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THE CONFRONTATION CLAUSE AND THE HEARSAY RULE: A PROBLEMATIC RELATIONSHIP IN NEED OF A PRACTICAL ANALYSIS

JOEL R. BROWN

A FREQUENTLY arising problem in criminal litigation involves the relationship between the exceptions to the hearsay rule and the sixth amendment confrontation clause. The origin of this problematic relationship can easily be traced. The express language of the confrontation clause guarantees that the accused has the right to confront witnesses against him. The effect of a strict application of the confrontation clause is diametrically opposed to the introduction of evidence under a hearsay rule exception.

In this Comment, the author focuses primarily on how the federal courts have dealt with this conflict. A brief history of the confrontation clause and the hearsay rule is followed by a discussion of *Ohio v. Roberts*,¹ an important 1980 Supreme Court decision putatively promulgating a functional, uniform standard for approaching the confrontation problem. After discussing how the Florida and federal courts dealt with the *Roberts* standard, the author examines *United States v. Inadi*,² a recent Supreme Court case that partially rejects *Roberts*. This decision's likely effect on future confrontation challenges is also discussed.

I. HISTORY OF THE CONFRONTATION CLAUSE AND HEARSAY EVIDENCE

The sixth amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."³ In 1965, the Supreme Court applied the confrontation clause to the states through the fourteenth amendment.⁴ Additionally, almost every state constitution contains a similar provision.⁵

In *Mattox v. United States*,⁶ an 1895 Supreme Court decision, *Mattox* argued that at his second trial—which resulted from an appeal and remand—the court should exclude testimony given by

1. 448 U.S. 56 (1980).

2. 106 S. Ct. 1121 (1986).

3. U.S. CONST. amend. VI.

4. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

5. Collected at 5 J. WIGMORE, EVIDENCE § 1397 (rev. ed. 1974). Florida's confrontation clause is found in FLA. CONST. art. I, § 16.

6. 156 U.S. 237 (1895).

two witnesses who had died since testifying at his first trial. Though both witnesses had been fully cross-examined at the former trial, the defendant charged that admitting the testimony infringed on his sixth amendment right of confrontation.⁷

In permitting the introduction of the testimony, the Supreme Court explained the two-fold purpose underlying the confrontation clause. First, it affords the defendant an opportunity to cross-examine the witness, thereby allowing the defendant to test the witness' memory and possibly elicit some information that might aid in his defense. Second, it gives the jury an opportunity to observe the witness' demeanor and determine his credibility.⁸

The hearsay rule is based largely on the same interests that underlie the confrontation clause. In *California v. Green*,⁹ the Court noted, "The whole purpose of the Hearsay rule has been already satisfied [because] the witness is present and subject to cross-examination [and] [t]here is ample opportunity to test him as to the basis for his former statement." This statement of purpose is similar to the Court's explanation of the confrontation clause in *Mattox*.¹⁰

The purpose of the hearsay rule and the purpose and language of the confrontation clause apparently provide a basis for challenging practically any evidence submitted under the exceptions to the hearsay rule. The Supreme Court, however, has refused to apply the literal language of the confrontation clause which would effectively eliminate all hearsay exceptions.¹¹ Unfortunately, the Court has not yet formulated a uniform standard to deal with the relationship between the hearsay rule and the confrontation clause. Consequently, courts have been faced with confrontation challenges in a myriad of contexts with conflicting results.

7. *Id.* at 240, 245.

8. *Id.* at 242-43. The Court explained in an often-quoted passage:

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, being used against the prisoner in lieu of a personal examination . . . of the witness . . . in which the accused has an opportunity . . . [to compel the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id.

9. 399 U.S. 149, 155 (1970) (brackets in original) (footnote omitted).

10. See *supra* note 8 and accompanying text.

11. See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980).

II. MODERN APPLICATION OF THE CONFRONTATION CLAUSE

The Supreme Court has addressed the effect of the confrontation clause on otherwise admissible hearsay evidence on several occasions. *Ohio v. Roberts*¹² was a recent effort by the Supreme Court to clarify the standards for determining when hearsay evidence can be admitted without offending a defendant's confrontation right.

A. *Roberts and its Progeny*

Roberts was charged with forging a check and possessing stolen credit cards.¹³ At his trial the prosecution relied on an Ohio statute to introduce a transcript of testimony elicited at Robert's preliminary hearing from a witness who had since become unavailable.¹⁴ The witness had left the jurisdiction and her location was unknown. The Supreme Court ruled that the testimony could be constitutionally admitted under the confrontation clause.¹⁵

In dealing with the former testimony exception to the hearsay rule,¹⁶ the Court noted that the confrontation clause limits the admissibility of hearsay evidence in two ways. First, the clause establishes an unavailability rule. In other words, "[i]n the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use

12. 448 U.S. 56 (1980).

13. *Id.* at 58.

14. *Id.* at 59. The Ohio statute provided:

Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

OHIO REV. CODE ANN. § 2945.49 (Page 1975).

15. *Roberts*, 448 U.S. at 77.

16. The former testimony exception is found in FED. R. EVID. 804(b)(1), which provides:
(b) Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony

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

against the defendant."¹⁷ Second, to promote accuracy in the factfinding process, the hearsay must be marked with adequate "indicia of reliability" when the witness is shown to be unavailable.¹⁸

The reliability prong of the *Roberts* test is satisfied if the evidence "falls within a firmly rooted hearsay exception."¹⁹ The Court deems this dispositive of reliability. However, if the evidence does not come under a firmly rooted exception, the proponent must show "particularized guarantees of trustworthiness" to avoid exclusion of the evidence.²⁰

A strong majority of the federal courts of appeals have determined that the two-pronged test promulgated in *Roberts* applies to a wide range of hearsay exceptions. The coconspirator exception, which must satisfy the confrontation clause even though classified as nonhearsay in the Federal Rules of Evidence,²¹ provides a good example of how *Roberts* has been applied. Every circuit that has addressed the coconspirator exception, except for one,²² either impliedly or expressly has decided that such evidence must satisfy the *Roberts* test before it can be properly admitted.²³

In *United States v. Massa*,²⁴ James Massa and Duane Skinner had been convicted after allegedly participating in an elaborate swindling scheme devised by Thomas Brimberry, an unindicted coconspirator. While being investigated by the Internal Revenue Service, Brimberry made a deal with the government resulting in his testimony against Skinner and Massa.²⁵

On appeal, the United States Court of Appeals for the Eighth Circuit decided that any error in admitting Brimberry's testimony was harmless, but noted the *Roberts* Court clearly intended the requisites of unavailability and reliability to be applicable in other

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

18. *Id.*

19. *Id.* at 66.

20. *Id.*

21. FED. R. EVID. 801(d)(2)(E) provides that a statement is not hearsay if "[t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during a course and in furtherance of the conspiracy."

22. The exception is the United States Court of Appeals for the Seventh Circuit. See *United States v. Molt*, 758 F.2d 1198 (7th Cir. 1985), cert. denied, 106 S. Ct. 1458 (1986).

23. In *United States v. Inadi*, 106 S. Ct. 1121 (1986), the Supreme Court rejected the apparent majority rule, holding that evidence submitted under the coconspirator exception need not satisfy the *Roberts* unavailability prong. See *infra* text accompanying notes 114-25.

24. 740 F.2d 629 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985).

25. *Id.* at 635. Brimberry lost the benefit of the deal, however, because he lied to the grand jury. *Id.* at 635 n.1.

than the former testimony context which was specifically addressed in *Roberts*.²⁶ The court reasoned that the competing interests recognized and addressed in *Roberts* are "implicated no matter what hearsay exception is used to justify the admission of an out-of-court statement."²⁷ Further, the court observed that even though *Roberts* only addressed hearsay exceptions, the same interests are at stake when the statements of coconspirators are admitted as nonhearsay. The court concluded 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."²⁸

Most of the other circuits addressing the coconspirator rule assumed *Roberts* applied.²⁹ For example, in *United States v. Bourjaily*,³⁰ the defendant argued that his right of confrontation had been violated when the statements of his codefendant were admitted under the coconspirator exception. Bourjaily claimed that even if the statements satisfied the coconspirator exception mandates, the confrontation clause required a more stringent admissibility standard which was not met.³¹

The United States Court of Appeals for the Sixth Circuit stated that notwithstanding its prior decisions which "held that evidence admitted as a co-conspirator's statement . . . automatically satisfie[d] the sixth amendment requirements, . . . none of [those] cases discuss[ed] the implications of the two-pronged test of *Roberts* on [its] analysis."³² The court then proceeded with a *Roberts*-type analysis, concluding that the witness was unavailable and that the reliability test was satisfied because the testimony fell within a firmly rooted hearsay exception.³³

The United States Court of Appeals for the Seventh Circuit apparently stood alone in its refusal to apply *Roberts* in the coconspirator exception context. In *United States v. Williams*,³⁴ the

26. *Id.* at 639.

27. *Id.*

28. *Id.*

29. See, e.g., *United States v. Caputo*, 758 F.2d 944, 951 (3d Cir. 1985); *United States v. Lisotto*, 722 F.2d 85, 88 (4th Cir. 1983), *cert. denied*, 466 U.S. 905 (1984); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983).

30. 781 F.2d 539, 541 (6th Cir.), *cert. granted*, 107 S. Ct. 268 (1986).

31. *Id.*

32. *Id.* at 543.

33. *Id.* at 543-44.

34. 737 F.2d 594 (7th Cir. 1984). The court stated that "It should be plain to litigants that absent very persuasive reasons to overrule these cases, or a command from a higher

court did not even cite *Roberts* and concluded that its ruling of admissibility under the coconspirator exception precluded any confrontation challenge. Subsequently, in *United States v. Molt*,³⁵ the defendant, Emerson Molt, challenged the admission of testimony by narcotics users regarding conversations he had with alleged coconspirators. The court, speaking through Judge Posner, emphatically explained that the coconspirator exception "makes 'a statement by a coconspirator . . . during the course and in furtherance of the conspiracy' admissible against [the defendant]—period."³⁶ The court further noted, "There is no requirement of showing that the out-of-court declarant is unavailable, or that there is some special reason to think the evidence is reliable."³⁷ Thus, the Seventh Circuit acknowledged no situation in which a confrontation clause challenge would prevent the admission of evidence otherwise admissible under the coconspirator exception.

The federal appellate courts also applied *Roberts*' two-pronged test to exceptions other than the former testimony and coconspirator exceptions. In *Hutchins v. Wainwright*,³⁸ Michael Hutchins had been convicted of armed robbery and assault with intent to commit second degree murder. Other than the victim, only an unnamed informant—who refused to testify—could identify Hutchins as the perpetrator. The United States Court of Appeals for the Eleventh Circuit refused to admit the testimony of the unnamed informant based on the prosecutor's failure to establish the informant's unavailability or the reliability of the hearsay statements.³⁹

In *Haggins v. Warden, Fort Pillow State Farm*,⁴⁰ a child sexual assault victim told two nurses and a police officer the name of the person who had committed the crime—Wilbert Haggins. The Tennessee Supreme Court affirmed his conviction, and Haggins filed a petition for writ of habeas corpus in federal district court, arguing that his right of confrontation had been violated by admission of the child's inculpatory statements through the police officer and nurses.⁴¹ The Sixth Circuit affirmed the district court's denial of

authority, challenges to co-conspirators' statements should be based on the requirements of Rule 801(d)(2)(E), not on the Sixth Amendment." *Id.* at 610.

35. 758 F.2d 1198 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1458 (1986).

36. *Id.* at 1199 (quoting FED. R. EVID. 801(d)(2)(E)).

37. *Id.*

38. 715 F.2d 512, 514 (11th Cir. 1983), *cert. denied*, 465 U.S. 1071 (1984).

39. *Id.* at 516.

40. 715 F.2d 1050, 1052-53 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

41. *Id.* at 1053.

the writ after finding that the testimony satisfied the two-pronged *Roberts* test. The court reasoned that the child declarant had been declared incompetent to testify, thus she was clearly unavailable and the excited utterance exception was deemed firmly rooted.⁴²

In *United States v. Washington*,⁴³ a county official was convicted of mail fraud. He purchased supplies for the county at inflated prices in order to receive bribes and kickbacks from the sellers. The United States Court of Appeals for the Fifth Circuit reversed Washington's conviction, but never reached the issue of the admissibility of the records used as evidence of the illegal kickback scheme. However, in dicta the court recognized that the *Roberts* test applied when determining the admissibility of evidence under the business records exception to the hearsay rule.⁴⁴ The court suggested that "[i]f the government should again try Washington and it should again use the sellers' business records, the district court should require adherence to the *Roberts* test."⁴⁵

In *Lenza v. Wyrick*,⁴⁶ the Eighth Circuit applied the *Roberts* test to the admission of statements under the state-of-mind exception.⁴⁷ The defendant, Michael Lenza, had been convicted of second-degree murder. At his trial, the court admitted testimony re-

42. *Id.* at 1053-55.

43. 688 F.2d 953, 955 (5th Cir. 1982).

44. The business records exception is found in FED. R. EVID. 803(6), which provides: The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...
(6) Records of regularly conducted activity

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

45. *Washington*, 688 F.2d at 959.

46. 665 F.2d 804 (8th Cir. 1981).

47. The state-of-mind exception is found in FED. R. EVID. 803(3), which provides: The following are not excluded by the hearsay rule if the declarant is available as a witness:

...
(3) Then existing mental, emotional, or physical condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the

garding conversations between the witnesses and the victim and her mother. Lenza objected to the admission of the extrajudicial statements as hearsay and violative of his right of confrontation.⁴⁸ After concluding that *Roberts* applied, the court determined that the testimony had been properly admitted because the declarants were indisputably unavailable—some had died and the location of the others was unknown. As to the reliability of the declarant's testimony, it could be presumed because it fell within the firmly rooted state-of-mind exception.⁴⁹

Although no federal appellate court has addressed *Roberts'* applicability to the statement against interest exception to the hearsay rule,⁵⁰ the United States District Court for the Middle District of Pennsylvania in *United States v. H & M, Inc.*⁵¹ held that the *Roberts* test applied to this exception. Four individuals and two corporations had been convicted of conspiring in unreasonable restraint of interstate trade and commerce. On appeal, the defendants challenged the admission of testimony regarding inculpatory statements made by a declarant who had since died.⁵² The court decided that the testimony could be admitted because the declarant was unavailable and the circumstances accompanying the declarant's statements satisfied the particularized guarantees of trustworthiness requirement. In concluding that the statements satisfied *Roberts'* reliability prong, the court emphasized that the declarant had been subject to cross-examination.⁵³

fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

48. *Lenza*, 665 F.2d at 809-10.

49. *Id.* at 810.

50. The statement against interest exception is found in Fed. R. Evid. 804(b)(3), which provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . .

(3) Statement against interest

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the same statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

51. 562 F. Supp. 651 (M.D. Pa. 1983).

52. *Id.* at 655, 662.

53. *Id.* at 669.

The Eleventh Circuit applied *Roberts* in determining the admissibility of testimony under Georgia's *res gestae* exception in *Williams v. Melton*.⁵⁴ Hosea Williams had been convicted of leaving the scene of an accident without rendering aid. At trial, the judge admitted the hearsay testimony of three witnesses to the accident under the *res gestae* exception.⁵⁵ Williams filed a federal habeas corpus petition following his conviction, and the federal district court granted the petition based in part on a finding that admission of the hearsay evidence violated the defendant's confrontation right.⁵⁶ In reversing the district court, the Eleventh Circuit concluded that *Roberts* applied and that the disputed testimony satisfied both the reliability and unavailability requirements.⁵⁷ The parties had agreed that the hearsay declarant was unavailable, thus the court needed only to test the statements under *Roberts'* reliability prong. In finding that the statements satisfied the reliability prong, the court emphasized the compelling circumstantial evidence presented at trial linking Williams to the accident.⁵⁸

The federal courts that invoke *Roberts* apply the unavailability prong more uniformly than the reliability prong. The diverse application of the reliability prong is due to disagreement over what constitutes a "firmly rooted" exception.⁵⁹ The Court in *Roberts* recited four hearsay exceptions it considered to be firmly rooted: dying declarations, cross-examined prior testimony, and the business and public records exceptions.⁶⁰ The Court did not, however, inti-

54. 733 F.2d 1492 (11th Cir.), cert. denied, 469 U.S. 1073 (1984).

55. *Id.* at 1494. Georgia's *res gestae* exception provides: "When declarations part of *res gestae*. Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the *res gestae*." GA. CODE ANN. § 24-3-3 (1982).

56. *Williams v. Melton*, 568 F. Supp. 104 (N.D. Ga. 1983).

57. *Williams*, 733 F.2d at 1496.

58. Among the evidence the court considered convincing were various documents found in the abandoned car addressed to and from Williams as well as the car rental agreement signed by Williams' wife. Further, an accident specialist testified that Williams' wound was consistent with the likely pattern of impact on the driver of the abandoned car. Finally, one of Williams' customers testified that she had given him a plastic bag of tomatoes that night and later she had seen him leave the business with the tomatoes. A plastic bag of tomatoes was found in the abandoned car. *Id.*

59. Notwithstanding the "firmly rooted" problem, the generally recognized elements of reliability of testimony are the quality of the declarant's memory, clarity of expression, perception, and sincerity. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974).

60. *Roberts*, 448 U.S. at 66 n.8.

Dying declaration and cross-examined prior testimony exceptions are found in FED. R. EVID. 804(b)(1), (2):

(b) Hearsay exceptions

mate that the list was exhaustive, and no further guidance has been forthcoming.

The proper classification of the coconspirator exception provides a good example of the dissension among federal circuit courts. In *United States v. Lurz*,⁶¹ the defendant, Raymond Lurz, had been convicted of conspiring to manufacture, distribute, and possess phencyclidine (PCP). The trial court had admitted coconspirator statements implicating Lurz.⁶² On appeal, the Fourth Circuit held that statements under the coconspirator exception are per se admissible without violating the confrontation clause.⁶³ The court

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony

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

(2) Statement under belief of impending death

In a prosecution for homicide or in a civil action proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

Business and public records exceptions are found in FED. R. EVID. 803(6), (8):

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(6) Records of regularly conducted activity

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

...

(8) Public records and reports

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 source of information or other circumstances indicate lack of trustworthiness.

61. 666 F.2d 69, 73 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982).

62. *Id.* at 80.

63. *Id.* at 80-81.

also intimated that once a statement falls under an exception, it is per se admissible without showing any indicia of reliability after the unavailability prong has been satisfied.⁶⁴ Other circuits have adopted this per se approach with little or no elaboration.⁶⁵

The United States Court of Appeals for the Ninth Circuit has disagreed with the presumed reliability of evidence which satisfied the coconspirator exception. In *United States v. Ordonez*,⁶⁶ German Hernandez-Garcia and Oscar Ordonez had been convicted of conspiracy to possess and distribute cocaine after the trial court admitted ledgers implicating them in illegal transactions. The prosecution was unable to identify the persons who had made several entries into the ledger. Further, the prosecution failed to establish that the unidentified persons were unavailable to testify or even that a good faith effort had been made to secure their testimony.⁶⁷

On appeal, the Ninth Circuit expressly rejected the per se admissibility of statements satisfying the coconspirator exception, concluding that the hearsay exception requirements and the confrontation clause requirements are not identical. The court explained that

[i]n determining whether the Confrontation Clause has been violated where a co-conspirator's statement is offered, a trial court must find that the circumstances under which the statements were made present a sufficient "indicia of reliability" so that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."⁶⁸

Unlike the Fourth Circuit in *Lurz*, the Ninth Circuit required a showing of reliability in conjunction with unavailability in order to satisfy the confrontation clause.

64. The court bluntly stated: "The Lurz statements came in under F.R.E. 801(d)(2)(E) as exceptions to the hearsay rule. So admitted, they do not violate the confrontation clause." *Id.*

65. See, e.g., *United States v. Wolfe*, 766 F.2d 1525 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1379 (1986); *Boone v. Marshall*, 760 F.2d 117 (6th Cir. 1985); *United States v. Molt*, 758 F.2d 1198 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1458 (1986); *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983).

66. 737 F.2d 793, 796 (9th Cir. 1983).

67. *Id.* at 802.

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

Courts rejecting the per se reliability approach largely rely on the analysis suggested in *Dutton v. Evans*.⁶⁹ In *Dutton*, Alex Evans had been convicted of murder and sentenced to death. A fellow prisoner of Venson Williams, one of Evans' accomplices, had testified for the prosecution at Evans' trial.⁷⁰ Defense counsel objected to Williams' testimony as hearsay and violative of Evans' right of confrontation and sought a writ of habeas corpus, which the district court denied. The Fifth Circuit reversed, finding that the defendant's confrontation right had been violated.⁷¹

In reversing the Fifth Circuit, the Supreme Court identified four factors that it considered pertinent in determining the reliability of hearsay testimony submitted under the coconspirator exception: (1) whether the statement contained assertions of past fact, (2) whether the declarant had personal knowledge of the identity and role of the other participants in the crime, (3) whether it was possible that the declarant's statement was based on 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 role in the crime.⁷² Courts applying this reliability analysis have largely recognized that all of the listed factors need not be present to support a confrontation clause challenge.⁷³

The Third and Eighth Circuits took the interesting position that the coconspirator exception is not only not a firmly rooted exception, it is not an exception at all. In *United States v. Ammar*,⁷⁴ Judith Ammar and others had been convicted of conspiracy for the importation and distribution of heroin. Two of the defendants pleaded guilty and testified for the prosecution.⁷⁵ The Third Circuit affirmed the trial court's decision to admit the testimony but noted that the "coconspirator statements are not technically hear-

69. 400 U.S. 74 (1970). Two decisions applying the *Dutton* analysis are *United States v. Ammar*, 714 F.2d 238 (3d Cir.), cert. denied, 464 U.S. 936 (1983), and *United States v. Perez*, 658 F.2d 654 (9th Cir. 1981).

70. *Id.* at 77. The witness testified that when the defendant's coconspirator returned from arraignment, he told the witness, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." *Id.*

71. *Evans v. Dutton*, 400 F.2d 826 (5th Cir. 1968).

72. *Dutton*, 400 U.S. at 88-89.

73. See, e.g., *Williams v. Melton*, 733 F.2d 1492, 1497 (11th Cir.), cert. denied, 469 U.S. 1073 (1984); *United States v. Perez*, 658 F.2d 654, 661 (9th Cir. 1981).

74. 714 F.2d 238 (3d Cir.), cert. denied, 464 U.S. 936 (1983).

75. *Id.* at 243.

say" because they are characterized "along with admissions as '[s]tatements which are not hearsay' under Rule 801(d)(2)."⁷⁶

Similarly, in *United States v. Massa*,⁷⁷ the Eighth Circuit concluded that coconspirator statements are admissions rather than an exception to the hearsay rule. The court also reasoned that "[a]dmissions are not admitted because of confidence in their inherent reliability; rather, they are admitted because 'a party will not be heard to object that s/he is unworthy of credence.'"⁷⁸ Thus, a less stringent admissibility standard was used under the coconspirator exception than would be used under a confrontation clause challenge.

The position taken by the courts in *Massa* and *Ammar*, although creative, has questionable merit. The categorization of an out-of-court statement as an exception to the Federal Rules of Evidence usually does not control whether the confrontation clause is implicated.⁷⁹ Instead, courts normally treat statements by coconspirators as hearsay admissible under the admissions exception to the hearsay rule.⁸⁰

In determining whether the other hearsay exceptions constitute firmly rooted exceptions under the *Roberts* reliability prong, the federal appellate courts have relied on conclusory observations rather than in-depth analysis. For instance, in *Haggins v. Warden, Fort Pillow State Farm*,⁸¹ the Sixth Circuit addressed the excited utterance exception and summarily decided: "The declarations fit squarely within the parameters of a well-recognized and firmly-rooted hearsay exception. . . . Thus, under *Ohio v. Roberts*, we

76. *Id.* at 255; see *supra* note 21 for the substance of Rule 801(d)(2)(E).

77. 740 F.2d 629, 639 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

78. *Id.* (quoting *Ammar*, 714 F.2d at 255).

79. In *Tennessee v. Street*, 105 S. Ct. 2078, 2082 (1985), the Court noted, "If the jury had been asked to infer that [the witness'] confession proved that respondent participated in the murder, then the evidence would have been hearsay; and because [the witness] was not available for cross-examination, Confrontation Clause concerns would have been implicated." *Id.* One could plausibly argue that by distinguishing between hearsay and nonhearsay in this manner, the Court left open the possibility that the confrontation clause does not apply to coconspirator statements at all because, like the rebutting testimony, these statements are not considered hearsay.

However, in *United States v. Inadi*, 106 S. Ct. 1121 (1986), the Court appeared to foreclose that argument: "Federal Rule of Evidence 801 characterizes out-of-court statements by co-conspirators as exemptions from, rather than exceptions to, the hearsay rule. Whether such statements are termed exemptions or exceptions, the same Confrontation Clause principles apply." *Id.* at 1128 n.12.

80. 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* para. 801(d)(2)(01) (1985).

81. 715 F.2d 1050, 1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

may infer that the statements carry sufficient indicia of reliability to satisfy the policies protected by the confrontation clause.”

The Eighth Circuit, in *Lenza v. Wyrick*,⁸² used a similar per se application without explanation. After discussing *Roberts* and determining that the availability prong was satisfied, the court stated: “In the present case the challenged testimony falls within the ‘state of mind’ exception to the hearsay rule, and thus reliability may be inferred.”⁸³ This implies that reliability may be inferred from hearsay admissible under any of the recognized hearsay exceptions and that the confrontation clause is no obstacle.

In *Williams v. Melton*,⁸⁴ the Eleventh Circuit took a unique approach with regard to Georgia’s *res gestae* exception. The court quoted the language in *Roberts* which indicated that reliability can be inferred when the evidence falls within a firmly rooted hearsay exception. The court concluded, however, that “this language in *Roberts* is only *dicta* because the Court did not find a firmly rooted hearsay exception.”⁸⁵ Further, the court noted that “it would be possible for a court to apply Georgia’s firmly rooted *res gestae* exception in an unconstitutional manner.”⁸⁶ However, the court ultimately admitted the evidence, stating that there was substantial circumstantial evidence which provided the needed indicia of reliability.⁸⁷

The court in *United States v. H & M, Inc.*⁸⁸ skirted the classification problem. After citing *Roberts*, the court stated that it “assume[d], without deciding, that the statement against interest hearsay exception is not a firmly rooted one, thus mandating use of the ‘particularized guarantees of trustworthiness test’ in this case.”⁸⁹ Although this approach does not evince judicial decisiveness, the opportunity for constitutional infringement and reversal was necessarily limited.

B. Florida’s Application of the Confrontation Clause

Florida courts have also encountered difficulty in defining the relationship between the confrontation clause and the hearsay rule.

82. 665 F.2d 804 (8th Cir. 1981).

83. *Id.* at 811.

84. 733 F.2d 1492 (11th Cir.), *cert. denied*, 469 U.S. 1073 (1984).

85. *Id.* at 1495 (emphasis in original).

86. *Id.*

87. *Id.* at 1496.

88. 562 F. Supp. 651 (M.D. Pa. 1983).

89. *Id.* at 668 n.11.

The courts, however, have not been faced with an abundance of situations in which it was necessary to address the troublesome relationship.

In *State v. Basiliere*,⁹⁰ a pre-*Roberts* case, the defendant, Ronald Basiliere, had been charged with aggravated battery. Basiliere's attorney deposed the victim when Basiliere was not present; the victim subsequently died before the trial.⁹¹ The prosecution sought to have the deposition introduced at trial, thereby prompting the trial court to certify questions regarding the admissibility of the deposition testimony.⁹² The Florida Supreme Court found that the confrontation clause is violated when a trial court admits into evidence a discovery deposition taken by the defendant's counsel when the defendant was not present and the witness has become unavailable.⁹³

Although the *Roberts* decision would arguably alter the result in *Basiliere*, the Florida Supreme Court has declined to change its position. For example, in *State v. James*,⁹⁴ the Fifth District Court of Appeal asked the Florida Supreme Court to decide whether *Roberts* permitted a discovery deposition to be admitted into evidence against a defendant when the defendant was present at the deposition, or upon waiver of presence if the witness had become unavailable to testify.⁹⁵ *James* presented essentially the same factual situation as *Basiliere* in that the prosecution, due to the victim's death before trial, sought to introduce the victim's deposition testimony taken by the defendant's attorney. The court decided

90. 353 So. 2d 820 (Fla. 1977).

91. *Id.* at 821-22.

92. The trial court certified the following questions:

I. Whether the use of the deposition testimony at trial violates defendant's confrontation rights under the Sixth Amendment to the United States Constitution and under Article I, Section 16, Florida Constitution, inasmuch as the defendant was not present during the taking of the deposition by his attorney and defendant received no notice that said deposition could be used at his trial.

II. Whether Fla.R.Crim.P. 3.220(d), which provides for discovery depositions and says that they 'may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness,' yet does not provide, as does the comparable Fla.R.Civ.P. 1.330(a)(3), for the use of said deposition as evidence at trial upon a finding of unavailability of the witness, precludes the use of the deposition testimony as evidence at trial upon the finding of unavailability of the witness.

Id. at 822.

93. *Id.* at 823-25.

94. 402 So. 2d 1169 (Fla. 1981).

95. *Id.* at 1170.

that criminal procedure rules⁹⁶ precluded discovery depositions from being used as substantive evidence in criminal trials; therefore, the court refused to rule on the allegation that the use of the deposition violated the confrontation clause.⁹⁷

In *Terrell v. State*,⁹⁸ the First District Court of Appeal applied *Basilere* and *James* to a case once again involving a prosecutor's attempt to introduce a deposition as substantive evidence when the witness was unavailable. Terrell, the defendant, appealed his conviction for possession of illegal drugs alleging that the deposition of the informant—who had arranged and participated in the

96. The rules referred to by the court were FLA. R. CRIM. P. 3.220(d), which provides:

(d) Discovery Depositions. At any time after the filing of the indictment or information the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged. The deposition shall be taken in a building where the trial may be held, such other place agreed upon by the parties or where the trial court may designate by special or general order. The party taking the deposition shall give written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name of each person to be examined. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the place of taking. Except as provided herein, the procedure for taking such deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant hereto may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. The trial court or its clerk shall, upon application, issue subpoenas for the persons whose depositions are to be taken. A resident of the State may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued[;]

and FLA. R. CRIM. P. 3.190(j), which provides in part:

(j) Motion to Take Deposition to Perpetuate Testimony.

(1) After an indictment or information upon which a defendant is to be tried is filed, the defendant or the State may apply for an order to perpetuate testimony. The application shall be verified or supported by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition to prevent a failure of justice. The court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If the application is made within ten days before the trial date, the court may deny the application.

(2) If the defendant or the State desires to perpetuate the testimony of a witness living in or out of the State whose testimony is material and necessary to the case, the same proceedings shall be followed as provided in the preceding subdivision, but the testimony of the witness may be taken before an official court reporter, transcribed by him and filed in the trial court.

97. *James*, 402 So. 2d at 1171.

98. 407 So. 2d 1039, 1040 (Fla. 1st DCA 1981).

drug transaction—should not be admitted into evidence. The court refused to admit the deposition, not on confrontation grounds, but because it failed to comply with Florida's criminal procedure rules.⁹⁹ The court reasoned that the statutory exception for former testimony recognizes the necessity for meeting the procedural requirements because it provides that the deposition must be "taken in compliance with law."¹⁰⁰ Thus, the court concluded that the evidence must satisfy procedural requirements before any hearsay or confrontation issues arise.

Probably the most common situation in which confrontation problems arise in Florida involves the statements of coconspirators or codefendants. The Florida Supreme Court most recently addressed this issue in *Nelson v. State*.¹⁰¹ In *Nelson*, the trial court had admitted into evidence under the statement against interest exception taped conversations of codefendants incriminating the defendant.¹⁰² In reversing the trial court, the supreme court noted that the clear language of the statutory hearsay exception precluded the tape's admission. Further, the court observed that because defense counsel could not cross-examine a tape recording, "[t]he admission of a confession of a codefendant who does not take the stand deprives a defendant of his rights under the sixth amendment confrontation clause."¹⁰³ Finally, the court decided that the prosecution had not established an adequate predicate in order to introduce the evidence under the coconspirator exception, thereby obviating the need to address the confrontation clause.¹⁰⁴

In *Priestly v. State*,¹⁰⁵ the Fourth District Court of Appeal was faced with a confrontation clause challenge to hearsay otherwise admissible under the coconspirator exception. Darrell Priestly and his son appealed their convictions for trafficking and conspiring to traffic in marijuana. They argued that the trial court erroneously admitted tape recordings of a coconspirator's incriminating conver-

99. *Id.* at 1041. The rule referred to by the court was FLA. R. CRIM. P. 3.220(d), *see supra* note 96. The court remarked that *James and Basiliere* "reach[ed] the unequivocal conclusion that a deposition taken pursuant to Rule 3.220(d) may be used for impeachment purposes only." *Terrell*, 407 So. 2d at 1041.

100. *Id.* (quoting FLA. STAT. § 90.804(2)(a) (1981)).

101. 490 So. 2d 32 (Fla. 1986).

102. *Id.* at 34. The statement against interest exception provides in part: "A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within this exception." FLA. STAT. § 90.804(2)(c) (1985).

103. *Nelson*, 490 So. 2d at 34 (citations omitted).

104. *Id.* at 35.

105. 450 So. 2d 289 (Fla. 4th DCA 1984).

sations.¹⁰⁶ The court acknowledged that “[t]here was no clearcut answer to the question whether a statement of a coconspirator admissible under the Federal Rules of Evidence is inadmissible because of the Confrontation Clause.”¹⁰⁷ However, without any discussion other than recitation of the holding in an analogous federal case, the court decided that no confrontation right was violated by admitting the evidence.¹⁰⁸

In *Maugeri v. State*,¹⁰⁹ the Third District Court of Appeal was also faced with a confrontation clause challenge to testimony admitted under the statement against interest exception. The defendant, Joseph Maugeri, appealed his first-degree murder and burglary convictions, alleging that the trial court should have disallowed the victim’s live-in girlfriend’s testimony. She testified that the victim had told her that he had stolen two kilograms of cocaine from Maugeri’s airplane. Maugeri had claimed that only cash had been stolen.¹¹⁰ In its confrontation clause analysis, the court stated that “[e]ven though the hearsay statement may pass muster under the statutory rule of evidence, it must also survive the constitutional scrutiny of the sixth amendment.”¹¹¹

In rejecting the per se finding of admissibility the court in *Maugeri* agreed with the Washington Supreme Court’s observation that “‘inculpatory statements are a ‘firmly rooted exception’ [and therefore generally admissible] if we add the proviso that they must be accompanied by corroborating circumstances clearly indicating their trustworthiness.’”¹¹² This rather confusing analysis exemplifies the awkwardness with which state courts have dealt with the confrontation problem. The primary defect in this analysis lies in the court mixing the firmly rooted language with a type of particularized guarantee of trustworthiness analysis. The Court in *Roberts* never intended to require a trustworthiness analysis for evidence submitted under a firmly rooted exception. Either an ex-

106. *Id.* at 290-91.

107. *Id.* at 291.

108. The case the court cited was *United States v. Swainson*, 548 F.2d 657 (6th Cir.), cert. denied, 431 U.S. 937 (1977), wherein the Sixth Circuit “held that the admission into evidence under the federal coconspirator rule of a tape containing a conversation between two of three conspirators did not violate the constitutional right to confrontation of the third conspirator.” *Priestly*, 450 So. 2d at 291.

109. 460 So. 2d 975 (Fla. 3d DCA 1984).

110. *Id.* at 976.

111. *Id.* at 977-78.

112. *Id.* at 978 (quoting *State v. Parris*, 654 P.2d 77, 81 (Wash. 1982)).

ception is firmly rooted resulting in presumed reliability, or it is not firmly rooted, necessitating a trustworthiness analysis.

In summary, Florida courts have not developed a practical analysis for dealing with the relationship between the confrontation clause and hearsay testimony. *Basilieri* still controls in the area of depositions serving as prior testimony. The subsequent decision in *Roberts* could have justifiably altered the result in *Basilieri*, but the Florida Supreme Court has not so held. Thus, the procedural hurdle of perpetuating the deposition testimony must first be cleared before a confrontation analysis is proper.¹¹³

The admissibility of evidence under the other hearsay exceptions vis a vis the confrontation clause remains uncertain. Unfortunately, the analysis in cases like *James* and *Maugeri* does not serve as a solid basis for predictability. Thus, Florida courts will likely continue to apply their unorthodox, if not incorrect, confrontation analysis until the United States Supreme Court develops a more thorough mode of analysis which the Florida Supreme Court or legislature will adopt.

III. *United States v. Inadi*

In 1986, the Supreme Court in *United States v. Inadi*¹¹⁴ narrowed the range of cases to which the *Roberts* unavailability prong applies. Joseph Inadi had been convicted of conspiring to manufacture and distribute methamphetamine. Over Inadi's objection, the trial court allowed the prosecution to introduce tape recorded statements made by Michael McKeon, an unindicted coconspirator, during telephone conversations with others involved in the conspiracy.¹¹⁵ Inadi appealed, arguing that the prosecution had failed to establish the declarant's unavailability as required by the confrontation clause.¹¹⁶

The Third Circuit reversed the trial court decision, holding that the prosecution must satisfy the *Roberts* unavailability prong as a condition to admission of statements that otherwise were admissi-

113. Although conceptually attractive because it serves as a safeguard, the procedural requirement is difficult to satisfy in daily situations. Neither party supposedly anticipates the unavailability of a witness, and thus procedural perpetuation of the deposition testimony normally does not occur. Consequently, the testimony is barred even though neither party had reason to believe that the perpetuation procedure was necessary.

114. 106 S. Ct. 1121 (1986).

115. *Id.* at 1124.

116. *Id.*

ble under the coconspirator exception.¹¹⁷ The court, relying on *Roberts*, held that the prosecution "bears the burden of producing the coconspirator-declarants or proving that they are unavailable."¹¹⁸

The Supreme Court reversed the Third Circuit and effectively limited *Roberts* to its facts.¹¹⁹ By limiting the *Roberts* confrontation clause analysis to hearsay offered under the former testimony exception, the Court rejected the broader construction given to *Roberts* by the federal circuits.¹²⁰ The Court declared that "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."¹²¹ The Court reasoned that the unavailability rule would not produce much testimony that promotes the truth-determining process, and such a rule would not actually exclude evidence unless the prosecution mistakenly did not produce an otherwise available declarant.¹²²

The Court further reasoned that an unavailability requirement would be useless in promoting the purposes of the confrontation clause if the prosecution does not want to call the coconspirator and the defense had not chosen to subpoena the witness.¹²³ However, the language of the confrontation clause apparently does not support this rationale because by shifting the burden of production to the accused, the hearsay declarant technically becomes a witness *for* rather than *against* the accused.¹²⁴ Shifting the burden also makes confrontation an opportunity rather than a right as provided in the sixth amendment. Further, as Justice Marshall pointed out in his dissent, when a defendant calls the declarant as

117. *United States v. Inadi*, 748 F.2d 812, 818-19 (3d Cir. 1984), *rev'd*, 106 S. Ct. 1121 (1986).

118. *Id.* at 819; *see supra* text accompanying note 17.

119. *Inadi*, 106 S. Ct. at 1124, 1129.

120. *See supra* text accompanying notes 22-23.

121. *Inadi*, 106 S. Ct. at 1126.

122. *Id.* at 1127.

123. *Id.* at 1128.

124. As Professor Westen explained:

What distinguishes a witness "against" the accused from a witness "in his favor" is *not* the content of the witness' testimony but the *identity of the party relying* on his evidence. A person is a witness "against" the accused if he is one whose statements the prosecution relies upon in court in its effort to convict the accused Conversely, witnesses "in his favor" are all the remaining witnesses whom a defendant wishes to examine after the prosecution has confronted him with its witnesses.

Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 604-05 (1978) (emphasis in original).

his own witness in federal prosecutions, he is handicapped in that the defendant has no right "to obtain any prior statements of that declarant in the government's possession."¹²⁵

In summary, the Court has apparently limited the *Roberts* confrontation clause analysis to hearsay offered under the former testimony exception. The Court definitely decided that evidence under the coconspirator exception need not satisfy an unavailability requirement. However, an uncertain relationship remains between the confrontation clause and the other hearsay exceptions.

A. *Reliability Requirement After Inadi*

One problem lingering after *Inadi* concerns the uncertainty of when the reliability of testimony sought to be introduced under a hearsay exception can be presumed and when the proponent must show particularized guarantees of trustworthiness. Thus, the four exceptions expressly recognized as "firmly rooted" in *Roberts* remain the only authority on the issue.¹²⁶ Even though the recognition of these exceptions was dicta, with so much uncertainty remaining in this area, courts will likely embrace any guidance the Supreme Court offers.¹²⁷ Consequently, until the Supreme Court makes a definitive statement as to what constitutes a firmly rooted exception, courts will differ as to which hearsay exceptions qualify.

Predicting the Supreme Court's resolution of this problem is not an easy task, considering the paucity of opinions to serve as a basis for speculation. One approach would be to determine an exception's classification based on the length of time that the exception has been recognized. One cannot, however, rely on longevity alone because the business records exception was not recognized at common law,¹²⁸ yet the Court in *Roberts* cited it as a firmly rooted exception.¹²⁹

Another possibility, considering the composition of the present Court, is to recognize as firmly rooted all the exceptions expressly enumerated in the Federal Rules of Evidence. Thus, no particularized guarantees of trustworthiness would be required. This possi-

125. *Inadi*, 106 S. Ct. at 1134 (Marshall, J., dissenting) (citing 18 U.S.C. § 3500 (1982)).

126. These exceptions are dying declarations, cross-examined testimony, business records, and public records. *Roberts*, 448 U.S. at 66 n.8; see also text accompanying note 60.

127. As Professor Lilly has noted: "Whether 'firm-rooting' is a function of the longevity of an exception, the number of jurisdictions recognizing it, or both is not certain." Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 228 (1984).

128. *Johnson v. Lutz*, 170 N.E. 517, 519 (N.Y. 1930).

129. *Roberts*, 448 U.S. at 66 n.8.

bility appears very plausible when considering judicial efficiency because courts would not need to engage in a reliability analysis and another avenue of appeal would be eliminated.

Such a rule, however, appears contrary to the rationale underlying the presumed reliability of a firmly rooted exception. The illustrative exceptions given by the Court in *Roberts* are all recognized as being based on reliability.¹³⁰ All hearsay exceptions are not, however, based on reliability.¹³¹ For example, the coconspirator exception is based on the legal fiction of an agency relationship between the coconspirators.¹³² To presume reliability under this exception would further extend the legal fiction and arguably encroach on sixth amendment and due process rights.¹³³

After *Inadi*, federal courts faced with confrontation challenges to testimony admitted under the coconspirator exception have uniformly analyzed the testimony's reliability and have rejected the notion that the coconspirator exception is firmly rooted. For example, in *United States v. Pecora*,¹³⁴ after acknowledging the effect of *Inadi* on the unavailability rule, the Third Circuit noted that "[t]he reliability requirement is separate and distinct from an availability requirement."¹³⁵ Further, the court stated that "[c]oconspirator statements do not possess the special trustworthiness characteristic of evidence falling within a 'firmly rooted hearsay exception.'"¹³⁶ Other courts have agreed,¹³⁷ thus the Supreme Court would have to once again disregard the majority of the cir-

130. *Id.* at 66.

131. After addressing the reliability of several hearsay exceptions one commentator noted: "Excited utterances, present sense impressions, statements of a then existing mental or physical condition, and statements for purposes of medical diagnosis (not treatment) do not carry the same indicia of reliability as the above described categories." Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 25-26.

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

133. In addressing the questionable reliability of coconspirator statements, one author has noted:

When measuring the reliability of coconspirator statements in terms of sincerity, ambiguity, perception and memory, it becomes obvious that the coconspirator exception is not "firmly rooted." Because they have a special incentive to shift blame to one another, coconspirators are likely to bend the truth of their statements. They are also likely to speak in code words or names that make the identification of their meaning or subject matter ambiguous.

Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay*, 53 FORDHAM L. REV. 1291, 1311 (1985) (footnote omitted).

134. 798 F.2d 614 (3d Cir. 1986).

135. *Id.* at 627.

136. *Id.* at 628 (citations omitted).

cuits to hold that all the Federal Rules exceptions are firmly rooted.

B. *The Unavailability Rule After Inadi*

The Supreme Court is unlikely to extend the unavailability rule beyond the limits already fixed by the hearsay rules. Although the Court may not choose to confine the confrontation clause to the unavailability rules governing the hearsay exceptions, the rationale underlying the *Inadi* decision strongly suggests that the Court is willing to allow the Federal Rules of Evidence to define the scope of confrontation rights.¹³⁸

For example, in *Inadi* the Court reasoned that the coconspirator and former testimony exceptions did not warrant the same treatment under the unavailability rule; this distinction was impliedly acknowledged by the drafters of the Rules in commenting on the two exceptions.¹³⁹ Both *Inadi* and the drafters, when addressing the former testimony exception, emphasized the importance of the opportunity to observe the declarant's demeanor during the proceeding and especially on cross-examination.¹⁴⁰ The Court then pointed out that the same objectives are not promoted by the unavailability rule because "it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force."¹⁴¹

In practically every case involving a confrontation clause challenge to evidence submitted under a hearsay exception, the Court could easily resort to its analysis in *Inadi*. In other words, the Court could accept the reasoning of the Rules drafters as to their categorization of the exception at issue under the unavailability rule.¹⁴²

137. See *United States v. Rengifo*, 789 F.2d 975, 985 (1st Cir. 1986) (court implies that a reliability analysis is required); *United States v. Ward*, 793 F.2d 551, 556 (3d Cir. 1986); *United States v. Szabo*, 789 F.2d 1484, 1487 (10th Cir. 1986).

138. In addressing the possibility of equating the confrontation clause with the hearsay rule, one commentator noted: "The obvious difficulty with this construction is that it permits the law of evidence to dictate the reach of a parallel constitutional provision. The resulting anomaly is that the scope of constitutional protection is placed in the hands of judges and legislators who fashion the hearsay exception." Lilly, *supra* note 127, at 210.

139. See FED. R. EVID. 804(b)(1) advisory committee note.

140. *Id.*; *Inadi*, 106 S. Ct. at 1126.

141. *Id.* at 1126-27.

142. A difficulty would remain in dealing with the unavailability rule when applied to the "catch all" exceptions. See FED. R. EVID. 803(24), 804(b)(5). Both the rule requiring unavailability and the rule declaring availability immaterial contain these residuary exceptions. Thus, a comprehensive decision that the unavailability rule should or should not ap-

Another reason suggesting that the Court will follow the lead of the Rules drafters is that it had the opportunity in *Inadi* to embrace the *Roberts* two-pronged test as the norm in confrontation clause analysis, but declined to do so. In fact, the Court took great pains to emphasize that in *Roberts* it “ha[d] not sought to ‘map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay ‘exceptions’.”¹⁴³ However, the *Inadi* Court could have just as easily quoted from *Roberts* that the unavailability rule applied in the “usual case.”¹⁴⁴ Alternatively, the Court could have quoted the prefatory remark in *Roberts* that “[it had been asked] to consider once again the relationship between the Confrontation Clause and the hearsay rule with its *many* exceptions.”¹⁴⁵

These factors, combined with the prevailing ideological and jurisprudential persuasion of the present Court, suggest that the confrontation clause will not limit the admission of evidence submitted under the hearsay exceptions beyond the unavailability requirements of the Federal Rules. This result is likely even though the Court has declined to find that the hearsay rule and the confrontation clause have merged into a single rule requiring the same analysis.¹⁴⁶ The Court in *Inadi* had the opportunity to adopt the *Roberts* test in determining confrontation challenges. The clear implication from *Inadi* is that the confrontation clause

ply would render one of the residuary exceptions superfluous. See Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 691 n.132 (1986).

One possible solution would be to examine prior case law and determine how other courts have dealt with similar cases and apply the rule accordingly. This approach assumes that analogous precedents exist which is not necessarily correct.

A more realistic approach, assuming no applicable precedent, would be to determine with what exception the proffered evidence most closely complies and apply the unavailability rule of that exception. This approach necessarily involves ad hoc determinations, but the drafters surely contemplated some difficulty when they included the residuary exceptions.

143. *Inadi*, 106 S. Ct. at 1125 (citation omitted).

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

145. *Id.* at 62 (emphasis added).

146. In fact, in *California v. Green*, 399 U.S. 149 (1970), the Court acknowledged that the confrontation clause and the hearsay rule were based largely on the same interests, but warned against identical analytical application of the two.

The Court stated:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.

Id. at 155.

has very limited applicability once the requirements of the hearsay exceptions are satisfied.

IV. CONCLUSION

The full effect of the *Inadi* decision has not yet been determined. As confrontation challenges rise through the judicial system testing the parameters of *Inadi*, courts should carefully consider the damaging consequences that could result from further weakening the confrontation clause. Due process protections are jeopardized whenever courts diminish the right of confrontation.

To preserve due process safeguards, courts should follow the lead of decisions like *Pecora* and continue applying the reliability prong of the *Roberts* test to evidence offered under the hearsay exceptions, including the coconspirator exception.¹⁴⁷ Further, courts should assure that those values embodied in the unavailability requirement are not subordinated to facilitate judicial efficiency.

Inadi stops just short of declaring that in most contexts once evidence satisfies the hearsay exception requirements, no confrontation issue exists. However, equating the constitutional right of confrontation with the hearsay rules would render superfluous a significant portion of the sixth amendment, a result that would come close to eliminating one of the basic rights an accused person has traditionally enjoyed in American courts.

147. As one commentator observed: "[T]he confrontation clause's standard of reliability closely approximates that which is independently operative through the due process clause." Lilly, *supra* note 127, at 224 (footnote omitted). Because the confrontation clause and due process clause protections are so similar, courts should not relax the confrontation clause to the point of infringing on due process rights.

