, in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES 95, 98 (Mar. 1985) (conference held in Washington, D.C., and sponsored by the National Legal Resource Center for Child Advocacy and Protection, a program of the Young Lawyers Division of the American Bar Association). Participants reported that children who initially volunteered the report of the incident were usually able to repeat their complaint in front of the accused at trial. Participants reported that children who had to be questioned about the sexual abuse before disclosing it, and who fluctuated in their accounts of what transpired, were more likely to suffer trauma and emotional distress from face-to-face confrontation in open court. Such children were also more likely to recant before or at trial.

193. People v. Stritzinger, 34 Cal. 3d 505, 518, 668 P.2d 738, 747, 194 Cal. Rptr. 431, 440 (1983) (quoting People v. Williams, 93 Cal. App. 3d 40, 53, 155 Cal. Rptr. 414, 420 (1979)).

194. In determining whether it is relatively impossible for the child witness to testify on the basis of the likelihood of severe psychological injury, the court in Warren v. United States, 436 A.2d 821 (D.C. Ct. App. 1981), suggested the following factors:

> [W]e think that the following matters are relevant to the question of psychological unavailability: (1) the probability of psychological injury as a result of testifying, (2) the degree of anticipated injury, (3)

tremely unlikely that the Maine, New Mexico, or California statutes discussed above[195] will survive confrontation clause analysis. Under the Maine statute, prior recorded testimony of a child witness becomes admissible, subject to cross-examination by the defendant, upon a finding of unavailability.[196] The California statute likewise provides for admissibility of prior testimony, but only of preliminary hearing testimony.[197] New Mexico sanctions admissibility of videotaped depositions.[198] All three statutory schemes, however, provide that the defendant must be present when the child testifies.[199] Only under very unusual circumstances will the child's testimony face-to-face with the defendant in open court be "relatively impossible" when it is "relatively possible" for the same child to testify

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> the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping [child sexual abuse] or terrorist act. Just as in the case of physical infirmity, it is difficult to state the precise quantum of evidence required to meet the standard of unavailability. The factors should be weighed in the context of each other, as well as in the context of the nature of the crime and the pre-existing psychological history of the witness.

Id. at 830. See also Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985), in which the author states:

> Some trauma is inevitable whenever a child takes the stand, and although the trauma of testifying should be minimized to the extent possible, it cannot justify depriving the defendant of a fundamental aspect of his right to a fair trial.
>
> . . . .
>
> . . . Specifically, the state holds an interest in protecting young children, allegedly the victims of sexual abuse, from the trauma of repeated appearances and extended testimony in open court in the presence of the alleged assailant. The trial judge should therefore allow the child to testify on videotape if testifying in open court would cause the child substantial emotional trauma.

Id. at 819, 824; *cf.* State v. Gilbert, 109 Wis. 2d 501, 517, 326 N.W.2d 744, 751-52 (1982) (holding that courts should alter court procedure to lessen trauma of child witnesses but should not allow child to avoid testifying because of emotional trauma).

195. *See supra* notes 187-89 and accompanying text.

196. ME. REV. STAT. ANN. tit. 15, § 1205(2) (Supp. 1987).

197. *See* CAL. PENAL CODE § 1346(d) (West Supp. 1987) (providing that the court may admit a videotape of the victim's testimony at the preliminary hearing as former testimony if the court finds that further testimony would cause the victim emotional trauma, rendering the victim medically unavailable to testify).

198. N.M. STAT. ANN. § 30-9-17 (1984).

199. *See supra* notes 196-98. *But see* CAL. EVID. CODE § 1228 (West Supp. 1987) (allowing admission of statement by child witness made out of the presence of the defendant for the limited purpose of determining the admissibility of defendant's confession).

face-to-face with the defendant at a prior hearing, former trial, preliminary hearing, or perpetuation deposition.[200] The Florida statutes, on the other hand, could utilize the relative impossibility standard because, unlike the other statutes, they provide for the taking of the child's testimony outside the defendant's presence.[201]

d. *Unwillingness or Inability to Testify*

A child witness may be unavailable because the child is unwilling or unable to testify in open court, whether or not in the defendant's presence, even though the court requests that the child testify. A child witness may also be unavailable if, placed in unfamiliar court surroundings, the child forgets what happened.[202]

B. RELIABILITY OF HEARSAY STATEMENT

The Court in *California v. Green*[203] held that the confrontation clause is satisfied whenever the declarant of a hearsay statement testifies at trial and is subject to cross-examination.[204] In those circumstances a court need not search for adequate indicia of reliability before admitting the statement.

When the declarant does not testify at trial, however, the confrontation clause requires the court to measure, without regard to whether the witness is unavailable or available, the trustworthiness of the hearsay statement against the indicia of reliability standard articulated as the second prong of the test in *Ohio v. Roberts*.[205] Although the Court in *Roberts* declined

200. A deposition may be less stressful because it is not public. On the other hand, if counsel is taking the child's deposition in a small room, and the defendant is there, the child may have trouble looking away from the defendant. The process may thus be more traumatic than testimony in open court.

201. *See* FLA. STAT. ANN. §§ 92.53(4), 92.54(4) (West Supp. 1987).

202. *See, e.g.*, State v. Myatt, 237 Kan. 17, 21, 647 P.2d 836, 841 (1985) ("The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant."); *see also* FED. R. EVID. 804(a)(2), (3) (defining "unavailable" to include persistent refusal to testify and lack of memory).

203. 399 U.S. 149 (1970).

204. *See supra* notes 75-89 and accompanying text.

205. 448 U.S. 56, 66 (1980). The Court stated:

> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection."

to map out a theory of the confrontation clause that would determine the constitutionality of admissibility under all hearsay exceptions, the Court stated, without qualification, that a trial court may admit into evidence a hearsay statement of a nontestifying witness only if the statement bears adequate indicia of reliability.[206] The *Roberts* Court concluded that adequate indicia of reliability[207] can be inferred without more in a case in which the evidence falls within a "firmly rooted hearsay exception."[208]

The *Roberts* Court held that statements not falling within a firmly rooted hearsay exception are nevertheless constitutionally admissible if they possess "particularized guarantees of trustworthiness"[209] equivalent to the circumstantial guarantees of trustworthiness underlying the firmly rooted hearsay exceptions. The Court's language parallels the requirements of the residual hearsay exceptions in the Federal Rules[210] and has been adopted in special statutory hearsay exceptions in some states for use in child sex abuse prosecutions.[211] Thus, evidence

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> This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," and "stem from the same roots." It also responds to the need for certainty in the workaday world of conducting criminal trials.
>
> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66 (citations and footnotes omitted).

206. *Id.*

207. Adequate indicia of reliability must be established with regard to whether the witness who does not appear must also be shown to be unavailable. *Id.*

208. *Id.* Firmly rooted hearsay exceptions include the common law hearsay exception for former testimony codified in Federal Rule of Evidence 804(b)(1); the hearsay exceptions specifically denominated in Federal Rule of Evidence 803 which do not require unavailability; the remaining exceptions specifically denominated in Federal Rule of Evidence 804 which do require unavailability (with the arguable exception of statements against penal interest), *see infra* note 219; the hearsay exemption of Federal Rule of Evidence 801(d)(2) defining admissions of parties-opponent as not hearsay (with the arguable exception of adoptive admissions of codefendants), *see infra* notes 215-17; and the once arguable exemption of Federal Rule of Evidence 801(d)(2)(F) defining statements of co-conspirators as not hearsay. *See infra* notes 224-31 and accompanying text.

209. 448 U.S. at 66.

210. FED. R. EVID. 803(24), 804(b)(5).

211. The Kansas, KAN. STAT. ANN. § 60-460(dd) (Supp. 1986), Washington,

admissible under those hearsay exceptions also satisfies the reliability concerns of the confrontation clause.[212] After the Court's decision in *Roberts*, three areas of dispute arose concerning whether a hearsay exemption or exception was firmly rooted or required a showing of particularized guarantees of trustworthiness.

1. Adoptive Admissions

Under the Federal Rules, a statement adopted by a party is exempted as nonhearsay.[213] In *United States v. Monks*,[214] however, the Ninth Circuit Court of Appeals held that adoptive admissions of a co-defendant do not automatically satisfy the confrontation clause.[215] The court reasoned that although the defendant can "confront" his own out-of-court adoptive admissions by testifying at trial, other defendants incriminated by the adoptive admissions would be deprived of the right of confrontation.[216] The court therefore required a further search for reliability by balancing whether the statements were assertions of past fact, whether the declarant had personal knowledge of the facts related, whether the declarant's recollection was faulty, and whether circumstances suggested the declarant had misrep-

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WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987), and Florida, FLA. STAT. ANN. § 90.803(23) (West 1979 & Supp. 1987), child sex abuse statutes follow the *Roberts* Court's language. *See supra* note 50 and accompanying text.

212. The statement in United States v. Barlow, 693 F.2d 954, 964 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983), agreed to in United States v. Marchini, 797 F.2d 759, 764 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1288 (1987), that "we . . . assume for the purposes of this decision that a distinction does exist because we do not believe that *Roberts* stands for the general proposition that evidence of reliability may be inferred under all exceptions to the rule against hearsay, including Rule 804(b)(5)" and that the court should proceed "on a case-by-case basis" fails to support the notion of a distinction. Of course a case-by-case approach is called for. Neither *Barlow* nor *Marchini*, however, provide any support for the assertion that differences exist between the case-by-case approach called for by Federal Rule of Evidence 804(b)(5) and *Roberts*.

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

214. 774 F.2d 945 (9th Cir. 1985).

215. *Id.* at 952. The *Monks* Court stated:

> Here, the fact that *Monks* has implicated Holt in the robbery, in and of itself, incriminates Holt regardless of whether Holt adopts Monks' implications or not. Therefore, the Confrontation Clause is implicated because Holt is unable to cross-examine Monks as to his accusations. We conclude that adoptive admissions do not automatically satisfy the Confrontation Clause, at least where the third-party statements alleged to have been adopted have probative value independent of the fact that they may have been adopted by the defendant.

Id. (footnote omitted).

216. *Id.*

resented the defendant's role.[217]

2. Statements Against Penal Interest

Courts disagree as to whether statements against penal interest, offered to inculpate or exculpate under Federal Rule of Evidence 804(b)(3), fall within the firmly rooted hearsay exceptions of *Ohio v. Roberts*,[218] or must have particularized guarantees of trustworthiness.[219] The Federal Rules of Evidence require that corroborating circumstances indicate the trustworthiness of exculpatory statements.[220] Some courts have applied that requirement to inculpatory statements as well.[221] The question of whether statements against penal interest fall within the firmly rooted hearsay exceptions or must have particularized guarantees of trustworthiness may lack practical significance if the requirement of corroborating circumstances is the equivalent of the separate requirement of a showing of particularized guarantees of trustworthiness.[222]

3. Co-conspirator Statements

Until recently, the circuits were split as to whether statements falling within the co-conspirator hearsay exemption[223] were firmly rooted and thus automatically satisfied the confrontation clause.[224] For example, the Eighth Circuit Court of

217. *Id.*

218. 448 U.S. 56, 66 (1980).

219. *Compare* United States v. Katsougrakis, 715 F.2d 769, 776 (2d Cir. 1983) (firmly rooted), *cert. denied*, 464 U.S. 1040 (1984), *with* Olson v. Green, 668 F.2d 421, 428 (8th Cir.) (particularized guarantees), *cert. denied*, 456 U.S. 1009 (1982). For other decisions that require a showing of particularized guarantees, see Maugeri v. State, 460 So. 2d 975, 978 (Fla. Dist. Ct. App. 1984); State v. Parris, 98 Wash. 2d 140, 148, 654 P.2d 77, 81 (1982) (en banc).

220. FED. R. EVID. 804(b)(3).

221. *See, e.g.*, United States v. Riley, 657 F.2d 1377, 1383 (8th Cir. 1981).

222. *See generally* E. CLEARY, MCCORMICK ON EVIDENCE § 279, at 824-27 (3d ed. 1984) (discussing confrontation problems encountered when determining what is against interest).

223. FED. R. EVID. 801(d)(2)(E).

224. Admissions of a party-opponent that are exempt from the operation of the rule against hearsay by Federal Rule of Evidence 801(d)(2) formed a possible exception because admissibility is based upon the adversary system rather than an assessment of trustworthiness. Under *Roberts* it was unclear whether statements admitted pursuant to Federal Rule of Evidence 801(d)(2), and in particular, Federal Rule of Evidence 801(d)(2)(E), fell within a "firmly rooted" hearsay exception. *See* United States v. Caputo, 758 F.2d 944, 951-52 (3d Cir. 1985), *vacated*, 791 F.2d 37 (3d Cir. 1986) (per curiam). The *Caputo* court commented, "[i]n holding the *Roberts* 'unavailability' and 'reliability' requirements fully applicable to the admissions of coconspirators who do not testify in court,

Appeals held in *United States v. Massa*[225] that no reason exists "to specifically exclude coconspirator statements from *Robert's* [sic] requisite showing of unavailability and reliability."[226] The court reasoned that the same interests of face-to-face confrontation involved in hearsay exceptions apply to co-conspirator statements admitted as hearsay exemptions.[227] The court further reasoned that "coconspirator statements may be more in need of scrutiny under the confrontation clause precisely because, unlike hearsay exceptions, they are not admissible because of their inherent reliability."[228] Thus, the *Massa* court held that the *Roberts* Court's unavailability and particularized guarantees of trustworthiness requirements applied to co-conspirator statements.[229]

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we are joined by the other Courts of Appeals that have decided this question." *Id.* at 951. Judge Sloviter wrote a strong dissent in which he argued that *Roberts* only applies to those hearsay exceptions that require unavailability at common law. *Id.* at 953. For a full view, see United States v. Williams, 737 F.2d 594, 610 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). In *Williams* the court held that "challenges to co-conspirators' statements should be based on the requirements of Rule 801(d)(2)(E), not on the Sixth Amendment." 737 F.2d at 610. *See also* United States v. McLernon, 746 F.2d 1098, 1106 (6th Cir. 1984) ("The Circuits are split as to whether compliance with Rule 801(d)(2)(E) *automatically* satisfies the Sixth Amendment requirements.") (emphasis in original). The question was answered with respect to co-conspirators' statements in Bourjaily v. United States, 107 S. Ct. 2775, 2782-83 (1987). *See infra* note 230 and accompanying text.

225. 740 F.2d 629 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

226. *Id.* at 639.

227. *Id.*

228. *Id.*

229. *Id.* The court in *Massa* excluded the co-conspirator's statement under the confrontation clause (even though the statement was admissible under the co-conspirator hearsay exemption) because the declarant made the statements after the scheme was discovered and the statement's reliability could not be assured. *Id.* at 40-41. See also United States v. Pecora, 798 F.2d 614, 628 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 3261 (1987), in which the court stated:

> Coconspirator statements do not possess the special trustworthiness characteristic of evidence falling within "a firmly rooted hearsay exception." They are instead admitted because of "the legal fiction that each conspirator is an agent of the other and that statements of one can therefore be attributable to all." Thus, the Confrontation Clause requires a showing of reliability in addition to the requirements set forth in FRE 801(d)(2)(E).

Id. (citations omitted); *cf.* United States v. Paone, 782 F.2d 386, 391 (2d Cir. 1986) (after acknowledging prior decisions that indicate a requirement of a "higher standard of reliability . . . if the hearsay statements are 'crucial,' " and after repeating prior statements that cases in which the requirements of the hearsay rule alone "do not provide sufficient indicia of reliability . . . will be rare," held: "We decline appellant's invitation to require more support for a co-conspirator's statement than is required by Rule 801(d)(2)(E)."), *cert. denied*, 107 S. Ct. 3261 (1987); United States v. Williams, 737 F.2d 594, 610 (7th

In *Bourjaily v. United States*,[230] however, the Supreme Court recently took the opposite position, stating that "the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements."[231] Interestingly, the majority in *Bourjaily* determined that the co-conspirator hearsay exception satisfied the second prong of *Roberts*, not because of an assessment of reliability, but because the co-conspirator exception has a long-standing tradition.[232] The *Bourjaily* Court ignored the fact that notions of agency,[233] the adversary system,[234] and ne-

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Cir. 1984) ("(C)hallenges to co-conspirators' statements should be based on the requirements of Rule 801(d)(2)(E), not on the Sixth Amendment."), *cert. denied*, 470 U.S. 1003 (1985).

Regarding factors considered when particularized guarantees are sought, see United States v. Matlock, 773 F.2d 227, 229 (8th Cir. 1985) (considering whether the declarant made the statement in circumstances indicating reliability, whether the declarant had any reason to lie when making the statement, whether the declarant had a problem with memory, and whether the declarant had personal knowledge). For a decision incorrectly applying the factors from Dutton v. Evans, 400 U.S. 74, 88-89 (1970), to determine reliability instead of those implied in Ohio v. Roberts, 448 U.S. 56, 66 (1980), see United States v. Fahey, 769 F.2d 829, 839-40 (1st Cir. 1985).

Statements of a co-conspirator were held to be within the "firmly rooted" notion in Bourjaily v. United States, 107 S. Ct. 2775, 2782-83 (1987). *See infra* note 230 and accompanying text.

230. 107 S. Ct. 2775 (1987).

231. *Id.* at 2783. In an earlier case, United States v. Inadi, 475 U.S. 387 (1986), the Court explicitly refused to address the question. *Id.* at 391 n.3. The *Inadi* Court said reliability of the out-of-court statements was not at issue in the case because the "Court of Appeals determined that whether or not the statements are reliable, their admission violated the Sixth Amendment because the government did not show that the declarant was unavailable to testify." *Id.* (citing United States v. Inadi, 748 F.2d 812, 818-19 (3d Cir. 1984)).

232. *Id.* at 2782-83.

233. *See id.* at 2785 (Blackmun, J., dissenting) ("[T]he [co-conspirator] exemption [from hearsay] was based upon agency principles, the underlying concept being that a conspiracy is a common undertaking where the conspirators are all agents of each other and where the acts and statements of one can be attributed to all.").

234. *See id.* at 2786-87 (Blackmun, J., dissenting). Justice Blackmun stated:

> Thus, unlike many common-law hearsay exceptions, the co-conspirator exemption from hearsay with its agency rationale was not based primarily upon any particular guarantees of reliability or trustworthiness that were intended to ensure the truthfulness of the admitted statement and to compensate for the fact that a party would not have the opportunity to test its veracity by cross-examining the declarant. As such, this exemption was considered to be a "vicarious admission." Although not an admission by a defendant himself, the vicarious admission was a statement imputed to the defendant from the co-conspirator on the basis of their agency relationship. As with all ad-

cessity[235] are commonly asserted to support the common law co-conspirator hearsay exception. The Court overlooked the fact that the adversary system rationale led the drafters of the Federal Rules of Evidence to define co-conspirator statements as not hearsay rather than include them as a hearsay exception under Federal Rule of Evidence 803.[236] Thus, in *Bourjaily* the Court answered the question posed by the "indicia of reliability" prong of *Roberts*[237] without ever exploring the reliability of co-conspirator statements. In fact, the court in *Bourjaily* changed the concept of *firmly rooted* from a means of inferring indicia of reliability into an alternative method of satisfying the second prong of *Roberts*. *Bourjaily* arguably may stand for the proposition that any statement of a nonappearing declarant meeting the requirements of a firmly rooted hearsay exception does not run afoul of the confrontation clause. Under that gloss courts will not examine a firmly rooted hearsay exception to determine whether it in fact possesses adequate inidica of reliability. The long-standing tradition will be sufficient.[238]

In short, *Bourjaily* supports an interpretation of the confrontation clause that statements falling within *any* traditional common law hearsay exception are sufficiently reliable to be admitted against the defendant and that the unavailability requirement of the confrontation clause is congruent with the unavailability requirement of the traditional common law hearsay exceptions.

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missions, an "adversary system," rather than a reliability, rationale was used to account for the exemption to the ban on hearsay: it was thought that a party could not complain of the deprivation of the right to cross-examine himself (or another authorized to speak for him) or to advocate his own, or his agent's, untrustworthiness. The co-conspirator "admission" exception was also justified on the ground that the need for this evidence, which was particularly valuable in prosecuting a conspiracy, permitted a somewhat reduced concern for the reliability of the statement.

Id. at 2786 (citations and footnotes omitted).

235. *See id.*

236. *See id.* at 2787 (Blackmun, J., dissenting) ("The Advisory Committee explained that the exclusion of admissions from the hearsay category is justified by the traditional 'adversary system' rationale, not by any specific 'guarantee of trustworthiness' used to justify hearsay exceptions.").

237. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

238. The practical concern with assisting the government in prosecuting drug traffickers and other co-conspirators, *see supra* note 235 (necessity), and the benefit and burden concerns expressed in *Inadi*, *see supra* notes 153-71, appear to have greatly influenced the Court.

IV. THE CONFRONTATION CLAUSE: THE DILEMMA

A. THE CHALLENGE

If the confrontation clause sometimes requires production of an available declarant before reliable and necessary hearsay statements[239] may be admitted, the challenge is to devise a method to identify the statements that require such production. The Court in *Inadi* made the challenge more difficult by rejecting several limitations on the admissibility of hearsay statements. *Dutton v. Evans*[240] was subject to the interpretation, reinforced by the *normally required production* language of *Ohio v. Roberts*,[241] that an available declarant must be produced whenever introduction of the hearsay statement would not, on the bases of reliability and incremental probative value, be harmless error.[242] The *Inadi* Court, however, spoke in neither *normally required production* nor *harmless error* terms,[243] but rather in terms of the importance of co-conspirators' statements in comparison with the declarant's trial testimony.

Moreover, the Court in *Inadi* sanctioned admitting highly incrementally probative hearsay statements on the basis of reliability.[244] The Court suggested no limiting language. It equated the *normally required production* language of *Roberts* with the unavailability requirement already imposed by hearsay exceptions on the admissibility of former testimony.[245] The *Inadi* Court completely disregarded the *crucial or devastating impact* language of *Evans*.

Furthermore, *Inadi* could be read as permitting admission of all reliable hearsay statements[246] against a criminal defendant without production of an available declarant. If the *firmly rooted* component of the *Roberts* Court's second prong,[247] which will likely be interpreted as liberally as in *Bourjaily*,[248] encompasses all delineated hearsay exceptions in the Federal Rules of

239. Reliable and necessary hearsay statements are out-of-court statements that possess incremental probative value as to an important fact for conviction in the litigation. *See supra* text accompanying notes 110-11 and *infra* note 365.
240. 400 U.S. 74 (1970). *See supra* notes 94-117 and accompanying text.
241. 448 U.S. 56, 66 (1980).
242. *See supra* notes 137-43 and accompanying text.
243. *See supra* notes 167-68 and accompanying text.
244. *See* United States v. Inadi, 475 U.S. 387, 392-400 (1986).
245. *See id.*
246. *See supra* notes 118-43 and accompanying text.
247. 448 U.S. 56, 66 (1980).
248. 107 S. Ct. 2775, 2782-83 (1987). *See supra* text accompanying notes 230-31.

Evidence,[249] under *Inadi* a finding that a hearsay statement satisfied any such hearsay exception would apparently carry with it a determination that the confrontation clause does not require production of an available declarant. In short, reliability satisfying the second prong of *Roberts* would also, under *Inadi*, satisfy the first prong of *Roberts*, which deals nominally with unavailability but actually with reliability as well.

The Court's reference in *Inadi* to the defendant's right to call an available declarant[250] lends support to this argument. The Court noted that the defendant neither subpeonaed the witness nor attempted to seek his cross-examination under the Federal Rules of Evidence and the compulsory process clause.[251] The Court therefore concluded that a rule requiring the prosecution to make the witness available would be unlikely "to produce much testimony that adds anything to the 'truth determining process' over and above what would be produced without such a rule."[252]

The *Inadi* Court placed only one limitation on its analysis. The Court interpreted *Roberts* as confirming the long-standing

249. FED. R. EVID. 801(d), 803(1)-(23), 804(b)(1)-(4).

250. 475 U.S. at 397-98; *see supra* note 166 and *infra* notes 330-31 and accompanying text.

251. *Inadi*, 475 U.S. at 397; *see infra* note 252.

252. *Inadi*, 475 U.S. at 396 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)). The Court stated:

> Some of the available declarants already will have been subpoenaed by the prosecution or the defense, regardless of any Confrontation Clause requirements. Presumably only those declarants that neither side believes will be particularly helpful will not have been subpoenaed as witnesses. There is much to indicate that Lazaro was in that position in this case. Neither the Government nor the defense originally subpoenaed Lazaro as a witness. When he subsequently failed to show, alleging car trouble, respondent did nothing to secure his testimony. If respondent independently wanted to secure Lazaro's testimony, he had several options available, particularly under Federal Rule of Evidence 806, which provides that if the party against whom a co-conspirator statement has been admitted calls the declarant as a witness, "the party is entitled to examine him on the statement as if under cross-examination." Rule 806 would not require respondent to make the showing necessary to have Lazaro declared a hostile witness, although presumably that option also was available to him. The Compulsory Process Clause would have aided respondent in obtaining the testimony of any of these declarants. If the Government has no desire to call a co-conspirator declarant . . . either as a witness favorable to the defense, or as a hostile witness, or for cross-examination under Federal Rule of Evidence 806, then it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant "available."

Id. at 396-98 (footnotes omitted); *see also supra* note 166 (quoting *Inadi*).

position that former testimony[253] is inferior in probative value to live testimony before the trier of fact.[254] The *Inadi* Court, of

253. In California v. Green, 399 U.S. 149 (1970), the Court evaluated the admissibility of preliminary hearing testimony of a witness unavailable because of lack of recollection. *See supra* notes 87-89 and accompanying text. Noting that the declarant was under oath at the preliminary hearing and that the defendant had the opportunity to cross-examine the declarant at that time, the Court held that substantive admissibility of the preliminary hearing testimony did not violate the defendant's right of confrontation. 399 U.S. at 165-68.

Under *Green* defendants must have an opportunity to effectively cross-examine the witness; opportunity to cross-examine at the preliminary hearing is not per se adequate. *See* 399 U.S. at 159. Unless the defense was limited by unusual circumstances, however, the cross-examination opportunity provided in the preliminary hearing ordinarily will be sufficient. *See, e.g.*, People v. Wittebort, 81 Mich. App. 529, 532-34, 265 N.W.2d 404, 405-06 (1978) (holding that trial court did not abuse its discretion in admitting preliminary hearing testimony when defense counsel's failure to cross-examine the witness was due to the likelihood that cross-examination would have been "counter-productive" rather than to the alleged incompetency of counsel). The question of an adequate opportunity to conduct cross-examination in a child sexual abuse prosecution would arise if a child witness capable of direct examination answers incoherently or inconsistently, claims lack of recollection, or answers not at all when asked questions on cross-examination, including calmly presented, simple questions in understandable language. *See supra* note 202 and accompanying text.

Courts interpreting *Green* generally agree that admissibility turns on whether the defense had the opportunity to cross-examine effectively, not whether defense counsel actually engaged in extensive cross-examination. *See, e.g.*, State v. Parker, 161 Conn. 500, 504, 289 A.2d 894, 896 (1971) (noting "the test is the opportunity for full and complete cross-examination rather than the use of that opportunity"). Nevertheless, the issue has not been totally resolved. In *Ohio v. Roberts*, the Court held that under *Green* a court could admit preliminary hearing testimony of an unavailable witness offered by the prosecution when the witness had been called by the defense at the preliminary hearing and examined as a hostile witness. 448 U.S. 56, 67-73 (1980). Although in *Roberts* defense counsel never formally asked the court to declare the witness hostile or to allow him to cross examine the witness, his questions were the functional equivalent of cross-examination. *Id.* at 70-73. The Court noted that counsel on direct challenged the witness's perception of events and her veracity and had not been limited in this line of questioning. *Id.* at 71; *see supra* note 135 and accompanying text. The result was, as in *Green*, a " 'substantial compliance with the purposes behind the confrontation requirement.' " 448 U.S. at 71 (quoting *Green*, 399 U.S. at 166). The Court added, however, that it need not determine whether mere opportunity to cross-examine or de minimis questioning is sufficient under *Green*, because defense counsel's questions were the equivalent of extensive cross-examination. *Id.* at 70; *see supra* notes 135-36 and accompanying text.

254. The Court in *Inadi* stated:

> Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live

course, did not hold that a party need never produce an available declarant provided it can demonstrate reliability. The *Inadi* Court also did not specifically discard the first prong of *Roberts*. Reading *Inadi* with less force, the question is under what circumstances a party must produce an available declarant whose statement meets a firmly rooted hearsay exception or possesses particularized guarantees of trustworthiness so the prosecution can examine the declarant. Commentators must address that question in light of the Court's references in *Inadi* to the defendant's opportunity, under the compulsory process clause, to produce and examine an available declarant if the defendant so desires.[255]

B. COMMENTATORS' SUGGESTIONS

The commentators who have attempted to discover the true meaning of the confrontation clause have focused on principles the Supreme Court developed in *Evans*[256] and repeated in *Roberts*.[257] The commentators have attempted to design flexible criteria to determine the "utility of trial confrontation."[258] Professor Frank Read, for example, stated that a rule requiring production of available hearsay declarants would conflict with exceptions excusing witnesses whose presence would be inconvenient or unhelpful to the defendant.[259] Read proposed excusing the declarant's unavailability if the inconvenience of producing the declarant would outweigh the benefits, or if the declarant would be a minor witness who would testify to a technical and uncontested detail.[260]

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testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. But if the declarant is unavailable, no "better" version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point.

475 U.S. at 394-95 (citation omitted).

255. *Id.* at 397.

256. 400 U.S. 74 (1970); *see supra* notes 94-117 and accompanying text.

257. 448 U.S. 56 (1980); *see supra* notes 118-43 and accompanying text.

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

259. Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 43 (1972).

260. *Id.* at 49. Professor Read 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-exceptions cases), outweighs any possible benefit his presence could afford the accused? Is the witness a minor witness called to

Similarly, Professor Kenneth Graham proposed limiting the meaning of witnesses against a defendant, for confrontation clause purposes, to principal witnesses for the prosecution, including those witnesses necessary for the prosecution to survive a motion for acquittal based on insufficiency of proof.[261] Before hearsay statements would be admissible, under this interpretation, the confrontation clause would require the prosecution to produce witnesses whose contributions make them principal witnesses. On the other hand, a court would not require the prosecution to produce declarants whose statements are not crucial to the litigation.[262]

Professor Peter Westen asserted that confrontation analysis should not entail an inquiry into the reliability of a hearsay declaration.[263] He argued that the indicia of reliability test derived from the due process clause rather than the confrontation clause.[264] In addressing the question under what circumstances, pursuant to the confrontation clause, the prosecution must produce an available declarant, Westen suggested that courts should allow the prosecution to introduce a hearsay statement only after the prosecution has made a good faith effort to produce the declarant at trial and to elicit the statement there.[265] Westen would allow an exception to this rule in those cases in which the "statement is such that the defendant could not reasonably be expected to wish to examine the declarant in

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supply a technical, basically uncontested detail as opposed to a key prosecution witness?

Id. Others have agreed that "[t]he 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*, 85 HARV. L. REV. 38, 195-96 (1971) (footnote omitted).

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

262. *Id.* Professor Graham wrote:

> What then emerges from this view of the confrontation clause? I suggest that it implies that whether or not a particular person is a "witness against" the defendant depends upon the use to which his statements are to be put. If his contribution makes him the "principal witness" for the prosecution . . . he must be confronted, absent excuse or waiver. If, on the other hand his "testimony" is not "crucial," as the Court said the statement was not in *Dutton*, the prosecution need not produce him at trial. Vague as they may be, these respective categories require an analysis of the evidence in the context of the case rather than in the abstract.

Id. (footnotes omitted) (citing Dutton v. Evans, 400 U.S. 74, 87 (1970)).

263. *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 599-600 (1978).

264. *Id.* at 600.

265. *Id.* at 617.

person."[266] Westen thus concluded that the prosecution must "take the initiative in producing only those witnesses (whose statements it uses) whom it can reasonably expect the defendant to wish to examine at trial."[267]

To illustrate the operation of his approach, Westen discussed its application to the facts of *Evans*.[268] He asserted that the Court's decision to uphold admissibility of the hearsay statement in *Evans* was consistent with his interpretation of the purposes of the confrontation clause.[269] Westen noted that the hearsay statement in *Evans* was ambiguous, and the jury was unlikely to give it undue weight.[270] He further noted that the defendant likely could not have cast doubt on the statement's reliability by cross-examining the declarant at trial.[271] Thus, Westen concluded that because the prosecution could have reasonably concluded that the defendant had no interest in examining Williams in person, it was excused from producing Williams on its own initiative.[272]

Unfortunately, such an interpretation brings in through the back door what Westen originally rejected. Namely, under his approach courts would employ the confrontation clause to measure the reliability of any available witness's hearsay statement. Moreover, Westen's interpretation reintroduces an assessment of both the incremental probative value of the evidence in establishing a proposition and the importance of the proposition in the litigation—criteria that plagued the plurality opinion in *Evans*.[273] In addition, as Westen recognized, his interpretation also would require appellate courts to develop a standard for reviewing the reasonableness of the prosecution's determination that the defendant would not have wanted to examine the declarant in person.[274]

Finally, Professor Laird Kirkpatrick suggested using four criteria to determine when a party must call an available de-

266. *Id.* at 617-18.
267. *Id.* at 622.
268. For a discussion of *Evans*, see *supra* notes 94-117 and accompanying text.
269. Westen, *supra* note 263, at 621.
270. *See id.*
271. *See id.*
272. *Id.*
273. *See* Dutton v. Evans, 400 U.S. 74, 107-09 (1970) (Marshall, J., dissenting) (criticizing the plurality's holding that a defendant need not be given an opportunity to confront a hearsay declarant if the evidence admitted is not "crucial" or "devastating").
274. Westen, *supra* note 263, at 622.

clarant at trial: centrality, reliability, susceptibility to testing by cross-examination, and the adequacy of alternatives to cross-examination.[275] The centrality criterion focuses on the importance of the matter the evidence is offered to prove.[276] Reliability significantly resembles the third criterion, susceptibility to testing by cross-examination. In any case, reliability most certainly includes an assessment of whether the declarant actually made the statement.[277] Susceptibility to testing by cross-examination refers to the availability of documentary hearsay such as business records or transcripts of testimony in cases in which the declarant may not fully recall the matter stated.[278] Adequacy of alternatives to cross-examination includes opportunity to impeach the hearsay declarant under Federal Rule of Evidence 806, to introduce contrary evidence, and, under unusual circumstances, to cross-examine another witness familiar with the matter.[279]

Each of the commentators' proposals searches for indicia of reliability that would make remote the utility of trial cross-examination. Arguably, each test would reasonably assess the constitutionality, under the confrontation clause, of admitting evidence possessing minimal incremental probative value and addressing an unimportant aspect of the litigation. When the evidence possesses significant incremental probative value and addresses an important fact in the litigation, however, each of the utility of trial cross-examination tests would provide a result contrary to *Inadi*. This conclusion explains the *Inadi* Court's references not only to indicia of reliability and necessity, but also to burden and benefit, including, as an alternative, the defendant's calling the witness.[280] In short, each of the commentators' approaches would require a party to produce an available declarant in instances in which crucial or devastating hearsay evidence involves a co-conspirator statement. Yet the *Inadi* Court did not so require.

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275. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 682 (1986).

276. *See id.* at 683.

277. *Id.* Professor Kirkpatrick stated: "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." *Id.* (footnote omitted).

278. *Id.* at 684.

279. *See id.* at 685.

280. *See supra* notes 144-66 and accompanying text.

C. CHILD SEXUAL ABUSE PROSECUTIONS

The *Inadi* Court's elimination of the *crucial or devastating* language of *Evans* and the Court's incorporation of burden and benefit considerations complicate the issue of admissibility of videotaped statements. Videotaped hearsay statements may be admissible under the statutory hearsay exceptions of some states for videotaped statements.[281] Statutory hearsay exceptions permitting admissibility of videotaped statements generally require that the *defendant* be able to call and examine the declarant at trial.[282]

Several questions arise under such statutory exceptions. What does *Inadi* say as to requiring the *prosecution* to call an available child declarant to testify? What does *Inadi* suggest regarding satisfaction of the *Roberts* Court's two-prong test by requiring the availability of the child declarant so the defendant may call the child? Does *Inadi* suggest that the defendant's compulsory process right to produce and cross-examine an available declarant satisfies both prongs of *Roberts* in cases in which the government's burden in producing the declarant is greater than the defendant's benefit in being able to confront the declarant of a reliable and necessary hearsay statement? Does the burden to the government include the risk of exposing a victim of child sexual abuse to possible trauma or emotional distress by requiring the child to recount the sexual abuse in open court, face-to-face with the accused?

A recent Kansas decision highlights the dilemma of applying *Inadi* to child sexual abuse prosecutions. In *State v. Johnson*[283] the Kansas Supreme Court considered the constitutionality of two Kansas statutes which provided for the admissibility of the videotaped statements of a child alleged to be the victim of a crime.[284] Section 22-3433 of the Kansas Statutes provides for the admissibility of a child victim's videotaped statement made before the initiation of criminal proceedings if, among other things, no attorney is present during taping.[285] In addition, the child must be available for cross-examination, either in the courtroom or during the videotaping of a separate

281. *See* statutes cited *supra* note 184.

282. *See* statutes cited *supra* note 184.

283. 240 Kan. 326, 729 P.2d 1169 (1986), *cert. denied*, 107 S. Ct. 2466 (1987).

284. *See id.* at 327-32, 729 P.2d at 1171-75 (citing KAN. STAT. ANN. §§ 22-3433 to -3434 (Supp. 1986)).

285. KAN. STAT. ANN. § 22-3433 (Supp. 1986).

statement.[286] Section 22-3434 provides for the admissibility of a child victim's videotaped statement made after the initiation of criminal proceedings if, among other things, only the attorneys, the child, and any persons important to the child's welfare are present; only the attorneys question the child; and the child neither sees nor hears the defendant, if the defendant is present.[287] Section 22-3434 further provides that a child who has given videotaped testimony in accordance with the statute may not be compelled to testify at trial.[288]

In *Johnson* the trial court admitted videotaped testimony pursuant to the statutes.[289] The defendant had been charged with taking indecent liberties with his daughter, R.J., and of committing aggravated criminal sodomy with his stepson, J.W.[290] R.J. made the first part of the videotaped testimony pursuant to section 22-3433, during which only she and a social worker were present.[291] When R.J. made the second part of the videotaped testimony, pursuant to section 22-3434, R.J., her foster mother, a social worker, and both parties' attorneys were present.[292] On videotape, R.J. testified that the defendant had taken liberties with her and that she had seen the defendant sodomize J.W.[293] Neither party called R.J. to testify at trial, and the court did not find R.J. to be unavailable.[294]

The jury convicted Johnson of aggravated sodomy of J.W. but did not reach a verdict on the charge of indecent liberties with R.J.[295] Accordingly, the trial court declared a mistrial on the indecent liberties charges.[296] Johnson appealed, arguing that admission of R.J.'s videotaped testimony under sections 22-3433 and 22-3434 violated his right of confrontation.[297]

The Kansas Supreme Court upheld Johnson's conviction.[298] The court concluded that section 22-3433 did not violate the confrontation clause because the statute required the court

286. *Id.*
287. KAN. STAT. ANN. § 22-3434 (Supp. 1986).
288. *Id.*
289. 240 Kan. 326, 326-27, 729 P.2d 1169, 1170-71 (1986).
290. *Id.* at 326, 729 P.2d at 1170.
291. *Id.* at 326-27, 729 P.2d at 1170-71.
292. *Id.* The defendant was not present during the videotaping. *Id.* at 327, 729 P.2d at 1171.
293. *Id.*
294. *Id.* at 327, 331, 729 P.2d at 1171, 1174.
295. *Id.* at 327, 729 P.2d at 1171.
296. *Id.* These charges were later dismissed upon the State's motion. *Id.*
297. *Id.*
298. *Id.* at 333, 729 P.2d at 1175.

to find sufficient indicia of reliability before admitting the videotaped testimony and because the child must be available for cross-examination either in the courtroom or on videotape.[299] The court found its decision consistent with its previous decision in *State v. Myatt*,[300] which upheld the validity of another Kansas statute providing a hearsay exception for statements of child victims of sexual abuse.[301]

The *Johnson* court further found that section 22-3434 did not violate the confrontation clause, notwithstanding the statute's provision that a child victim giving videotaped testimony under that statute may not be compelled to testify at trial.[302] The court concluded that because the child is subject to cross-examination during the videotaping under section 22-3434, the attorneys have sufficient opportunity to bring out factors bearing on the trustworthiness and reliability of the child's statements.[303] Consequently, the court found that the trial court did not need to reconsider those attributes of the child witness.[304] The court held therefore that the admission of the child's videotaped testimony did not violate the defendant's confrontation clause rights.[305] That holding illustrates the potential impact of

299. *Id.* at 332, 729 P.2d at 1174.

300. 237 Kan. 17, 697 P.2d 836 (1985). The *Johnson* court applied the two-part test of *Myatt*:

> K.S.A. 1985 Supp. 22-3433 does not violate a defendant's right to confrontation because the child must be available to testify and be cross-examined either in the courtroom or as provided by K.S.A. 1985 Supp. 22-3434. Moreover, the statute requires that the court find the statement contains "sufficient indicia of reliability" before it can be admitted. Thus, K.S.A. 1985 Supp. 22-3433 satisfies the two-part test set out in *Myatt* for admission of child victim hearsay.

240 Kan. at 331, 729 P.2d at 1174 (citing *Myatt*, 237 Kan. at 24, 697 P.2d at 843).

301. *Myatt*, 237 Kan. at 25, 697 P.2d at 843.

In *Myatt*, the Kansas Supreme Court upheld the validity of § 60.460(dd) of the Kansas Statutes, which created a hearsay exception applicable only to child declarants based on a particularized finding of indicia of reliability. 237 Kan. at 25, 679 P.2d at 843. The *Myatt* court held the statute constitutional because it allowed the introduction of the hearsay statement only if the child was unavailable and the statement was reliable. *Id.* at 24, 679 P.2d at 843. The *Myatt* court noted that because children may be unable to testify at trial because of retraction of earlier statements due to guilt or fear, fading memory, or tender years, their hearsay statements may be the only probative evidence available. *Id.* at 21-22, 679 P.2d at 841. The court also noted that children's statements about sexual abuse are inherently reliable because children often lack knowledge of sexual matters. *Id.* The court further noted the increasing incidence of child sexual abuse. *Id.*; *see supra* note 52.

302. *Johnson*, 240 Kan. at 332, 729 P.2d at 1174.

303. *Id.*

304. *Id.*

305. *Id.*

political pressure to protect alleged victims of child sexual abuse from the trauma or emotional distress of testifying before the defendant in open court.

Under section 22-3434, as in other recently enacted videotaping statutes,[306] the child victim testifies before court proceedings begin, is subject to cross-examination, and is outside the defendant's physical presence. Section 22-3434, however, differs from other statutes[307] because it requires no showing of unavailability before videotaped testimony may be admitted in evidence. Moreover, section 22-3434(4) provides that, even if the child is available, the child may not be compelled to testify in court. Thus, section 22-3434 violates *Roberts*, which requires a showing of unavailability before prior testimony is admissible.[308]

Section 22-3433 raises similar confrontation clause issues. Section 22-3433 is designed to permit admissibility of a child victim's videotaped testimony to a social worker. Under *Roberts*, admissibility of a prior statement in accordance with the confrontation clause depends on the statement's reliability and the declarant's unavailability.[309] Although section 22-3433 requires that the statement be reliable,[310] it does not require a showing of unavailability. Thus, in the unlikely event that a statement complies with the reliability prong of *Roberts*,[311] admission of

306. *See, e.g.*, MASS. ANN. LAWS ch. 278, § 16D (Law. Co-op. Supp. 1987). Section 16D allows testimony of a child victim to be videotaped for use in court at a later time, provided that the court finds that the child witness is likely to suffer trauma as a result of testifying in open court or in the defendant's presence. Counsel must be given the opportunity to examine or cross-examine the child witness to the same extent as would be permitted at trial. *Id.* The defendant has a right to be present, unless the court finds the defendant's presence is likely to cause the child witness to suffer trauma. *Id.* Upon such a finding, the court may order that the child witness, while testifying, not be able to see or hear the defendant. *Id. See generally* statutes cited *supra* note 184 (providing for admissibility of a child victim's testimony by videotape or closed-circuit television).

307. *See, e.g.*, FLA. STAT. ANN. § 92.53 (West Supp. 1987) (requiring a substantial likelihood that the child would suffer emotional or mental harm if required to testify in court or that the child is otherwise unavailable); *see supra* note 185 and accompanying text.

308. 448 U.S. 56, 65-66 (1980).

309. *Id.*; *see supra* notes 118-43 and accompanying text.

310. Section 22-3433(1) provides that a recorded statement of a child witness must show "sufficient indicia of reliability" to be admissible.

311. *See* Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 57 (1985). The author wrote:

> Applying the relevant factors, proponents will often succeed in introducing the child's initial statement that describes the act of sexual

the statement nevertheless would pose a confrontation clause problem because the unavailability prong of *Roberts*[312] has not been met.

Section 22-3433 attempts to solve the confrontation clause problem by simply allowing the defendant to call the child to testify at trial.[313] Underlying the statute is the rationale that while the likely benefit of cross-examination of a child victim in court is slight, the burden of possible trauma or severe emotional distress to the child if required to accuse the defendant in open court is significant. That rationale also prompted the Texas legislature to rely on the compulsory process clause to address the confrontation clause problem in its videotaping statute.[314] The Texas Court of Appeals, however, declared that statute unconstitutional under the confrontation clause.[315] The

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contact performed with or on the child by another, as well as additional statements made immediately after the initial statement. It is, however, extremely doubtful that a child's statement to a police officer, social worker, or someone specially trained to interview children will be found to possess equivalent circumstantial guarantees of trustworthiness, whether or not the statement was videotaped or otherwise recorded. The normal timing of such an interview, its investigative function, the frequent use of suggestive questions by a person in authority, and the fact that the child will usually have made several earlier statements relating to the alleged sexual contact all militate against admissibility. Such investigatory statements are somewhat analagous [sic] to grand jury testimony which has received a checkered response when offered under Federal Rule of Evidence Rule 804(b)(5).

Id.

312. 448 U.S. at 65-66.

313. *See* KAN. STAT. ANN. § 22-3433(b) (Supp. 1986) ("If a recording is admitted in evidence under this section, any party to the proceeding may call the child to testify and be cross-examined, either in the courtroom or as provided by K.S.A. 1985 Supp. 22-3434 and amendments thereto.").

314. *See* TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 (Vernon Supp. 1987), *held unconstitutional by* Long v. State, 694 S.W.2d 185, 193 (Tex. Ct. App. 1985), *aff'd*, 56 U.S.L.W. 2031, 2031 (Tex. Crim. App. July 1, 1987) (No. 867-85) (en banc) (state petitioning for discretionary review; opinion subject to revision or withdrawal from permanent law report).

315. *Long*, 694 S.W.2d at 193. Nine Texas Courts of Appeal had upheld article 38.021, section two, before *Long*, 56 U.S.L.W. at 2031, held it unconstitutional. *See* Pierce v. State, 724 S.W. 2d 928, 929 (Tex. Ct. App. 1987); Amescua v. State, 723 S.W.2d 266, 273 (Tex. Ct. App. 1986); Woods v. State, 713 S.W.2d 173, 174 (Tex. Ct. App. 1986); Whittemore v. State, 712 S.W.2d 607, 609 (Tex. Ct. App. 1986); Mallory v. State, 699 S.W.2d 946, 949 (Tex. Ct. App. 1985); Newman v. State, 700 S.W.2d 307, 312 (Tex. Ct. App. 1985); Tolbert v. State, 697 S.W.2d 795, 799 (Tex. Ct. App. 1985); Alexander v. State, 692 S.W.2d 563, 566 (Tex. Ct. App. 1985); Jolly v. State, 681 S.W.2d 689, 695 (Tex. Ct. App. 1985). Two Texas Courts of Appeals found the statute unconstitutional. Buckner v.

Texas statute,[316] on which the Kansas statute[317] was modeled, provided for the admissibility of a child's videotaped statement if no attorney was present during the videotaping and the child was available to testify at trial.[318] The Texas statute did not require the prosecution to call the child during its case in chief, but merely required that the child be available for the defendant to call and examine, and presumably cross-examine if the defendant so chose.[319] The Texas statute, like the Kansas statute,[320] was based on the notion that the right of confrontation is satisfied as long as the hearsay declarant is available for the defendant to call and examine at trial.[321]

Before *United States v. Inadi*,[322] the unconstitutionality of the Texas statute was obvious. No Supreme Court decision de-

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State, 719 S.W.2d 644, 650 (Tex. Ct. App. 1986); Romines v. State, 717 S.W.2d 745, 753 (Tex. Ct. App. 1986).

For other cases applying various types of videotape statutes, *see, e.g.*, McGuire v. State, 288 Ark. 388, 393, 706 S.W.2d 360, 362-63 (1986) (holding videotape statements admissible); People v. Johnson, 146 Ill. App. 3d 640, 649-50, 497 N.E.2d 308, 314 (1986) (holding videotape of child sex abuse victim taken outside of defendant's presence admissible because defendant's rights to confront and cross-examine declarant were preserved); Miller v. State, 498 N.E.2d 1008, 1012-13 (Ind. Ct. App. 1986) (holding victim's videotaped statements admissible); Altmeyer v. State, 496 N.E.2d 1328, 1331 (Ind. Ct. App. 1986) (holding unavailable child's videotaped testimony inadmissible because of insufficient indicia of reliability); State v. Tafoya, 105 N.M. 117, 122, 729 P.2d 1371, 1376 (N.M. Ct. App. 1986) (holding videotaped prior consistent statements of child sex abuse victim admissible), *cert. denied*, 105 N.M. 94, 728 P.2d 845 (1986), *petition for cert. filed* (Feb. 12, 1987); Turner v. State, 716 S.W.2d 569, 571 (Tex. Ct. App. 1986), *review granted* (Oct. 14, 1987) (holding videotape admissible under article 38.071, §§ 4, 5); Taylor v. State, 727 P.2d 274, 274 (Wyo. 1986) (holding videotape of child sex abuse victim taken by police officers several days after alleged crime inadmissible because trial court permitted jury to view the tape during deliberations).

316. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 (Vernon Supp. 1987). Kentucky adopted this Texas statute as KY. REV. STAT. ANN. § 421.350(2) (Michie/Bobbs-Merrill Supp. 1986). A Kentucky court declared the statute constitutional in Eastman v. Commonwealth, 720 S.W.2d 348 (Ky. Ct. App. 1986) (withdrawn from bound volume because discretionary review is pending) (available on WESTLAW, TX-CS database).

317. KAN. STAT. ANN. § 22-3433 (Supp. 1986); *see supra* notes 284-86 and accompanying text.

318. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2.

319. *Id.*

320. *See supra* note 313 and accompanying text.

321. *See* TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2. Because a videotape gives the jury an opportunity to observe the child's demeanor and judge credibility, supporters of the statute also argued the child is in effect called to the stand by the playing of the videotape. Buckner v. State, 719 S.W.2d 644, 651 (Tex. Ct. App. 1986) (Burdock, J., dissenting).

322. 475 U.S. 387 (1986).

claring the procedures outlined in the statute unconstitutional existed simply because no one had been bold enough before the statute's enactment to test those procedures in the face of the history of the confrontation clause, its language, and the Supreme Court decisions touching on the subject. In writing the confrontation clause, the framers required that an available complaining witness be called and examined by the prosecution in open court, and that the witness be subjected to cross-examination by the defendant.[323] The compulsory process clause gives the accused the right to present evidence in her favor;[324] its purpose is not to permit the accused to present and examine witnesses against her, as the Texas statute apparently contemplated. The language of the sixth amendment requires the prosecution to present evidence.[325] The confrontation clause does not merely say "to confront," which could more easily be interpreted to mean cross-examine only. The compulsory process clause provides that the defendant shall have the right "to have compulsory process for obtaining witnesses in his favor."[326] "Witnesses in his favor" means witnesses tending to establish the defendant's innocence. The compulsory process clause does not state "witnesses against him," as apparently contemplated by the Texas statute. Until *Inadi* Supreme Court decisions bearing on this point were in full accord.[327]

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323. *See* U.S. CONST. amend. VI. The framers drafted the confrontation clause in reaction to the same abuse that the Texas statute reintroduced—trial by ex parte affidavit. *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895); *infra* note 327.

324. *See* U.S. CONST. amend. VI.

325. *See id.* The confrontation clause provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

326. *Id.*

327. *See, e.g.*, *Mattox*, 156 U.S. at 242-43. In *Mattox* the Court said:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id.

In 1899 the Court again considered the right of confrontation. In Kirby v. United States, 174 U.S. 47 (1899), the Court stated:

> The record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with

Over the years the Supreme Court decided many cases involving the admissibility of hearsay statements of available, unavailable, and available but nontestifying declarants. *Evans* and *Roberts* represent the last of this long line of decisions.[328] In every decision, the Court implicitly premised its discussion on the firm principle that the confrontation clause requires the prosecution to call available witnesses whose testimony is crucial and devastating at trial for examination in the presence of the accused and for cross-examination by defense counsel.[329] None of those decisions hinted even slightly that the sixth amendment permits the prosecution to introduce an ex parte affidavit or videotaped statement merely because the accused may call and examine such a witness at trial.

In *Inadi* the Court departed from its traditional sixth amendment interpretation and held that the prosecution need not call the declarant of a crucial and devastating statement at trial because the defendant can call the declarant pursuant to the compulsory process clause.[330] The Court stated that in light of the defendant's opportunity to call the declarant at trial, little, if anything, is gained by requiring the prosecution to make the declarant available.[331]

In fact, however, requiring the prosecutor to produce and examine a child declarant at trial has readily apparent advantages. If the prosecution may substitute belated for timely cross-examination, the child declarant may develop an interest in maintaining the prior statement and " 'become unyielding to the blows of truth.' "[332] In addition, the jury will often be ex-

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> a different offence [sic], for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.

Id. at 55 (emphasis in original).

328. *See supra* notes 94-143 and accompanying text.

329. *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 86-90 (1970) (premising discussion implicitly on principle that confrontation clause requires available complaining witness to appear at trial for examination in presence of accused and cross-examination by defense).

330. 475 U.S. 387, 397-98 (1986).

331. *Id.* at 398; *see also supra* note 252 (quoting *Inadi*, 475 U.S. at 396-98).

332. Romines v. State, 717 S.W.2d 745, 751 (Tex. Ct. App. 1986) (quoting California v. Green, 399 U.S. 149, 159 (1970)). The *Romines* court wrote:

> The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influ-

posed to a double dose of the child's testimony regarding the alleged abuse because the defense attorney, to effectively cross-examine, will have to take the child through videotaped testimony, impressing the event on the jurors' minds.[333] The Texas statute[334] allowed the prosecution to introduce the child's videotaped statements, which had been taken in a friendly environment, but required defense counsel to call the child to testify in court and possibly subject the child to the kind of trauma the statute was designed to avoid.[335] By calling the child, the defense counsel would further predispose the jury against the defendant.[336] Furthermore, the child may not remember the details of the event.[337] Under the statute the videotaped statement could be made after the prosecution had prepared the child regarding the child's version of the critical events.[338] Surely a statute like the Texas statute does not reduce trauma or emotional distress resulting from face-to-face confrontation with the defendant if the defendant exercises the right to call the child to the witness stand at trial.

Even if defense counsel risks angering the jury by calling the child, thereby exposing the child to the possibility of suffering trauma or emotional distress, cross-examination of the child regarding the videotaped statement will be difficult because defense counsel does not know whether the child will testify in

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ence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth."

Id.

333. *See id.* at 752. The court stated:

> [T]he child would surely have had to reiterate her previous adverse testimony or had her memory orally refreshed by appellant's counsel in order for him to effectively cross-examine her about the videotaped testimony. This would have given the jury a 'double dose' of the harmful and detrimental testimony against appellant. This 'double dose' may . . . result in more indelibly impressing same on the minds of the individual jurors.

Id.

334. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 (Vernon Supp. 1987), *held unconstitutional by* Long v. State, 694 S.W.2d 185, 193 (Tex. Ct. App. 1985), *aff'd*, 56 U.S.L.W. 2031, 2031 (Tex. Crim. App. July 1, 1987) (No. 867-85) (en banc) (state petitioning for discretionary review; opinion subject to revision or withdrawal from permanent law report).

335. *See id.* at 751-52.

336. *See id.* at 752.

337. *See id.* at 752-53 (noting that "[c]ross-examination of a three-year-old child eight months after the videotape was made cannot serve as a constitutionally adequate substitute for cross-examination contemporaneous with statements presented for consideration by the jury").

338. *See* art. 38.071, § 2(a)(1). The statute provides only that the prosecuting attorney cannot be present at the videotaping session. *Id.*

conformity with the prepared statement. If the child says the same thing, the defendant's position may be significantly damaged. If the child testifies inconsistently, or claims not to remember, however, fundamental issues arise, such as whether the child's videotaped statement is substantively admissible when the child testifies inconsistently or whether the theory of admissibility is limited solely to that of prior consistent statements. Under *Roberts* the prior statement of a child who fails to remember is inadmissible unless it possesses sufficient indicia of reliability,[339] which is unlikely considering the surrounding circumstances, including the fact that the statement was prepared in anticipation of litigation.

Inclusion in the Uniform Rules of Evidence of the *Inadi* notion that the confrontation clause may be satisfied by placing the burden of producing the hearsay declarant on the accused under the rubric of the compulsory process clause[340] demonstrates the notion's perniciousness. In 1986 the National Commissioners of Uniform State Laws approved a new Uniform Rule of Evidence creating a limited hearsay exception for the introduction of videotaped statements of child witnesses.[341] Uniform Rule of Evidence 807 is an unfortunate blend of the statutory hearsay exceptions requiring a particularized finding of guarantees of trustworthiness of an available declarant[342] and the Texas-type statute permitting videotaped statements prepared in anticipation of litigation.[343] Subdivision (a)(i) of the Rule provides for the admissibility of a child's hearsay statement if, among other things, the court finds that "there is a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court."[344] Subsection (a)(ii) requires the court to find that the "time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness."[345] Subdivision (b) permits questioning of the minor on behalf of the

339. 448 U.S. 56, 65-66 (1980); *see supra* text accompanying note 133.

340. *Inadi*, 475 U.S. 387, 410 (1986) (Marshall, J., dissenting) (noting " '[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure' " (quoting New York Life Ins. Co. v. Taylor, 147 F.2d 297, 305 (1945))).

341. *See* UNIF. R. EVID. 807 comment to 1986 amendment (Supp. 1987).

342. *See supra* text accompanying note 137.

343. *See supra* note 338 and accompanying text.

344. UNIF. R. EVID. 807(a)(i) (Supp. 1987).

345. UNIF. R. EVID. 807(a)(ii).

defendant.[346] The comment to subdivision (b) indicates that such questioning, taken at a deposition or by closed circuit testimony, may be conducted outside the defendant's presence.[347] Subdivision (c), however, states that nothing in subdivision (a) prevents "the court from permitting any party to call the minor as a witness if the interests of justice so require."[348] The comment to subdivision (c) states that "[c]onstitutionally, potential confrontation clause concerns are ameliorated by permitting any party, within the court's discretion, to call the child as a witness."[349]

Subdivision (c) conflicts with subdivision (a)(i), which permits admissibility of reliable hearsay statements when a substantial likelihood exists that requiring the child to testify in open court will cause severe emotional or psychological harm to the child.[350] Subdivision (c) allows the court to permit either party to call the child to testify as a witness, even though calling the child to testify in open court would cause the exact harm subdivision (a) is designed to prevent.

D. SUMMARY

The *Inadi* decision demonstrates the truth of Justice Harlan's statement that the confrontation clause is not well suited for testing rules of evidence.[351] In addition, Justice Marshall may have been ahead of his time when he noted the danger of constitutionalizing exceptions to the hearsay rule by making them exceptions to the confrontation clause.[352] *Inadi*

346. UNIF. R. EVID. 807(b) (providing that "the court shall, at the request of the defendant, provide for further questioning of the minor in such manner as the court may direct").

347. *Id.* comment (allowing trial judge to determine whether minor's testimony should be taken in open court or by means of videotaped deposition or closed circuit television under 807(d)); *see also* UNIF. R. EVID. 807(d) (providing that court may order parties to remain outside of minors' presence while minor testifies).

348. UNIF. R. EVID. 807(c).

349. UNIF. R. EVID. 807(c) comment.

350. UNIF. R. EVID. 807(a)(i) (Supp. 1987).

351. Dutton v. Evans, 400 U.S. 74, 96 (1970) (Harlan, J., concurring). Justice Harlan stated:

> [T]he Confrontation Clause . . . is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence. The failure of MR. JUSTICE STEWART'S opinion to explain the standard by which it tests Shaw's statement . . . bears witness to the fact that the clause is being set a task for which it is not suited.

Id.

352. *Id.* at 107 (Marshall, J., dissenting). Justice Marshall said:

and *Bourjaily* support Marshall's statement.[353] Moreover, not only does *Inadi* arguably reject the *Evans* Court's *normally requires production* language by its use of *compulsory process* language, *Inadi* supports the introduction of any available declarant's statement simply because of the defendant's ability to subpoena and examine the declarant as to the subject matter of the statement at trial.[354] While *Inadi* no more truly supports an extended compulsory process approach to the confrontation clause than *Roberts* truly imposed a standard of normally requiring production of an available declarant, *Evans*, *Roberts*, *Inadi*, and *Bourjaily* show that a reliability approach to interpreting the confrontation clause, combined with the notions of necessity, burden, and benefit, is not satisfactory.

V. THE CONFRONTATION CLAUSE: A PROPOSAL

A. THE PROBLEM

The interpretation of the confrontation clause as developed in *Green*, *Evans*, *Roberts*, *Inadi*, and *Bourjaily* allows introduction as substantive evidence of all prior hearsay statements of a testifying witness whether the statements are inconsistent[355] or consistent[356] with the witness's in-court testimony. With respect to a co-conspirator's out-of-court statement offered under a hearsay exemption,[357] for example, the court under *Green* need not search for circumstantial guarantees of trustworthiness if the declarant testifies at trial, because oath, demeanor, and cross-examination before the trier of fact meet the confrontation clause's requirement of indicia of reliability.[358] If the declarant is unavailable, hearsay statements that either meet a firmly rooted hearsay exception or are shown to possess partic-

> Indeed, if [Justice Stewart's] opinion meant what it says, it would come very close to establishing in reverse the very equation it seeks to avoid—an equation that would give any exception to a state hearsay rule a "permanent niche in the Constitution" in the form of an exception to the Confrontation Clause as well.

Id.

353. *See supra* notes 230-52 and accompanying text.

354. *See* 475 U.S. 387, 399-400 (1986); *supra* notes 144-66, 243-52 and accompanying text.

355. *See supra* text accompanying notes 69-89.

356. *See supra* text accompanying notes 90-93.

357. Under the Federal Rules of Evidence, co-conspirators' statements made during the course and in furtherance of the conspiracy are defined as nonhearsay and are therefore exempt from the hearsay rule. *See* FED. R. EVID. 801(d)(2)(E).

358. California v. Green, 399 U.S. 149, 158-61 (1970).

ularized guarantees of trustworthiness are admissible.[359]

If the witness is available but does not testify, hearsay statements that meet a firmly rooted hearsay exception or are shown to possess particularized guarantees of trustworthiness may nevertheless be admissible because the statements' indicia of reliability, the remote utility of trial confrontation, and the competing interests of public policy justify admissibility.[360] Regarding statements made by a declarant who is available but does not tesify, *Inadi* and *Bourjaily*, if read broadly, support the notions that hearsay statements falling within traditional hearsay exceptions are sufficiently reliable on their face to be admitted against the defendant and that the unavailability requirement of the confrontation clause is congruent, or nearly so, with the unavailability requirement of the traditional hearsay exceptions.[361] In other words, with respect to deciding when the confrontation clause requires the production of an available declarant, the *Inadi* Court's emphasis on reliability and necessity, as well as the burden and benefit to the parties,[362] supports a change in the *Roberts* standard. This is particularly true when one considers its reference to the compulsory process clause.[363] After *Inadi* it is fair to at least reverse the emphasis from the *Roberts* Court's *normally requires production* standard to the following rule:

> When a hearsay declarant is not present for cross-examination at trial, with respect to a hearsay statement admissible under a firmly rooted hearsay exception or on a showing of particularized guarantees of trustworthiness, the confrontation clause does not normally require a showing that the declarant is unavailable.

If the confrontation clause were interpreted as being totally congruent with the hearsay rule and its exceptions, the last phrase could read: "The confrontation clause requires a showing of unavailability only when required by Federal Rule of Evidence 804(b)."

Even if the foregoing is an overstatement, as I believe it is, there nevertheless must be a theory as to when the confrontation clause requires production of an available declarant. The *Evans* and *Inadi* Courts spoke in terms of a search for trust-

359. *See* text accompanying note 7.

360. *See supra* notes 94-172 and accompanying text.

361. *See supra* text accompanying notes 144-72.

362. *Inadi*, 475 U.S. 387, 392-400 (1986). The *Roberts* standard normally requires a showing of unavailability when a hearsay declarant is not present at trial. *Roberts*, 448 U.S. 56, 65 (1980); *see supra* text accompanying note 135.

363. *See Inadi*, 475 U.S. at 397.

worthiness—a search for indicia of reliability.[364] The Court in *Evans* also looked to the criteria of certainty that the statement was made and the statement's low incremental probative value.[365] The *Inadi* Court specified that in addition to indicia of reliability, certainty that the statement was made, and necessity, the courts should consider the benefit and burden to the parties.[366] Most importantly, the *Inadi* Court recognized that co-conspirator statements are highly probative and critical, if not crucial or devastating.[367] Nevertheless, the Court did not require production of an available declarant.[368]

Because the *Inadi* Court's reliability, necessity, benefit, and burden analysis admits too much and the *Evans* Court's crucial or devastating evidence analysis excludes too much, an interpretation of the confrontation clause is needed that neither constitutionalizes nor unduly renders unconstitutional the hearsay rule and its exceptions.[369]

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364. *Id.* at 392-400; Dutton v. Evans, 400 U.S. 74, 89 (1970); *see supra* text accompanying notes 170-71.

365. *Evans*, 400 U.S. at 87-88; *see supra* notes 110-12 and accompanying text.

366. 475 U.S. at 396-400.

367. *Id.* at 395-96; *see supra* notes 167-68, 244-45 and accompanying text.

368. *Inadi*, 475 U.S. at 400.

369. The Court in *Roberts* rejected suggestions that it reevaluate its basic approach to the confrontation clause. 448 U.S. 56, 66 n.9 (1980). The Court wrote:

> The complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commentary. Few observers have commented without proposing, roughly or in detail, a basic approach. Some have advanced theories that would shift the general mode of analysis in favor of the criminal defendant.
>
> Others have advanced theories that would relax constitutional restrictions on the use of hearsay by the prosecutor.
>
> Still others have proposed theories that might either help or hurt the accused.
>
> Finally, a number of commentators, while sometimes criticizing particular results or language in past decisions, have generally agreed with the Court's present approach.
>
> Notwithstanding this divergence of critical opinion, we have found no commentary suggesting that the Court has misidentified the basic interests to be accommodated. Nor has any commentator demonstrated that prevailing analysis is out of line with the intentions of the Framers of the Sixth Amendment. Convinced that "no rule will perfectly resolve all possible problems," we reject the invitation to overrule a near-century of jurisprudence. Our reluctance to begin anew is heightened by the Court's implicit prior rejection of principal alternative proposals; the mutually critical character of the commentary; and the Court's demonstrated success in steering a middle course among proposed alternatives.

B. THE SUGGESTION

Justice Harlan's concurring opinions in *Evans* and *Green* serve as the starting point for an interpretation of the confrontation clause that neither demands a case-by-case evaluation of reliability nor requires production of every available declarant of crucial or devastating hearsay.[370] Justice Harlan focused on the "core purpose of the Confrontation Clause."[371] In his concurrence in *Evans*, Justice Harlan agreed with Wigmore that the confrontation clause requires only that testimony admitted under the rules of evidence, including the hearsay rule and its exceptions, be subject to cross-examination.[372] Under this interpretation the confrontation clause prescribes only a rule of trial procedure. The hearsay rule and its exceptions determine the admissibility of out-of-court statements, and the confrontation clause guarantees only that the defendant has the right to cross-examine the in-court declarant with regard to the statements.

Later in *Evans*, however, Justice Harlan adverted to an additional meaning of the confrontation clause when he attempted to reconcile his view with the holdings of the seven major Supreme Court confrontation decisions[373] involving in-

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Id. (citations omitted) (quoting Natali, *Green, Dutton and Chambers: Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43, 73 (1975)).

The Court's decisions in *Inadi* and *Bourjaily* may cause the Court to reconsider its offhand remark that it has not "misidentified the basic interests to be accommodated" by the confrontation clause. *Id.*

370. *Accord* Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32, 42 (1973) (suggesting that an appropriate place to begin is Justice Harlan's concurrence in *Green*).

371. Dutton v. Evans, 400 U.S. 74, 94 (1970); *see also* California v. Green, 399 U.S. 149, 174-79 (Harlan, J., concurring) (discussing history of confrontation clause).

372. Justice Harlan stated:

> Contrary to things as they appeared to me last Term when I wrote in *California v. Green*, I have since become convinced that Wigmore states the correct view when he says: "The Constitution does not prescribe what kinds of testimonial statements . . . shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—*i.e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially."

Evans, 400 U.S. at 94 (citation omitted) (quoting 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 131 (3d ed. 1940)).

373. California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965); West v. Louisiana, 194 U.S. 258 (1904); Motes v. United States, 178 U.S. 458 (1900); Mattox v. United States, 156 U.S. 237 (1895); Reynolds v. United States, 98 U.S. 145 (1879).

troduction of former testimony.[374] By characterizing the issue in those cases as whether adequate confrontation had taken place, Harlan found application of the confrontation clause in those cases consistent with his view of the clause: "In the absence of countervailing circumstances, introduction of [prior-recorded testimony] would be an affront to *the core meaning of the Confrontation Clause.*"[375] In his concurrence in *Green*, Justice Harlan also discussed the core purpose of the clause by identifying its historical purpose as the prevention of "flagrant abuses, trials by anonymous accusers, and absentee witnesses."[376] The majority in *Green* similarly defined the core meaning of the confrontation clause as the defendant's right to confront the witness at trial.[377]

Thus, in *Green* and *Evans*, Justice Harlan recognized two distinct purposes of the confrontation clause: the clause guarantees a defendant the right to cross-examine all adverse witnesses present at trial[378] and provides a check against "flagrant abuses, trials by anonymous accusers, and absentee witnesses."[379] In *Green* Justice Harlan argued that the second purpose supported a rule of availability.[380] Under that view the declarant's unavailability or production at trial satisfied the confrontation clause. The prosecution failed to meet the clause's requirements only through the introduction of a hearsay statement of a declarant who is available but does not testify. In *Evans*, however, Justice Harlan retreated from this rule of availability, adopting Wigmore's position that the confrontation clause requires only that the defendant have an opportunity to cross-examine the witnesses that the prosecution produces.[381] Justice Harlan justified his change in position on the ground that an availability rule would unduly hamper the trend in evidence law toward dispensing with the requirement

374. *Evans*, 400 U.S. at 97.

375. *Id.* (emphasis added) ("The question in each case, therefore, was whether there had been adequate 'confrontation' to satisfy the requirement of the clause. Regardless of the correctness of the results, the holding that the clause was applicable in those situations is consistent with the view of the clause I have taken.").

376. *Green*, 399 U.S. at 179.

377. *Id.* at 181 (quoting *Mattox*, 156 U.S. at 242-43); *see supra* note 327.

378. The importance of cross-examination is seen in Town of Geneva v. Tills, 129 Wis. 2d 167, 178-79, 384 N.W.2d 701, 706 (1986) (holding telephonic testimony inadmissible when defendant was denied meaningful cross-examination).

379. *Green*, 399 U.S. at 179.

380. *Id.* at 174, 179, 186, 188-89.

381. 400 U.S. 74, 94 (1970).

of availability for those classes of reliable hearsay, such as business records, trade reports, and laboratory reports, in which cross-examination is of little utility to the opponent.[382] Under the approach Justice Harlan adopted in *Evans*, if the declarant is unavailable, only the rules of evidence and the requirements of due process govern the admissibility of a hearsay declaration, and the confrontation clause guarantees only the defendant's right to cross-examine the in-court witness.[383] If the declarant is available and testifies, the confrontation clause again requires that the defendant have the opportunity to cross-examine. Up to this point, Justice Harlan's analysis in *Evans* yields the same results as his analysis in *Green*, which was based on the core meaning of the confrontation clause. In the case of the available but nontestifying declarant, however, Justice Harlan argued in *Evans* that the confrontation clause requires only that the defendant can cross-examine the in-court witness, and that the constitutional admissibility of the hearsay declaration is reviewed solely against the due process standard of fundamental fairness.[384] In this situation, as Justice Harlan seemed to recognize in his discussion of the former testimony cases, his view of the confrontation clause is incompatible with its core meaning.[385] Justice Harlan thus ascribed a core purpose to the confrontation clause, but he interpreted the clause in a manner that precluded effectuation of that purpose. If the right of confrontation never compels the prosecution to produce available witnesses, it cannot serve its historical function of preventing "flagrant abuses, trials by anonymous accusers, and absentee witnesses."[386] On the other hand, Justice Harlan's concern that the confrontation clause not require production of all available witnesses is legitimate.

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382. *Id.* at 95-96.

383. For a Note advancing a similar position, see Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1438 (1966). Justice Harlan in his concurrence in *Green* acknowledged that the right to cross-examination is also an element of due process. 399 U.S. at 186 n.20; *cf.* Note, *The Burger Court and the Confrontation Clause: A Return to the Fair Trial Rule*, 7 J. MARSHALL J. PRAC. & PROC. 136 (1973) (Supreme Court reverting to a due process analysis of confrontation).

384. 400 U.S. at 94-97.

385. In *Green* Justice Harlan stated that "Wigmore's reading would have the practical consequence of rendering meaningless what was assuredly in some sense meant to be an enduring guarantee." 399 U.S. 149, 179 (1970).

386. *Id.*; *accord* United States v. Inadi, 475 U.S. at 411 (Marshall, J., dissenting) ("The plight of Sir Walter Raleigh, condemned on the deposition of an alleged accomplice who had since recanted, may have loomed large in the eyes of those who drafted that constitutional guarantee.").

There is, fortunately, an intermediate position that neither unduly restricts the use of reliable hearsay evidence in criminal prosecutions nor conflicts with the core meaning of the confrontation clause. In interpreting the language of the confrontation clause that "the accused shall enjoy the right . . . to be confronted with the witnesses against him,"[387] courts have apparently assumed that every hearsay statement the prosecution introduces is a statement of a witness against the defendant.[388] This assumption is valid if the statement is judged from the viewpoint of its use at trial. A better approach, however, is to judge the statement from the viewpoint of the circumstances under which it was initially made.

Under this approach, when the prosecution offers an out-of-court statement under a hearsay exemption or exception, the confrontation clause requires the prosecution to produce the declarant only if the declarant is available and then only if the circumstances surrounding the making of the statement indicate that it was accusatory when made. If the out-of-court statement was accusatory when made, the declarant is a witness against the defendant. Conversely, if the out-of-court statement was not accusatory, the declarant is not a witness against the defendant, and the confrontation clause has no application. This approach satisfies the core meaning of the confrontation clause, preventing "flagrant abuses, trials by anonymous accusers, and absentee witnesses."[389] In addition, the approach comports with the perception of fairness that the Supreme Court has articulated.[390] This interpretation of the right of confrontation, unlike the rule of availability espoused by Justice Harlan in *Green*, does not substantially impair the

387. U.S. CONST. amend. VI.

388. *See supra* text accompanying notes 261-62.

389. *Green*, 399 U.S. at 179. For a pre-*Roberts*, pre-*Inadi*, and pre-*Bourjaily* version of the witness against the defendant theory of the confrontation clause, see generally Graham, *The Confrontation Clause, the Hearsay Rule and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978).

390. In Lee v. Illinois, 106 S.Ct. 2056 (1986), the Court stated:

> On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest *in having the accused and accuser engage in an open and even contest in a public trial.* The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.

Id. at 2062 (emphasis added).

usefulness of the hearsay exceptions because out-of-court statements admitted under hearsay exceptions such as those for business records, learned treatises, or trade reports typically are not accusatory when made.

All witnesses the prosecution calls at trial are witnesses against the defendant, whether the witnesses are testifying about their own out-of-court declarations or merely repeating the out-of-court declarations of others. Prosecution witnesses are against the defendant not because their testimony will usually be damaging, but because the witnesses are aware that their testimony is elicited by the party accusing the defendant of committing the crime charged. Consequently, the right of confrontation described by Justice Harlan in *Evans*—the right to cross-examine prosecution witnesses present at trial—is always to be afforded the defendant.

Most important, the suggested interpretation is consistent with the core meaning ascribed to the confrontation clause.[391] That meaning reflects a concern that the prosecution will avoid producing witnesses at trial by soliciting written statements such as depositions, letters, and affidavits that incriminate particular defendants. The suggested interpretation precludes such practices because all hearsay declarations solicited by the prosecution will be accusatory in nature and therefore constitutionally inadmissible at trial unless the declarant is either produced at trial or truly unavailable. The suggested interpretation clearly prohibits the showing of a videotaped ex parte statement made in preparation for trial by a declarant who is available but not called by the prosecution at trial, as

391. For discussion of the origin and development of the hearsay rules and the confrontation clause, see F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104 (1951); 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 177-87, 214-19 (3d ed. 1944); Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 713-26 (1971); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 179-85 (1948); Note, *Confrontation, Cross-Examination, and the Right to Prepare a Defense*, 56 GEO. L.J. 939, 953 (1968); Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 746-47 (1965). After surveying most of these authorities, Justice Harlan stated in his concurrence in *Green*: "[M]y own research satisfies me that the prevailing view—that the usual primary sources and digests of the early debates contain no informative material on the confrontation right—is correct." 399 U.S. at 176 n.8. Similarly, in *Evans* Harlan concluded that "the historical understanding of the clause furnishes no solid guide to adjudication." 400 U.S. 74, 95 (1970).

provided in the Texas-type statutes considered above.[392]

A statement is accusatory in nature under this analysis if it is made under circumstances that evince either an intent of the declarant to accuse someone with conduct that is criminal or an awareness by the declarant of a reasonable possibility that the statement may be of assistance to the authorities in the apprehension or prosecution of any person who may be charged with having committed a crime. Because every witness is probably aware that statements given to persons in authority, such as police officers or government attorneys, may be of assistance in the apprehension or prosecution of a criminal defendant, such statements are always accusatory regardless of their content. For example, ex parte affidavits or depositions secured by examining magistrates and confessions of accomplices[393] are accusatory.

Statements admitted under hearsay exceptions such as those for spontaneous declarations, learned treatises, and business records, on the other hand, are not likely to be accusatory. Each hearsay statement must be judged individually.[394] For ex-

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392. *See supra* notes 64-66, 316-21 and accompanying text. As stated by Justice White, writing for the majority in *Green*:

> [T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his *accuser* in a face-to-face encounter in front of the trier of fact. . . . "The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.* the witnesses against him, brought before him face to face . . . ."

399 U.S. at 156-57 (emphasis added) (quoting 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883)).

393. *Id.* at 156-57.

394. An examination of how the suggested interpretation would affect admission of out-of-court statements under the Federal Rules of Evidence illustrates the utility of the approach. Rules 801(d)(1) and 801(d)(2) define certain out-of-court statements as "not hearsay." Rule 801(d)(1), which concerns prior statements by the in-court witness, requires the declarant to be present at trial and subject to cross-examination, so the confrontation clause is always satisfied. Under Rule 802(d)(2), which concerns admissions by a party-opponent, each of the five subdivisions is designed to ensure the responsibility of the party-opponent for the content of the statement. As to subdivisions (A), (B), and (C) of Rule 801(d)(2), it is difficult in the abstract to conceive of a situation in which the confrontation clause would be applicable. A party will usually not authorize or adopt another's statement that is accusatory in nature, and the state could not call a defendant to testify against himself concerning his own statement. Malloy v. Hogan, 378 U.S. 1, 6 (1964) (applying fifth amendment privilege against self-incrimination to states through fourteenth amendment). Under subdivision (D) of Rule 801(d)(2), the requirement that

ample, in a murder prosecution, a sales record offered by the prosecution showing that the defendant had recently purchased the murder weapon would be admissible as substantive evi-

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the statement must concern a matter within the scope of the agency or employment will operate to exclude most statements accusatory in nature. If, however, a statement is accusatory and related to a matter within the scope of employment, the suggested interpretation would require production of the declarant if she was available. Finally, a statement must be in furtherance of a conspiracy in order to satisfy subdivision (E) of Rule 801(d)(2) and is thus unlikely to be made under circumstances accusatory in nature.

Under Rule 803 facts surrounding the creation of the hearsay declaration will determine whether an available declarant must be produced. Consider, for example, the admission under the business records exception of a medical examination conducted in a private hospital for presence of sperm. *See* FED. R. EVID. 803(6). If the examination was at the state attorney's request or by reason of law, it is part of the accusatory, investigatory process and the confrontation clause applies. On the other hand, if the examination was conducted for the purpose of providing health care for the patient, the confrontation clause would not apply. An easier example is the admission under the exception for public records and reports of a police laboratory report that a bullet was fired from a particular gun. *See* FED. R. EVID. 803(8). The police lab is part of the state criminal enforcement process. Because the report was made with the intention and for the purpose of solving crimes, it is accusatory in nature even though the person performing the test was unaware of the defendant, and therefore the confrontation clause applies.

Under Rule 803(8), which applies to the police laboratory report and may apply to the medical sperm analysis, neither statement would be admissible since each was made as part of the investigatory process. Rule 803 creates an exception for:

> 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.

FED. R. EVID. 803(8).

The Advisory Committee's Note states that factual findings are not admissible under subdivision (C) in criminal cases when offered against the accused "in view of the almost certain collision with confrontation rights." FED. R. EVID. 803 advisory committee note. Notice also that the exception provided for in subdivision (B) does not extend to matters "observed by police officers and other law enforcement personnel." FED. R. EVID. 803(8)(B). Such statements are prime examples of statements accusatory in nature, and the Congressional debates reflected the concern embodied in the core meaning of the confrontation clause that such statements may not be reliable and that the defendant should have the right to cross-examine the makers of accusatory statements:

> [Mr. Dennis.] What I am saying here is that in a criminal case, only, we should not be able to put in the police report to prove your case without calling the policeman. I think in a criminal case you ought to have to call the policeman . . . and give the defendant the chance to

dence if properly authenticated under the business records hearsay exception.[395] The confrontation clause would not apply to the offer because the making of the sales record occurred under circumstances that negate any intent by the sales clerk to accuse the defendant of criminal conduct.[396] Likewise, the confrontation clause would not apply to require the prosecution to produce the author of the learned treatise that was offered by a medical examiner in support of the examiner's conclusion about the cause of death[397] because the writing of the treatise occurred under circumstances that negate any intent by the author to accuse the defendant. Finally, the confrontation clause would not require the production of a custodian who certifies that the Internal Revenue Service possesses no record of a tax return having been filed by the defendant for a specific year[398]

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cross examine him, rather than just reading the report into evidence. . . .

. . . .

. . . I think the point is that we are dealing here with criminal cases, and in a criminal case the defendant should be confronted with the accuser to give him the chance to cross examine.

120 CONG. REC. 2387-88 (1974).

Finally, because unavailability is a prerequisite for each of the five exceptions of Rule 804, under the suggested interpretation the confrontation clause would always be satisfied for statements admitted pursuant to those exceptions. *See* FED. R. EVID. 804(b)(1)-(5).

395. *See* FED. R. EVID. 803(6).

396. In United States v. Lloyd, 431 F.2d 160 (9th Cir. 1970), *cert. denied*, 403 U.S. 911 (1971), the Ninth Circuit reached the same result in a similar situation. Defendant was convicted under the Selective Service Act for refusal to report for induction. *Id.* at 163. At trial the government offered only a certified and authenticated copy of Lloyd's selective service file and called no witnesses. *Id.* The court affirmed the conviction, overruling defendant's sixth amendment confrontation challenge. *Id.* at 163-64, 172.

397. *See* FED. R. EVID. 803(18).

398. *See* FED. R. EVID. 803(10); *see also* United States v. Yakobov, 712 F.2d 20, 26 (2d Cir. 1983) (holding prohibitions of Rule 803(8) do not extend to Rule 803(10)). The court explained:

> [T]here is a significant difference between the nature of a statement envisioned by Rule 803(8) and that of a statement envisioned by Rule 803(10). Rule 803(8) deals with statements setting forth "matters observed" and "findings of fact resulting from an investigation." The contents of these statements normally are direct affirmative assertions as to elements of the offense charged. In *Oates*, for example, the report and worksheet stated that the substance seized was heroin; in *United States v. Davis*, . . . the reports stated dates and places of purchases of a firearm. The assertion made by a statement envisioned by 803(10) is normally a step removed from any element of the offense charged: it is not a statement that the defendant has failed to perform a given act or that he does not enjoy a certain status. Rather it is a statement that, among the records regularly kept by a public office or agency, a certain record, entry, report, etc., has not been

because the defendant did not prepare the tax return under circumstances accusatory to himself. The suggested approach focuses on the circumstances surrounding the underlying hearsay declaration, not the method of authentication of the declaration in court.[399]

Under the suggested interpretation, although each statement must be considered in light of surrounding circumstances, questions of interpretation should be few. Statements charging someone with a crime will almost always take the form of an accusation, complaint, or notification such as "Bob raped me" or "Come quick, Sam is robbing the bank." Statements made by declarants aware of a reasonable possibility that the statement may assist the authorities in apprehending or prosecuting a person charged with committing a crime will almost always be made to a law enforcement officer. Federal Rule of Evidence 803(8)(B) precludes the use of the public record exception to introduce statements to police officers. The considerations underlying the exclusion are the same as those that should require the production of an available declarant of an otherwise admissible statement made to a police officer.[400]

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found. This type of statement is an inferential step away from any element of the offense charged. It is not a finding of the material fact but is an assertion from which a finding of such a fact may be made.

Id. (citing United States v. Davis, 571 F.2d 1354, 1356 (5th Cir. 1978); United States v. Oates, 560 F.2d 45, 63 (2d Cir. 1977)).

399. For example, the interpretation of "matters observed" in Federal Rule of Evidence 803(8)(B) is consistent with and supportive of the proposed interpretation of the confrontation clause. "Matters observed" has been held *not* to include records created routinely and ministerially in advance of and not associated with a particular criminal investigation. *See, e.g.*, United States v. Quezada, 754 F.2d 1190, 1194 (5th Cir. 1985) (finding warrant of deportation admissible); *see also* United States v. Hardin, 710 F.2d 1231, 1237 (7th Cir.) (finding statistical graph showing street value of heroin admissible), *cert. denied*, 464 U.S. 918 (1983).

400. FED. R. EVID. 803 Senate Judiciary Committee report. The report stated:

> The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

Id.

The concept applies to Rule 803(8)(C) as well. *See* FED. R. EVID. 803 advisory committee's note. The Advisory Committee stated:

> The formulation of an approach which would give appropriate weight

To illustrate, assume that Ms. Smith was just outside the bank as Bill Bumber was robbing it. As Bumber left the bank, he noticed Ms. Smith and pointed his gun at her. She screamed for all to hear, "Bill Bumber, please don't shoot me." Bumber then fled the scene. As Ms. Smith turned, she saw a police officer and immediately shouted, "There goes Bill Bumber. He just robbed the bank. Be careful—he's got a gun." At Bumber's trial the prosecution calls, on the issue of identity, the police officer to testify that he heard both statements and to relate their contents. Both statements appear to meet the present sense impression[401] and excited utterance exceptions[402] to the hearsay rule. Whether the defendant's right of confrontation requires the prosecution to account for Ms. Smith's nonappearance before the officer may testify to the statements he overheard should depend on whether the statements were accusatory when made.

Ms. Smith's first statement—"Bill Bumber, please don't shoot me"—was not accusatory when made. Ms. Smith did not have the purpose of imputing criminal conduct to Bumber or of accusing him of anything, but only of persuading Bumber not to hurt her. Nor did Ms. Smith make the statement at the behest of a police officer or other authority figure whom Ms. Smith might anticipate would be involved in investigating or prosecuting the robbery. Thus, as to Ms. Smith's first statement, she is not a witness against defendant Bumber, and the confrontation clause should not apply to the admission of the hearsay statement. On the other hand, Ms. Smith's second statement, which she directed to the police officer, was accusatory when made. Ms. Smith had the purpose of charging Bumber with criminal conduct, and she could reasonably anticipate that the statement would assist the authorities in apprehending and prosecuting Bumber. Accordingly, even though the second statement would be substantively admissible under the rules of evidence without regard to availability, the con-

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to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluative reports under item (c) is very specific; they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Id.

401. FED. R. EVID. 803(1).

402. FED. R. EVID. 803(2).

frontation clause should require that the prosecution account for Ms. Smith's nonappearance before the police officer testifies about the contents of the statement.

Returning to the hypothetical case of Alice, five of Alice's six statements were made under circumstances that should require her production at trial or a showing of unavailability before they may be admitted in satisfaction of the confrontation clause. Each assertion contains an accusation. To the extent that each statement seeks prevention of future occurrences or identifies the defendant, the confrontation clause should require Alice's appearance or unavailability. Only the statement to the examining physician may not implicate the confrontation clause, and then only to the extent the statement seeks physical medical treatment.

VI. CONCLUSION

Current confrontation clause analysis focusing on reliability, and correspondingly the utility of cross-examination, necessity, benefit, and burden is, as Justice Harlan has said, not well suited for testing the rules of evidence.[403] The error in previous confrontation clause analysis is that hearsay declarants were deemed witnesses against the defendant on the sole ground that the prosecution offered the hearsay declaration at trial. A better interpretation of the confrontation clause is that a nonappearing but available hearsay declarant is a witness against the defendant only if the circumstances surrounding the making of the declaration indicate that it was accusatory in nature when made. Under this interpretation, the confrontation clause could be restated as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be present and to cross-examine his accusers if they are available.

The right of confrontation would still prescribe only a rule of preference and would be satisfied whenever a declarant was truly unavailable. The defendant would retain the right to cross-examine every witness that the prosecution produces at trial. As to available witnesses not produced, however, the confrontation clause would bar only the admission of hearsay declarations accusatory in nature when made. As suggested by Harlan, the command of the fifth and fourteenth amendments that federal and state trials be conducted in accordance with

403. Dutton v. Evans, 400 U.S. 74, 96 (1970) (Harlan, J., concurring); *see supra* note 351 (quoting *Evans*, 400 U.S. at 96).

due process of law would determine the appropriateness of evidentiary rules.[404] This interpretation would have the salutary result that the confrontation clause would not apply to statements admitted under most hearsay exceptions and thus would not impair the usefulness of those exceptions. Moreover, the interpretation would not constitutionalize the hearsay rule and its exceptions, and it would satisfy the core meaning of the confrontation clause.

404. *Evans*, 400 U.S. at 96-97.