Mississippi College School of Law
MC Law Digital Commons

Journal Articles | Faculty Publications

1993

After White v. Illinois: Fundamental Guarantees to A Hollow Right to Confront Witnesses

Patricia W. Bennett
Mississippi College School of Law, pbennett@mc.edu

Follow this and additional works at: http://dc.law.mc.edu/faculty-journals

 Part of the Criminal Law Commons, and the Evidence Commons

Recommended Citation
40 Wayne L. Rev. 159 (1993).

This Article is brought to you for free and open access by the Faculty Publications at MC Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of MC Law Digital Commons. For more information, please contact walter@mc.edu.

AFTER WHITE v. ILLINOIS: FUNDAMENTAL GUARANTEES TO A HOLLOW RIGHT TO CONFRONT WITNESSES

PATRICIA W. BENNETT†

I. INTRODUCTION

Etched prominently in constitutional law, the Confrontation Clause, found in the Sixth Amendment to the United States Constitution, proclaims that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[1] Since its inception, the Confrontation Clause, "[o]ne of the fundamental guarantees of life and liberty,"[2] has stood as a bulwark against trials by anonymous accusers and absentee witnesses,[3] seemingly requiring a face-to-face encounter between the accuser and the accused. In tandem with its constitutional counterpart, cross-examination,[4] the Confrontation Clause has afforded those accused of a crime the privilege of measuring the truth of adverse testimony by the yardstick of in-court inquiry.

Recently, in *White v. Illinois*,[5] the United States Supreme Court addressed the Confrontation Clause in its review of a defendant's conviction at a trial in which only the words of the defendant's

---

† Associate Professor of Law, Mississippi College School of Law. The author is a former Assistant United States Attorney and Assistant District Attorney.

I wish to thank Jane Hicks, Jeffrey Jackson, Melinda Mullins, J. Allen Smith, and Carol West for comments on an earlier draft of this Article.

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

2. Kirby v. United States, 174 U.S. 47, 55 (1899).

3. *See* Reynolds v. United States, 98 U.S. 145, 158 (1878); Greene v. McElroy, 360 U.S. 474 (1959); Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.") (citing Delaware v. Fernsterer, 474 U.S. 15, 18-19 (1985) (per curiam)).

4. Chambers v. Mississippi, 410 U.S. 284, 295 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation . . . .").

5. 112 S. Ct. 736 (1992).

accuser, but not the accuser herself, had appeared. The accused, Randall D. White, was convicted by a jury of aggravated criminal sexual assault on a four-year-old female child who never testified at the defendant's trial.[6] White maintained on appeal that the trial court's receipt of the child's hearsay testimony was error and that his rights under the Confrontation Clause had been violated. The United States Supreme Court disagreed and, concomitantly, fashioned a disquieting construction of the Confrontation Clause to accommodate the rules of hearsay evidence. The *White* Court's construction of the Clause departs from the Clause's accorded treatment in prior case law and promises to erode the hallowed protections under the Confrontation Clause traditionally guaranteed to those accused of crime.[7]

The thrust of this Article is three-fold: (1) to discuss the historical aspects of the Confrontation Clause and its interpretation by the United States Supreme Court, (2) to show that, with *White v. Illinois*, the Supreme Court lost its moorings with previous decisions and drifted into treacherous constitutional seas, and (3) to suggest a textual construction of the Confrontation Clause that would be harmonious with the hearsay rule while preserving the rights of the accused to face their actual accusers.

II. History of the Confrontation Clause

A. *The Original Scope*

Most constitutional scholars agree that precisely what the framers had in mind when they created the Sixth Amendment is open to debate.[8] The Amendment sailed smoothly through ratification, with only minor Congressional quarrel.[9] Still, some tracing of its

---

6. *Id.* at 739.

7. *See* Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145 (1993).

8. California v. Green, 399 U.S. 149, 174-75 (1970) (Harlan, J., concurring); *see* William H. Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529, 532 (1974); James W. Jennings, Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 742 (1965); Comment, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 n.10 (1966) (citing HELLER, *infra* note 13, as "the only historical illumination the clause has received.").

9. *See Green*, 399 U.S. at 175-76 (Harlan, J., concurring); 1 ANNALS OF CONG. (1789-1790).

background is possible.[10] Studies of its background have convinced most constitutional scholars that the purpose of the Sixth Amendment's Confrontation Clause was to address trial by *ex parte* affidavit.[11] During *ex parte* affidavit proceedings, the accused faced criminal charges which the prosecuting attorney would endeavor to prove by reading confessions of accomplices, depositions, letters, and other documentary proof.[12] Predictably, the accused were irritated about "proof" from unseen, unheard witnesses. Accordingly, the accused frequently demanded that their accusers be brought to face them.[13] Those on trial also demanded the right to present their own witnesses.[14] Hence, those accused believed that the right to confront their accusers, and the right to summon witnesses, were important protections necessary to a meaningful defense.

Eventually, in 1791, the Sixth Amendment was incorporated into our Constitution.[15] Much later, in 1965, the United States Supreme Court, through the conduit of the Fourteenth Amendment, applied the Confrontation Clause to the states.[16] While the language of the Confrontation Clause admits of easy reading, the meaning of its key phrase, "the witnesses against him," defies any ready, unanimous interpretation. Over the years, scholarly camps espousing various interpretations, have formed and warred over the pedigree and thrust of the phrase.[17]

---

10. *See* 5 WIGMORE, EVIDENCE § 1364 (Chadbourn rev. ed. 1974); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 177-87, 214-19 (reprint 1966) (3d ed. 1944); Jennings, *supra* note 8, at 746-47; Note, *Confrontation, Cross-Examination and the Right to Prepare a Defense*, 56 GEO. L.J. 939, 953 (1968).

11. Mattox v. United States, 156 U.S. 237, 242 (1895); *see, e.g.*, *Green*, 399 U.S. at 156, 179 (Harlan, J., concurring), 192 (Brennan, J., dissenting); *see also* 5 WIGMORE, *supra* note 10, § 1395.

12. *See* 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883).

13. *See* FRANCIS H. HELLER, THE SIXTH AMENDMENT 104 (reprint 1969) (1951); Harry L. Stephen, *The Trial of Sir Walter Raleigh*, 2 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY 172 (4th Cir. 1919); Baker, *supra* note 8, at 532-33.

14. *See* HELLER, *supra* note 13, at 106-08.

15. *See* 1 ANNALS OF CONG. (Joseph Gales ed. 1789).

16. Pointer v. Texas, 380 U.S. 400 (1965).

17. *See* Maryland v. Craig, 497 U.S. 836, 844-50 (1990); Coy v. Iowa, 487 U.S. 1012, 1015-20 (1988); 5 WIGMORE, *supra* note 10, § 1364; Baker, *supra* note 8, at 532. *See generally* Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 677-82 (1986) (discussing the positions of various scholars); Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959).

The debate over the meaning of the phrase remains intense because of the impact that any settled interpretation would pose to the hearsay rule. Scholars vigorously disagree as to what effect the Confrontation Clause has upon the admissibility of hearsay evidence.[18] A plain reading of the Sixth Amendment convinces some that the Clause aims to bar all forms of hearsay evidence.[19] Others contend that the Clause was intended to be read in conjunction with the hearsay rule and to permit limited types of hearsay evidence.[20]

The Wigmore-Harlan view regards the phrase, "the witnesses against him," as preserving to the parties at trial the right to cross-examine only those witnesses who actually testify in person.[21] The accused simply has the right to cross-examine in court any witness from whom hearsay is elicited. The Wigmore-Harlan view does not interpret the Clause as requiring in court the actual declarant of the hearsay statement. Under this interpretation, no conflict arises between the Confrontation Clause and the rules of hearsay evidence. At the other extreme is the interpretation that demands the presence in court of any witness whose statement is to be offered against the accused.[22] Obviously, this literal interpretation would bar all forms of hearsay evidence.

The United States Supreme Court has rejected both extreme interpretations, opting instead to accommodate some forms of hearsay, while providing for a limited right of confrontation.[23] In *White*, its most recent pronouncement on the subject, the Court stated that "we have consistently sought to 'stee[r] a middle course' . . . that recognizes that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' . . . and

---

18. Federal Rule of Evidence 801(c) defines hearsay as follows: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

19. *See* Baker, *supra* note 8, at 540 (such a view is "rightly viewed as unfortunate . . . and seems to be supported by neither history, logic, nor Supreme Court precedent.").

20. Ohio v. Roberts, 448 U.S. 56, 63 (1980); Mattox v. United States, 156 U.S. 237, 240-44 (1895); 5 WIGMORE, *supra* note 10, § 1397.

21. *See generally* Dutton v. Evans, 400 U.S. 74, 94-95 (1970) (Harlan, J., concurring in the result); 5 WIGMORE, *supra* note 10, § 1397.

22. *See* Baker, *supra* note 8, at 539-40.

23. *See, e.g.*, United States v. Inadi, 475 U.S. 387 (1986); Dutton v. Evans, 400 U.S. 74 (1970); Mattox v. United States, 156 U.S. 237 (1895); Reynolds v. United States, 98 U.S. 145 (1878).

'stem from the same roots.'"[24] Accordingly, the *White* Court held that, "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied."[25] While the Court proclaimed that its trek to this eventual constitutional resting point had been done "consistently,"[26] a review of the prior case law suggests otherwise.

B. The Force of Precedent

A perusal of the early cases that examined the friction between the Confrontation Clause and the hearsay exceptions is revealing. Virtually all of the pre-*White* cases addressing the subject involved one of the three following hearsay exceptions: (1) dying declarations, (2) former testimony, or (3) statements of a co-conspirator. Not until *White* did the Court hold that hearsay exceptions in addition to the above three satisfy the Confrontation Clause.[27] At first glance, one might consider this observation to be surprising, given the number of hearsay exceptions which exist.[28] What is clear, however, is that *White* represents a complete break from earlier cases.

---

24. 112 S. Ct. 736, 741 (1992) (quoting Ohio v. Roberts, 448 U.S. 56, 68 (1980); California v. Green, 399 U.S. 149, 155 (1970); Dutton v. Evans, 400 U.S. 74 (1970)).

25. *Id.* at 743.

26. *Id.* at 741.

27. *Id.* at 743 (spontaneous declarations and statements made for medical treatments).

28. Federal Rule of Evidence 803 provides the following twenty-four exceptions: (1) Present sense impression; (2) Excited utterance; (3) Then existing mental, emotional, or physical condition; (4) Statements for purposes of medical diagnosis or treatment; (5) Recorded recollection; (6) Records of regularly conducted activity; (7) Absence of entry in records kept in accordance with the provisions of paragraph (6); (8) Public records and reports; (9) Records of vital statistics; (10) Absence of public record or entry; (11) Records of religious organizations; (12) Marriage, baptismal, and similar certificates; (13) Family records; (14) Records of documents affecting an interest in property; (15) Statements in documents affecting an interest in property; (16) Statements in ancient documents; (17) Market reports, commercial publications; (18) Learned treatises; (19) Reputation concerning personal or family history; (20) Reputation concerning boundaries or general history; (21) Reputation as to character; (22) Judgment of previous conviction; (23) Judgment as to personal, family, or general history, or boundaries; and (24) Statements not specifically covered by the Rules but which have equivalent circumstantial guarantees of trustworthiness and which are probative, material and promote the interests of justice. FED. R. EVID. 803.

1. Dying Declarations

The dying declaration exception to the hearsay rule is prominently discussed in *Mattox v. United States*.[29] Although the issue in *Mattox* did not involve a statement uttered by a declarant on his deathbed, the court discussed the dying declaration exception to the hearsay rule at length in dicta.[30] The *Mattox* Court observed that:

> [T]here could be nothing more directly contrary to the letter of the provision ["to be confronted with the witnesses against him"] than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules.[31]

The Court's respect for this exception was based on two readily identifiable reasons. First, age: the dying declaration exception has a lineage which predates the Constitution itself.[32] One scholar maintains that it was the only exception to the right of confrontation which had life when the Sixth Amendment was adopted.[33] Secondly, the dying declaration exception owes its prominence in early case law to the underlying basis for the exception. At a time when church and state were closer, the law ascribed especial respect to the last words of one in the grip of certain, immediate death.

---

29. 156 U.S. 237 (1895).

30. *Id.* at 240. The issue in *Mattox* concerned the admissibility of testimony given at a previous trial. The common-law dying declaration principle admitted into evidence statements made by a declarant whose death was being prosecuted in a case of criminal homicide, when the statements related to the cause of the declarant's death. *See* 5 WIGMORE, *supra* note 10, §§ 1431-34. The Federal Rules of Evidence Hearsay exception regarding a "statement under *belief* of impending death" (the declarant need not die) has an unavailability requirement which includes but is not limited to instances of death. *See* FED. R. EVID. 804 (emphasis added).

31. 156 U.S. at 243-44.

32. Kirby v. United States, 174 U.S. 47, 61 (1899).

33. *See* HELLER, *supra* note 13, at 105.

Convinced that no one on his deathbed would risk eternal damnation by expending his last sigh on a lie, the courts accorded great credibility to dying declarations.[34]

Constitutional scholars differ on what significance this historical hearsay exception has in reconciling the Confrontation Clause with the hearsay rule. One body of thought has simply concluded that the existence and vitality of the dying declaration exception signify that the Framers expected the Confrontation Clause to be read in conjunction with this particular exception.[35] Others have gone further and concluded that the Framers expected the Confrontation Clause to be applied in harmony with *all* of the hearsay exceptions.[36] Still others maintain with equal vigor that the continued acceptance of the dying declaration hearsay exception proves that the Framers contemplated that hearsay evidence would be admissible under the Confrontation Clause only if the declarant was unavailable to testify. They argue that an unavailability requirement surely follows from the Framers' avowed purpose to abolish trial by *ex parte* affidavits when the declarant was available, coupled with the Framers' concurrent decision to accept the admissibility of dying declarations when the declarant is unavailable.[37]

Notwithstanding the *Mattox* Court's acceptance of the dying declaration exception as not being offensive to the Confrontation Clause, one must remember that the issue before the *Mattox* Court had nothing to do with a dying declaration. The Court's discussion of the matter is dicta. As such, one may question whether this hearsay exception is offensive to the Confrontation Clause.[38] However, the above consideration is inapposite to *Mattox*'s accepted reading, which has spawned a progeny of cases adopting its dicta on the status of dying declarations under the Confrontation Clause.[39] *Mattox* now stands for the well-established principle that the dying declaration exception to the hearsay rule does not offend the Confrontation Clause. While one is left to speculate as to what specific insight this assertion provides on the dispute over the

---

34. *See* Mattox v. United States, 146 U.S. 140, 152 (1892). (This case should not be confused with Mattox v. United States, 156 U.S. 237 (1989), which involved the same defendant).

35. *See Mattox*, 156 U.S. at 243-44.

36. *See* WIGMORE, *supra* note 10, § 1397.

37. *See* Baker, *supra* note 8, at 539-41.

38. Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 U.C.L.A. L. REV. 557, 611-12 (1988); Note, *supra* note 10, at 942.

39. *E.g.*, Kirby v. United States, 174 U.S. 47, 61 (1899); Dowdell v. United States, 221 U.S. 325, 330 (1911); Pointer v. Texas, 380 U.S. 400, 407 (1965).

relationship between the Confrontation Clause and the hearsay rule, *Mattox* makes at least one point clear: the Confrontation Clause was never intended to eliminate *all* hearsay evidence.[40]

2. Former Testimony

Most of the pre-*White* United States Supreme Court cases that addressed the Confrontation Clause dealt with issues involving former testimony. A brief review of a representative sampling of the cases confirms this assertion and shows the precise issues before the Court.

As early as 1878, the Court began to fashion its interpretation of the Confrontation Clause. In *Reynolds v. United States*,[41] the defendant was indicted, tried, and convicted of bigamy. At trial, the defendant objected to the admission of a transcript of the prior testimony of his alleged second wife.[42] Her prior testimony had been given in a former trial of the defendant for the same offense but under a different indictment.[43] The prior testimony of the witness was introduced over the objection of the defendant.[44] On appeal, the Court held that the proffered testimony of the absent witness was admissible[45] because it was the same testimony given at another trial of the defendant for the same offense[46] and the defendant had been present at the other trial and had been allowed a full opportunity for cross-examination of the witness.[47]

In 1895, the Court was called upon to interpret further the Confrontation Clause. The context this time involved prior statements of deceased witnesses. In *Mattox v. United States*,[48] the defendant was convicted of murder on retrial after his first conviction was overturned.[49] At the second trial, the prosecutor introduced transcripts of the prior testimony of two witnesses, both deceased at the time of the second trial. Each had testified and

40. 156 U.S. at 243 ("Many of [the Constitution's] provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution . . . . Such exceptions were obviously intended to be respected.").

41. 98 U.S. 145 (1878).

42. *Id.* at 159.

43. *Id.*

44. *Id.* at 160.

45. *Id.* at 161.

46. *Id.* at 160-61.

47. *Id.* at 161.

48. 156 U.S. 237 (1895).

49. *See id.* at 238.

been cross-examined at the first trial.[50] The defendant objected to use of the prior testimony based on the Confrontation Clause.

The Court found no constitutional error in admitting the transcripts of the prior trial testimony of the deceased witnesses.[51] It noted that the overwhelming case authority was to allow prior testimony of a deceased witness "where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case . . . ."[52] To justify this exception to the right of confrontation, the Court reasoned that "[t]o say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent."[53] Consequently, the Court affirmed the lower court ruling admitting the testimony at trial.[54]

Motes v. United States[55] is another case decided at a time when the Court was still defining the contours of the Confrontation Clause. The issue in *Motes* was very similar to the one in *Reynolds* in that the question before the Court dealt with the admissibility of a transcript of prior testimony given at a preliminary examination by an absentee trial witness. The transcript of the prior sworn testimony showed that the defendant had been given an opportunity to cross-examine the witness.[56] However, the Court held that the admission of the transcript testimony into evidence violated the defendant's constitutional right to confront the witnesses against him because the witness' absence was "manifestly due to the negligence of the officers of the Government."[57] The Court's decision was grounded on the maxim that "no one shall be permitted to take advantage of his own wrong."[58]

Later, in *Pointer v. Texas*,[59] the Court held that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the

50. *Id.* at 240.
51. *Id.* at 244.
52. *Id.* at 241.
53. *Id.* at 243.
54. *Id.* at 250.
55. 178 U.S. 458 (1900).
56. *Id.* at 470-71.
57. *Id.* at 471.
58. *Id.* at 472 (quoting *Reynolds*, 98 U.S. at 159).
59. 380 U.S. 400 (1965).

States by the Fourteenth Amendment."[60] In *Pointer*, the "chief witness" for the State presented evidence against the defendant at a preliminary hearing.[61] At trial, the State offered the transcript of the chief witness' testimony from the preliminary hearing after introducing evidence that the witness had moved to another state.[62] Counsel for the defendant unsuccessfully objected several times.[63] The facts showed that at the preliminary hearing the defendant had been "accorded the opportunity of cross examining witnesses there against him."[64] However, the facts also showed that the defendant did not have counsel at the preliminary hearing.[65] Therefore, the Court held that use of the transcript to convict the defendant denied him the privilege of confrontation guaranteed by the Sixth Amendment.[66] Justice Black, writing the opinion for the Court, observed that: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[67]

In *Douglas v. Alabama*,[68] the Court considered the meaning of cross-examination and confrontation of a testifying witness.

> The [defendant] and one Loyd were tried separately in Alabama's Circuit Court on charges of assault with intent to murder. Loyd was tried first and was found guilty. The State then called Loyd as a witness at [defendant's] trial. Because Loyd planned to appeal his conviction, his lawyer, who also represented [defendant], advised Loyd to rely on the privilege against self-incrimination and not to answer any questions. When Loyd was sworn, the lawyer objected, on self-incrimination grounds, "to this witness appearing on the stand," but the objection was overruled. Loyd gave his name and address but, invoking the privilege, refused to answer any questions concerning the alleged crime. The

60. *Id.* at 403.
61. *Id.* at 401.
62. *Id.*
63. *Id.* at 401-02.
64. *Id.*
65. *Id.* at 401.
66. *Id.* at 408.
67. *Id.* at 405.
68. 380 U.S. 415 (1965).

> trial judge ruled that Loyd could not rely on the privilege because of his conviction, and ordered him to answer, but Loyd persisted in his refusal. The judge thereupon granted the State Solicitor's motion "to declare [Loyd] a hostile witness and give [the solicitor] the privilege of cross-examination." The Solicitor then produced a document said to be a confession signed by Loyd. Under the guise of cross-examination to refresh Loyd's recollection, the Solicitor purported to read from the document, pausing after every few sentences to ask Loyd, in the presence of the jury, "Did you make that statement?" Each time, Loyd asserted the privilege and refused to answer, but the Solicitor continued this form of questioning until the entire document had been read.[69]

Although the statements in the exchange were not technically testimony, the Solicitor's recitation and Loyd's silence encouraged the jury to infer that Loyd made the statements.[70] The defendant was unable to cross-examine Loyd about the statements imputed to, but not admitted by, Loyd which formed a fundamental part of the State's case against the petitioner.[71] The Court held that this procedure denied the petitioner his right to cross-examination under the Confrontation Clause.[72]

In *Brookhart v. Janis*,[73] the Supreme Court considered whether an unusual trial procedure used in Ohio courts denied defendant his "constitutional right to be confronted with and to cross-examine the witnesses against him."[74] Having waived a trial by jury, the defendant was convicted of forgery and other offenses after a "prima facie trial."[75] Under this "special" Ohio trial procedure, the defendant could not contest the prima facie case proved by the State and could not cross-examine the witnesses.[76]

The Court pointed out that unless defendant had waived his right to confront and cross-examine witnesses, the defendant's

---

69. *Id.* at 416-17.
70. *Id.* at 419.
71. *Id.*
72. *Id.*
73. 384 U.S. 1 (1966).
74. *Id.* at 3.
75. *Id.* at 6.
76. *Id.* at 3, 6.

constitutional rights would have been violated in two ways. He would have been denied the right to cross-examine the witnesses who testified against him, and he would have been denied the right to cross-examine a co-defendant whose statement was admitted as evidence against him.[77] Guided by the State's admission that "[i]f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it,"[78] the Court found that the defendant had not waived his right to cross-examine witnesses and reversed the convictions.[79]

In *Barber v. Page*,[80] the Court considered whether the State violated the defendant's right to be confronted with witnesses against him at his trial when the State's "principal evidence against him consisted of the reading of a transcript of the preliminary hearing testimony of [a co-defendant] who at the time of trial was incarcerated . . . ."[81] Counsel for the defendant did not cross-examine the witness at the preliminary hearing, although an attorney for a co-defendant did.[82]

The Court found that "the State made absolutely no effort to obtain the presence of [the witness] at trial . . . ."[83] The Court then stated that "a witness is not 'unavailable' for purposes of [an] exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[84] Finding that the State had not made a good-faith effort, the Court reversed the conviction and further stated that it "would reach the same result on the facts of this case had [defendant's] counsel actually cross-examined [the witness] at the preliminary hearing."[85]

---

77. *Id.* at 4.
78. *Id.* at 3.
79. *Id.* at 8.
80. 390 U.S. 719 (1968).
81. *Id.* at 720.
82. *Id.*
83. *Id.* at 723.
84. *Id.* at 724-25.
85. *Id.* at 725. In Berger v. California, 393 U.S. 314 (1969), the Court granted certiorari to determine whether *Barber* "should be given retroactive application." *Id.* at 315. The petitioner in *Berger* was convicted of robbery and kidnapping for the purpose of robbery. At petitioner's preliminary hearing, the victim testified and the petitioner's attorney had an opportunity to cross-examine the victim. However, at the time of petitioner's trial, the victim was outside the State of California and did not testify, although the state had made attempts to

In *California v. Green*,[86] the Supreme Court expounded at length on confrontation and cross-examination. Defendant Green was convicted of selling marijuana to a minor. The minor testified against the defendant at the preliminary hearing and was thoroughly tested by extensive cross-examination by counsel for the defendant.[87] The minor was the State's principal witness at the bench trial.[88] When the minor vacillated and became evasive on his direct examination, the prosecution read excerpts from his preliminary hearing testimony.[89] The excerpts were admitted as substantive evidence, along with the statements of a police officer testifying as to what the minor had told him.[90]

The defendant was convicted, but the state appellate court reversed, holding that the use of the minor's prior statements as substantive evidence denied the defendant his right of confrontation.[91] The State appealed, and the United States Supreme Court considered the narrow issue of whether the defendant's right to be confronted with the witnesses against him was inconsistent with the "substantive use of prior inconsistent statements."[92] 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

---

contact the victim by telephone. *Id.* at 314. Consequently, the Government offered and the Court admitted the victim's preliminary hearing testimony into evidence.

Though *Barber* was on appeal at the time of the lower court's decision in *Berger*, the Court stated that the *Barber* decision should have been foreseen as a result of the Court's earlier decision in Pointer v. Texas, 380 U.S. 400 (1965). The *Barber* decision, handed down shortly after the petitioner's convictions, held "that the absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the State had made a good-faith effort to secure the witness' presence." 390 U.S. at 725. The only issue in *Berger*, then, was whether the holding in *Barber* should be given retroactive effect. The Court decided in favor of retroactive application and remanded the case for reconsideration under the *Barber* standard. 393 U.S. at 314.

86. 399 U.S. 149 (1970).
87. *Id.* at 151.
88. *Id.*
89. *Id.* at 151-52.
90. *Id.* at 152.
91. *Id.* at 153.
92. *Id.* at 155.

> common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.[93]

The Court concluded that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination."[94] Thus, it held that the admission of the minor's preliminary hearing testimony was constitutional.[95]

In *Mancusi v. Stubbs*,[96] the defendant objected to admission of former testimony of a victim who subsequently left the country.[97] The Court concluded that the defendant had been given "an adequate opportunity to cross-examine [the victim] at the first trial, and [his] counsel . . . availed himself of that opportunity

---

93. *Id.* at 155-56 (citing Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965)).

94. *Id.* at 158.

95. *Id.* at 170. Another issue in *Green* concerned the admissibility of the minor's statements to a police officer. The minor "claimed at trial that he could not remember the events that occurred after respondent telephoned him and hence failed to give any current version of the more important events described in his earlier statement." *Id.* at 168. After the minor's lapse of memory on the witness stand, the police officer testified and recounted the minor's statement to him that the respondent had supplied the marijuana. The trial court admitted the statement as substantive evidence.

The Supreme Court said that the issue was not ripe for decision because the trial court had based its decision on the erroneous premise that any out-of-court statement of a witness is inadmissible as substantive evidence, regardless of the opportunity to cross-examine at trial. *Id.* at 169. Therefore, the trial court had not addressed the issue. Further, neither party had addressed the question of the police officer's testimony and resolution would depend on facts which had not been developed in the record. *Id.* at 169-70. In United States v. Owens, 484 U.S. 554 (1988), the Court resolved this issue and held that the admission of a witness' prior "identification statement" would not violate the Confrontation Clause if the witness was unable to testify due to memory loss. *Id.* at 564.

96. 408 U.S. 204 (1972). The case was before the Court for review of a habeas corpus petition. The respondent had been convicted of murder in Tennessee. The New York court had sought to use the Tennessee conviction to sentence the respondent as a second offender. The merit of the Tennessee conviction was at issue. *Id.* at 205.

97. The victim had returned to his native Sweden and had taken up permanent residence there. *Id.* at 209.

. . . ."[98] Finding support for the lower court's determination that the victim was unavailable for the second trial, the Court held that there was "no constitutional error in permitting his prior-recorded testimony to be read to the jury . . . ."[99] The Court stated that the transcript of the victim's prior trial testimony "bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'"[100]

Finally, in *Ohio v. Roberts*,[101] the Court considered "the constitutional propriety of the introduction into evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial."[102] At the defendant's preliminary hearing, the defense called one witness[103] and questioned her in a manner that "clearly partook of cross-examination."[104] The prosecution did not question the witness.[105]

At trial, the State was unable to secure the witness' presence.[106] After the defendant testified, the State introduced a transcript of the witness' preliminary hearing testimony in rebuttal.[107] The defendant objected to the use of the transcript and asserted that his rights under the Confrontation Clause had been violated.[108] The Supreme Court held that the preliminary hearing transcript bore sufficient "indicia of reliability" to be admissible at trial,[109] and that the prosecution had met its burden of showing that the witness was unavailable.[110] Therefore, the preliminary hearing transcript was admissible.

En route to its decision, the Court stated that the Confrontation Clause restricts the range of admissible hearsay in two ways: First, the Clause establishes a rule of necessity which prefers face-to-

---

98. *Id.* at 216.
99. *Id.*
100. *Id.* (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970); California v. Green, 399 U.S. 149, 161 (1970)).
101. 448 U.S. 56 (1980).
102. *Id.* at 58.
103. *Id.*
104. *Id.* at 70.
105. *Id.* at 58.
106. *Id.* at 59. At a motion hearing, the witness' mother testified that she had no knowledge of the witness' whereabouts and would be unable to reach the witness in the case of an emergency. *Id.* at 60.
107. *Id.* at 59.
108. *Id.*
109. *Id.* at 73.
110. *Id.* at 75.

face accusation by requiring the prosecution either to produce the declarant whose statement it wishes to use against the defendant, or to demonstrate the unavailability of that declarant.[111] Second, once the prosecution establishes that the witness is unavailable, the prosecution must show, as a prerequisite to admissibility, that the statement has "indicia of reliability,"[112] which "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[113] Otherwise, evidence will be admissible only if it is shown to have a "particularized guarantee of trustworthiness."[114]

These cases show that while the Confrontation Clause imposes a rule of preference for live testimony over transcripts so that the jury will be able to gauge credibility, former testimony is admissible under certain guarded situations. Former testimony is admissible upon a showing that the out-of-court declarant is unavailable and that his previous sworn testimony was cross-examined by the accused against whom the testimony is to be used.[115] "Unavailability" is more than being outside the portals of the courtroom.[116] Furthermore, "prior opportunity to cross-examine" requires more than having been present when the former testimony was given.[117]

Over the years, the Court has reaffirmed that the admission of former testimony does not offend the Confrontation Clause.[118] The explanation is obvious: with the safeguards of unavailability and prior cross-examination, the accused retains the equivalence of the protections provided by the Clause.[119] The only Confrontation Clause protection arguably missing is the requirement that the witness face the jury in person, a safeguard that the *Mattox* Court described as being "an incidental benefit."[120]

---

111. *Id.* at 65.

112. *Id.* at 65-66 (citing California v. Green, 399 U.S. 149, 161 (1970)).

113. *Id.* at 66.

114. *Id.* (footnote omitted).

115. *E.g., Green*, 399 U.S. at 165-68.

116. *See, e.g.*, Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968).

117. *See* Pointer v. Texas, 380 U.S. 400; Douglas v. Alabama, 380 U.S. 415 (1965). Of course, the party offering former testimony has the burden of establishing all of the prerequisites. *See, e.g., Roberts*, 448 U.S. at 65 ("In the usual case, . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant . . . .").

118. *See Green*, 399 U.S. 149 (1970); Mattox v. United States, 156 U.S. 237 (1895); Reynolds v. United States, 98 U.S. 145 (1879).

119. *See Green*, 399 U.S. at 158.

120. *Mattox*, 156 U.S. at 243.

While the previous testimony exception now broadly embraces factual situations where the out-of-court declarant offers cross-examined, sworn testimony of an earlier day, under the case law this exception initially was permitted only in the extraordinary circumstances of concealment and death.[121] Those circumstances prompted the Court to admit the statements and to find that there was no violation of the Confrontation Clause even in view of the purpose of the Clause. Noting that it was bound to interpret the Clause within the legal framework that "existed at the time it was adopted,"[122] the *Mattox* Court discussed the Clause's purpose:

> 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 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.[123]

The *Mattox* Court then questioned whether the accused should ever "lose the benefits of any of these safeguards, even by the death of the witness."[124] But these "general rules of law," stated the Court, "must occasionally give way to considerations of public policy and the necessities of the case."[125]

Since *Mattox*, the Court has expanded the reach of former testimony to circumstances other than those involving concealment or death of a witness, but the Court has maintained the unavailability requirement. In *Barber*[126] and *Mancusi*,[127] for instance, the

---

121. In *Reynolds*, the government contended that it was unable to locate the defendant's wife because the defendant had concealed her. 98 U.S. at 159-60. In *Mattox*, the former testimony at issue was that of two witnesses who died before the trial. 156 U.S. at 240.

122. 156 U.S. at 243.

123. *Id.* at 242-43.

124. *Id.* at 243.

125. *Id.*

126. Barber v. Page, 390 U.S. 719 (1968).

127. Mancusi v. Stubbs, 408 U.S. 204 (1972).

Court elaborated upon the state's good faith obligation to produce available prosecution witnesses and emphasized the state's affirmative duty to exert reasonable efforts to locate the witnesses.[128] Hence, although the unavailability requirement for former testimony had its beginnings in circumstances involving the concealment or death of a witness, that requirement has been expanded to embrace other situations where the offering party has made a good faith effort to locate the witness, but cannot because of circumstances beyond the party's control.

Ohio v. Roberts[129] travels in the same direction as its predecessor former testimony cases relative to unavailability. *Roberts* dealt with a witness' former testimony given at a preliminary hearing.[130] In holding that the state had shown unavailability where the state was unable to locate the witness, the Court merely reaffirmed the unavailability requirement. The true significance of *Roberts* is that its approach to reconciling the Confrontation Clause and the rules of hearsay appears to extend the unavailability requirement beyond just former testimony.

Nevertheless, from *Reynolds* to *Roberts*, from 1878 to 1980, the Supreme Court has recognized that the former testimony exception to the hearsay rule does not violate the Confrontation Clause. The former testimony exception requires oath, unavailability and opportunity for prior cross-examination, and is now an accepted feature of criminal procedure law.

3. Co-Conspirator Statements

The line of cases involving co-conspirator statements represents the third category of hearsay exceptions that the Court has reconciled with the Confrontation Clause. The three leading cases dealing with this topic are *Dutton v. Evans*,[131] *United States v. Inadi*,[132] and *Bourjaily v. United States*.[133] *Dutton* held that the

128. In *Barber*, where the witness was incarcerated in a federal prison in another state, and where under case law and state evidence law this amounted to unavailability, the Court held that those facts alone were not sufficient to meet the requirements of the Confrontation Clause. 390 U.S. at 721-25. In *Mancusi*, the Court agreed that the witness was unavailable under the Confrontation Clause only because the witness had become a permanent resident of Sweden and the State of Tennessee was powerless to secure the witness' presence at trial. 408 U.S. at 211-13.

129. 448 U.S. 56 (1980).

130. *Id.* at 58.

131. 400 U.S. 74 (1970).

132. 475 U.S. 387 (1986).

133. 483 U.S. 171 (1987).

statement of the defendant's co-conspirator was admissible and not violative of the Confrontation Clause. The Court reasoned that a spontaneous statement adverse to the witness' penal interest has indicia of reliability and that the admission of the statement does not deny a defendant's right of confrontation if the witness is cross-examined.[134] *Inadi* proclaimed that the co-conspirator exception was not circumscribed by a showing of unavailability.[135] Then, *Bourjaily* announced that evidence admitted under this exception was not dependent upon a showing of indicia of reliability.[136] Collectively, the cases show the co-conspirator exception is compatible with the Confrontation Clause and, further, that the requirements of unavailability and indicia of reliability championed by *Roberts* do not apply to the co-conspirator hearsay exception.

In *Dutton v. Evans*,[137] a murder case, Evans, Williams and Truett were charged with brutally killing a police officer. In return for his testimony, Truett was granted immunity from prosecution, and Evans and Williams were indicted.[138] At Evans' separate trial, the prosecution called twenty witnesses.[139] When one witness, Shaw, testified, defense counsel objected, contending that Evans' right of confrontation had been violated.[140] After the objection was overruled, Shaw testified that Williams, the alleged co-conspirator, had previously stated, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."[141] The Court held that since the statement had been admitted as a co-conspirator's statement, it did not violate the Confrontation Clause in the circumstances of the case.[142] The Court observed, "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But, this Court has never equated the two . . . ."[143]

In *United States v. Inadi*,[144] a jury convicted Inadi of conspiring to manufacture and distribute a controlled substance and other related offenses.[145] The evidence introduced at trial showed that

134. 400 U.S. at 89.
135. 475 U.S. at 399-400.
136. 483 U.S. at 182.
137. 400 U.S. 74 (1970).
138. *Id.* at 76.
139. *Id.* at 77.
140. *Id.* at 77-78.
141. *Id.* at 77.
142. Id. at 87-88.
143. *Id.* at 86 (footnotes omitted).
144. 475 U.S. 387 (1986).
145. *Id.* at 388-89.

Inadi and other co-conspirators were involved in manufacturing and selling methamphetamine.[146] At trial, the Government played taped telephone conversations between the various participants of the conspiracy. The tapes included statements made by non-testifying, unindicted co-conspirators and showed their involvement in the conspiracy. Inadi objected to the admission of the recorded statements, arguing that they did not satisfy the requirements of the co-conspirator exception to the hearsay rule under Federal Rule of Evidence 801(d)(2)(E).[147] Inadi also contended that, absent a showing that the declarants were unavailable, the admission of their statements violated his right to confront and cross-examine the witnesses against him.[148] The Third Circuit reversed the conviction on the ground that "the Confrontation Clause established an independent requirement that the Government, as a condition to the admission of any out-of-court statements, must show the unavailability of the declarant."[149]

On appeal, the Supreme Court held that the admission of co-conspirators' statements which otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E), does not violate the Confrontation Clause. Further, it found that a showing of the declarant's unavailability as a prerequisite to the statements' admissibility is not required.[150] The Court's reasons for refusing to extend the unavailability rule to co-conspirator's statements were: (1) that co-conspirator statements made while the conspiracy is in progress "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court,"[151] because the statements derive their significance from the circumstances in which they are made, and (2) that the contextual significance of the statements is further shown in that the co-conspirators' positions will have changed significantly between the time of making the statements and the time of trial.[152] The Court pointed out that an unavailability rule would have no benefit in

146. *Id.* at 389.

147. Rule 801(d)(2)(E) provides: "A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E).

148. 475 U.S. at 390.

149. *Id.* at 391.

150. *Id.* at 400.

151. *Id.* at 395.

152. *Id.*

this context unless the prosecution mistakenly failed to introduce an available witness, because in all other circumstances the testimony would be admitted either because the declarant testified as a witness, or is "unavailable."[153] The Court also noted that an unavailability rule is not likely to add anything to the "truth-determining process."[154] Further, an unavailability rule would impose significant burdens on the prosecution in locating witnesses and then ensuring their availability for trial.[155]

In *Bourjaily v. United States*,[156] the defendant was convicted of federal drug charges, including a conspiracy count. The evidence showed that a co-conspirator, Lonardo, had spoken earlier with an informant about a cocaine transaction.[157] During the course of the tape-recorded conversation, Lonardo spoke about his alleged partner, who turned out to be the defendant. Later, Lonardo and the defendant were arrested while buying cocaine from the informant.[158] At trial, the court admitted Lonardo's statements to the informant. The lower court found that the proof showed that a conspiracy did exist, and that the statements in question were made in furtherance of the conspiracy.[159] The defendant objected to the admission of the statements, contending that he could not cross-examine Lonardo because Lonardo had elected not to testify.[160] Affirming the rulings of the trial court and the court of appeals,the Supreme Court rejected the defendant's claim that his Sixth Amendment right to confrontation was violated and held that the Government was not required to show "independent indicia of reliability" to satisfy the Confrontation Clause in this case.[161]

4. Summary of Precedent

In summary, the precedent to *White* shows that the Court did not view all hearsay evidence as repugnant to the Confrontation Clause. Nor did it accept all hearsay evidence as compatible with the Clause. Rather, the Court recognized only three hearsay ex-

153. *Id.* at 396.
154. *Id.*
155. *Id.* at 399.
156. 483 U.S. 171 (1987).
157. *Id.* at 173.
158. *Id.* at 174.
159. *Id.*
160. *Id.*
161. *Id.* at 182.

ceptions cognizable under the Confrontation Clause: dying declarations, former testimony, and co-conspirator statements. The Court was satisfied that each of these exceptions was grounded in reliability. Further, in view of the peculiarities of the basis for the co-conspirator statement exceptions, the Court did not require a showing of unavailability for its use at trial. However, the Court did require such a showing for the use of former testimony. The Court in *White* could have stayed this course, or as suggested in *Roberts*, could have required all hearsay exceptions to satisfy the requirements of unavailability and indicia of reliability. But the Court chose not to travel in either of these directions; instead, the *White* Court broke new ground.

III. THE *WHITE* DECISION

A. The Majority Opinion

In *White v. Illinois*,[162] the defendant was convicted by a jury of the aggravated criminal sexual assault of a four-year-old girl and other offenses.[163] The child did not testify at trial. Without finding that the child was unavailable to testify,[164] and over the defense's objection, the trial court allowed testimony from five witnesses under the "spontaneous declaration" and "medical examination" exceptions to the hearsay rule.[165] The gist of the victim's statements, as presented at trial by the five witnesses, was that the "[defendant] had put his hand over her mouth, choked her, threatened to whip her if she screamed and had 'touch[ed] her in the wrong places.'"[166] The five witnesses who testified were the victim's mother, the baby-sitter, the first responding police officer, a hospital nurse, and an emergency room physician.[167] The police officer testified that the child victim also told him that the defendant had engaged her private parts with his tongue.[168] The Supreme Court affirmed the admissibility of the testimony and observed that the victim's statements to all of the witnesses were "essentially identical."[169]

---

162. 112 S. Ct. 736 (1992).
163. *Id.* at 739.
164. *Id.*
165. *Id.* at 739-40.
166. *Id.* at 739.
167. *Id.* at 739-40.
168. *Id.* at 739.
169. *Id.*

The defendant contended that, under the Confrontation Clause, either the child witness should have been produced at trial by the prosecution, or the trial court should have made a finding that the child was unavailable to testify.[170] The Supreme Court disagreed with this view and stated that the protection afforded by the Confrontation Clause is not so expansive as to require unavailability for the admission of all out-of-court statements.[171]

The Court also declined to read the Confrontation Clause so narrowly as to "virtually eliminate its role in restricting the admission of hearsay testimony."[172] Rather, the Court sought to "stee[r] a middle course,"[173] and concluded that "hearsay rules and the Confrontation Clause are generally designed to protect similar values"[174] and that both "stem from the same roots."[175] Hence, the Court ruled that "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied."[176] What the Court failed to consider is that "[c]onfrontation, however, is more than a direct guarantee of reliability, it incorporates an element of fairness, of affording the defendant an opportunity to test evidence against him, no matter how reliable that evidence may seem."[177]

Furthermore, the Court was not persuaded by its earlier ruling in *Ohio v. Roberts*[178] that "the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence."[179] In *Roberts*, the Court ruled against the defendant's challenge under the Confrontation Clause to the prosecution's introduction at trial of a transcript of the testimony of a witness

---

170. *Id.* at 740.

171. *Id.* at 741-42. Seeking to define unavailability, the *White* Court stated, "[b]y 'unavailability rule,' we mean a rule which would require as a predicate for introducing hearsay testimony either a showing of the declarant's unavailability or production at trial of the declarant." *Id.* at 742 n.6.

172. *Id.* at 741. The United States, as *amicus curiae*, argued that the Clause should bar only the use of hearsay statements that are "in the character of an *ex parte* affidavit." *Id.* at 741. However, the Court found that, in view of precedent, this argument came "too late in the day." *Id.*

173. *Id.* (quoting Ohio v. Roberts, 448 U.S. 56, 68 n.9 (1980)).

174. *Id.* (quoting California v. Green, 399 U.S. 149, 155 (1970)).

175. *Id.* (quoting Dutton v. Evans, 400 U.S. 74, 86 (1970)).

176. *Id.* at 743.

177. Note, *supra* note 10, at 940.

178. 448 U.S. 56 (1980).

179. *White*, 112 S. Ct. at 741.

who had not appeared at trial, but who at a probable cause hearing had been questioned by defense counsel.[180] In rejecting the defendant's claim, the *Roberts* Court explained the function of the Confrontation Clause:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule."[181]

However, the *White* Court stated that the above language must be reconciled with the Court's holding in *United States v. Inadi*,[182] where it addressed the admissibility of out-of-court statements made by a co-conspirator during the course of the conspiracy.[183] In *Inadi*, the Court limited *Roberts* to its facts by refusing to interpret *Roberts* as imposing an unavailability requirement for use of *all* out-of-court statements.[184] Hence, the *White* Court refused to extend the unavailability requirement as pronounced in *Roberts*, and instead held that "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."[185]

The *White* Court explained that its holding in *Inadi* was based on two factors:

---

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

181. *Id.* at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)).

182. *White*, 112 S. Ct. at 741 (citing United States v. Inadi, 475 U.S. 387 (1986)).

183. *Inadi*, 475 U.S. at 388.

184. *Id.* at 394.

185. *White*, 112 S. Ct. at 741.

> First, unlike former in-court testimony, co-conspirator statements "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court . . . ."
>
> Second, we observed that there is little benefit, if any, to be accomplished by imposing an "unavailability rule". Such a rule will not work to bar absolutely the introduction of the out-of-court statements; if the declarant either is unavailable, or is available and produced for trial, the statements can be introduced.[186]

In addition, the *White* Court was concerned that "while an unavailability rule would therefore do little to improve the accuracy of factfinding, it is likely to impose substantial additional burdens on the fact finding process."[187]

The *White* Court held that the above observations "apply with full force to the case at hand."[188] Hence, as in *Inadi*, the Court was persuaded that the hearsay statements at issue were "made in contexts that provide substantial guarantees of their trustworthiness."[189] In summary, the Court expounded:

> We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant later testifying in court. To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrong-headedness, given that the Confrontation Clause has as a basic purpose the promotion of the "integrity of the fact-finding process." . . . And as we have also noted, a statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability . . . . Given the evidentiary value of such statements, their reliability, and that establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs, we see no reason to treat the out-of-court statements in this case

186. *Id.* at 742 (quoting *Inadi*, 475 U.S. at 395-96) (footnote omitted).
187. *Id.* at 742.
188. *Id.*
189. *Id.* (footnote omitted).

> differently from those we found admissible in *Inadi*. A contrary rule would result in exactly the kind of "wholesale revision" of the laws of evidence that we expressly disavowed in *Inadi*. We therefore see no basis in *Roberts* or *Inadi* for excluding from trial, under the aegis of the Confrontation Clause, evidence embraced within such exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment.[190]

The above pronouncements are inconsistent with the Court's prior decisions interpreting the Confrontation Clause in a manner which indeed causes friction between it and the hearsay rules of evidence. While this point was not discussed in the majority opinion, it was examined in Justice Thomas' separate concurring opinion, which was joined by Justice Scalia.[191]

B. The Concurring Opinion

Justice Thomas wrote separately "only to suggest that our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself."[192] He further stated:

> The Court unnecessarily rejects, in dicta, the United States' suggestion that the Confrontation Clause in general may not regulate the admission of hearsay evidence . . . . The truth may be that this Court's cases unnecessarily have complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence.
>
> The Confrontation Clause provides simply that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." It is plain that the critical phrase within the clause for purposes of this case is "witnesses against him." Any attempt at unraveling and understanding the relationship between the Clause and the hearsay rules must begin with an analysis of the meaning of that phrase. Unfortunately, in recent cases in this area, the Court has *assumed* that *all* hearsay

190. *Id.* at 743 (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988), which quoted Kentucky v. Stincer, 482 U.S. 730, 736 (1987)) (other citations omitted).

191. *Id.* at 744-48 (Thomas, J., concurring).

192. *Id.* at 744.

> declarants are "witnesses against" a defendant within the meaning of the Clause, . . . an assumption that is neither warranted nor supported by the history or the text of the Confrontation Clause.[193]

Determined to develop an interpretation of the Confrontation Clause which would be true to its text and history, as well as congruent with the Court's earlier cases, Justice Thomas reached several conclusions vital to his interpretation of the Clause. First, he noted that "[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."[194] Hence, courts were given little guidance as to how to interpret the phrase "witnesses against him." Justice Thomas then discussed the Wigmore-Harlan interpretation, which construes the phrase to mean that under the Confrontation Clause a defendant has the right to confront and cross-examine only those witnesses who actually appear and testify at trial.[195] Justice Thomas rejected this interpretation because it creates tension with exceptions recognized at common law and with the Court's precedent.[196]

Justice Thomas also discussed an interpretation suggested by the United States as *amicus curiae*. This approach would apply the Confrontation Clause "only to those persons who provide in-court testimony or the functional equivalent, such as affidavits, depositions, or confessions that are made in contemplation of legal proceedings."[197] Justice Thomas observed:

> This interpretation is in some ways more consistent with the text and history of the Clause than our current jurisprudence, and it is largely consistent with our cases. If not carefully formulated, however, this approach might be difficult to apply, and might develop in a manner not entirely consistent with the crucial "witnesses against him" phrase.[198]

Relative to the interaction between the Confrontation Clause and the rules of evidence, Justice Thomas stated:

---

193. *Id.* (citations omitted).

194. *Id.* (citing California v. Green, 399 U.S. 149, 176 n.8 (1970) (Harlan, J., concurring); Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring); Baker, *supra* note 8, at 532).

195. *Id.* (citing *Dutton*, 400 U.S. at 94 (Harlan, J. concurring); 5 WIGMORE, *supra* note 10, § 1397).

196. *Id.* at 745.

197. *Id.* at 747.

198. *Id.*

> There appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation. The Court has never explored the historical evidence on this point. As a matter of plain language, however, it is difficult to see how or why the Clause should apply to hearsay evidence as a general proposition.[199]

Finally, Justice Thomas offered his interpretation of the Confrontation Clause. His formulation presumably would be loyal to its text and history, workable within the realm of rules of hearsay evidence, and respectful of the Court's prior cases interpreting the Clause.[200] According to Justice Thomas: "The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[201]

C. Analysis

The holding in *White* is troubling. The key witness whose words sealed the defendant's fate never had to appear in court and allow herself to be tested by cross-examination. Although *White* involved the sexual abuse of a four-year-old, one must be careful not to be over-influenced by the sensitivities of the case. Surely, the reader abhors sexual abuse. Any compassionate soul leaps to spare a toddler from public interrogation by an insensitive, zealous defense attorney. Many might be inclined to dispense with any need for cross-examining a mere infant deemed too young to form the intent to lie. If the evidence overwhelmingly points to the defendant's guilt, some might be less inclined to critically review this matter.[202] Others might point to the fact that the defendant made no attempt to call the child victim as a witness.

---

199. *Id.* at 746 (footnote omitted).

200. *Id.* at 747.

201. *Id.*

202. *See* Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) ("[T]he focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.").

Of course, those beguiled by that view would have lost sight of the government's burden at trial to convict by proof beyond a reasonable doubt an accused who has no duty to present any evidence.[203]

These sensitivities mask the larger concern. First, *White* is not restricted just to child-abuse cases. Thus, it should not be construed simply as one more case in the child-protective mode of *Coy v. Iowa*[204] and *Maryland v. Craig*.[205] While the holding of *White* arose in the context of such a case, nothing in the holding confines it only to child-abuse cases. The jurisprudence expounded in *White* is applicable to all criminal cases.

Next, one should not lose sight of the seriousness of this matter. A defendant's reputation, livelihood, and freedom are at stake. The law has long preached that one exposed to the dreadnoughts of a criminal felony conviction, with all of its attendant penalties, must be accorded every constitutional protection. The oft-cited maxim of "it is better that ten guilty men go free, than one innocent man be convicted" appropriately summarizes the point.[206]

Suppose that in *White* the victim had fabricated the story. Suppose that she was a precocious four-year-old, influenced by something on television, or by the remarks of adults. Suppose that her scream and subsequent outcry were the product of a dream. The facts of the incident as reported by the United States Supreme Court were that the child's statements to the five witnesses who

---

203. *In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

204. 487 U.S. 1012 (1988). The Court found a violation of the defendant's right to face his accuser when pursuant to a state statute the trial court had allowed two sexually-assaulted, thirteen-year-old girls to testify behind a large screen placed between them and the defendant on trial, even though the trial court never made any findings that these particular witnesses needed special protection.

205. 497 U.S. 836 (1990). The Court reiterated the Confrontation Clause's guarantee of face-to-face confrontation, but found no violation of the Clause. Similar to *Coy*, the six-year-old victim of child abuse testified at trial via closed circuit television. Pursuant to a state statute, the trial court determined that the procedure was necessary for the welfare of the child. *Id.* at 857.

206. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (1765) (The ancient criminal law maxim is that "it is better that ten guilty persons escape, than one innocent suffer.").

testified at trial were "essentially the same."[207] However, the facts as recounted by the Court also state that the child told her story to her sitter, her mother, and then to Officer Terry Lewis. To Officer Lewis, she seemingly added a statement, that the defendant "used his tongue on her in her private parts."[208] If the victim were an adult offering an enlarged account of an event which had occurred forty-five minutes earlier and already had been reported to two other persons, one might suspect embellishment. How, outside of cross-examination, could these matters be explored?[209] But instead of being able to test the credibility of the child victim, the defendant was permitted only to confront witnesses likely to be partial to the child.[210]

Consequently, in the wake of *White*, the state may succeed in securing the conviction of an accused upon evidence submitted by available declarants who never appear in person at trial to subject themselves to cross-examination.[211] This is a revolting development which causes unsettling ripples to wash upon other aspects of Constitutional jurisprudence.

First, *White* virtually eviscerates the Confrontation Clause, consigning its corpse to burial in the hearsay rules of evidence. Before *White*, the Court was careful not to join the Confrontation Clause and the evidentiary hearsay rule.[212] More than once, the

---

207. *White*, 112 S. Ct. at 739.

208. *Id.*

209. *See generally* David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1 (1986) (a thorough discussion of the problems associated with the admissibility of expert testimony offered to vouch for the credibility of a child witness). Professor McCord states, "[T]here are only two major issues in a child sexual abuse case: has the child been sexually abused? and was the abuse perpetrated by the defendant?" *Id.* at 40.

210. 112 S. Ct. at 739-40.

211. *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992). I do not share Professor Berger's overwhelming concern regarding prosecutorial abuse; however, I agree that there must be necessary restraints on the admission of hearsay, if the Sixth Amendment right of confrontation is to have meaning.

212. *See* California v. Green, 399 U.S. 149 (1970):

> 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. Our decisions have never established such a congruence;

Court proclaimed that while the two grew from the same roots, they were not of the same tree.[213] But, *White* has now grafted these limbs together: "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied."[214] As such, evidence law now defines the contours of the Confrontation Clause: hearsay definitions now shape the Clause.[215] The *White* Court has pried the top off the evidentiary rules of hearsay, and dumped into its body the dictates of the Confrontation Clause.

In so doing, in spite of its protestations to the contrary, the *White* Court has managed to constitutionalize the hearsay rules by incorporating the Confrontation Clause into them. As a result, the hearsay rules have been elevated to constitutional magnitude without benefit of the legislative process and the constitutional stature of the Confrontation Clause has been sapped of vitality.

While the *White* Court grafted the Confrontation Clause onto the hearsay rules, the Court did so in disregard of some of its own previous observations. In *Roberts*, the Court stated that "[t]he historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay."[216] Yet, the *White* Court has allowed "firmly rooted" exceptions to the hearsay rule to override the Confrontation Clause.[217] If "firmly rooted" exceptions are those dating back to the birth of the Clause, then what hearsay was the *Roberts* Court discussing?

In addition to its disquieting uplifting of the hearsay rules to constitutional stature, the *White* decision has another disturbing aspect. Because the Court has essentially determined that the Confrontation Clause only guarantees a defendant the right to cross-examine the witnesses who appear at trial, the purpose of

---

> indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

Id. at 155-56 (citations and footnote omitted); *see also* Dutton v. Evans, 400 U.S. 74, 86 (1970) (footnotes omitted) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now.").

213. *See Green*, 399 U.S. at 155-56; *Dutton*, 400 U.S. at 86.

214. 112 S. Ct. at 743.

215. *See* Jonakait, *supra* note 38.

216. Ohio v. Roberts, 448 U.S. 56, 63 (1980).

217. 112 S. Ct. at 743.

the Clause, to bar trials by *ex parte* affidavit, will be difficult to accomplish. Under *White*, an accused may be convicted by documentary evidence or other hearsay evidence of a declarant whose presence at trial is excused by "firmly rooted" hearsay exceptions.

While the *White* Court drove the last nail into the interpretation of the Clause which occasioned this result, the hammering clearly began some time ago. In *Mattox*, the Court saw the purpose of the Confrontation Clause as providing the accused with the opportunity to examine the witness before a jury capable of assessing the credibility of the witness.[218] In *Kirby v. United States*[219] and in *Dowdell v. United States*,[220] for instance, the Court repeated this theme, which was then carried through other cases.[221] Then, in *Dutton v. Evans*,[222] the Court shifted gears and declared that the "mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . . ."[223] Now, *White* has taken "practical concerns" to a new height, one so lofty that those concerns have overpowered the salutary purpose of the Confrontation Clause. Although the Confrontation Clause was intended to bar trial by *ex parte* affidavit,[224] the *White* Court allows that result because the accused may be convicted solely on documentary evidence admissible as hearsay exceptions under business records[225] or public records.[226] Hence, the Court has come full circle.

---

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

219. 174 U.S. 47, 55 (1899).

220. 221 U.S. 325 (1911). In *Dowdell*, the Court stated:

> This [Philippine statute] is substantially the provision of the Sixth Amendment to the Constitution of the United States which provides that the accused shall enjoy the right to a speedy and public trial, and to be confronted with the witnesses against him. This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination.

Id. at 329-30.

221. *See* Barber v. Page, 390 U.S. 719, 725 (1968); Pointer v. Texas, 380 U.S. 400, 406-07 (1965); Douglas v. Alabama, 380 U.S. 415, 418 (1965).

222. 400 U.S. 74 (1970).

223. *Id.* at 89.

224. *See, e.g.*, Mattox v. United States, 156 U.S. 237, 242-43 (1895).

225. Federal Rule of Evidence 803(6) provides that the following is not

The Court has completed this circle in spite of the language of the Clause itself. The Clause guarantees to an accused the right to confront and cross-examine the "witnesses against him" not merely the evidence against him.[227] Even if the Confrontation Clause was expected to accommodate some hearsay,[228] the *White* Court goes too far in concluding that all of the hearsay exceptions are equally embraced.

IV. Alternative Constructions

Dissatisfied with both the practical and jurisprudential promises of *White*, I now reach for a construction of the Confrontation Clause that would be true to its purpose, yet accommodate the times. The *White* Court was overwhelmed with the perceived dilemma of how to reconcile the Confrontation Clause with the hearsay rule.[229] To hold that the Clause requires the in-court presence of all witnesses against the accused would seem to condemn the prosecution to a most difficult standard. The prosecution would be forced to locate and hold for trial all witnesses, even minor ones. Trials would be lengthened, and societal costs would escalate. Similar results would attend a ruling endorsing the unavailability rule. Furthermore, the *White* Court was convinced that these considerations would pose problems for the hearsay rule. As the Court observed, the above alternatives would "result in . . . 'wholesale revision' of the laws of evidence."[230] Thus, faced with

---

excluded by the hearsay rule, even though the declarant is available as a witness:

> 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.

FED. R. EVID. 803(6).

226. *See* FED. R. EVID. 803(8). For a discussion of the admission of business and official records, see Note, *supra* note 10, at 943-45. *See also* Paul C. Giannelli, *Expert Testimony and the Confrontation Clause*, 22 CAP. U. L. REV. 45, 83 (1993).

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

228. HELLER, *supra* note 13, at 105 n.6.

229. White v. Illinois, 112 S. Ct. 736, 742 (1992).

230. *Id.* at 743 (quoting United States v. Inadi, 475 U.S. 387, 392 (1986)).

these concerns, the *White* Court resolved to dismantle the Confrontation Clause, constitutionalize the hearsay rule, and spare society the additional costs and burdens of prosecution. Conspicuously missing from these considerations is fairness to the accused.

A. Justice Thomas' Construction

In seeking to fashion a better construction, I will first consider that which was suggested by Justice Thomas in his concurring opinion in *White*.[231] Justice Thomas' solution is to read the Confrontation Clause as applying only to those persons who actually testify at trial.[232] His construction, like that of the majority, would permit the use at trial of all hearsay evidence that falls within a hearsay exception unless the hearsay is contained in affidavits, depositions, prior testimony, or confessions.[233] This formulation provides little sustenance for one already starved by the *White* opinion. Justice Thomas' approach still leaves open the possibility of convictions obtained solely by non-testifying, unavailable declarants. While Justice Thomas addresses only certain documentary evidence, he loses sight of the Clause's broader purpose: to require confrontation and cross-examination of all witnesses. Given the shortcomings of Justice Thomas' formulation, others must be considered.

B. Literalism

A formulation rejected repeatedly by the Court is one endorsing a rigid, literal reading of the Clause.[234] Under this view, the Court would require the presence in court of every witness poised to testify against the accused. This approach imposes increased societal costs, greater prosecution burdens, and virtually eradicates the hearsay exceptions.[235] Actually, hearsay arguably could survive and be presented at trial, but only if the declarant eventually testified at trial.

Constitutional scholars waiting to pounce on the "literal meaning" approach would be quick to point out that, supposedly, when the Clause was written, some hearsay exceptions enjoyed wide-

---

231. *Id.* at 747 (Thomas, J., concurring).
232. *Id.*
233. *Id.*
234. *See* Mattox v. United States, 156 U.S. 237, 243 (1895); Dutton v. Evans, 400 U.S. 74, 80 (1970).
235. *See supra* note 22 and accompanying text.

spread approval.[236] This, say these critics, shows that the Clause was expected to accommodate some hearsay. However, because the history of the Confrontation Clause is not written on a clean slate, and because the language of the Clause supports a literal reading, one could conclude that the Framers wished to signal the deathknell of all the hearsay exceptions.

While this "literal" approach would occasion a temporary overhaul of the judicial system, in the long run it probably would result in the constitutionalization of the hearsay rule. Eventually, society would tire of the burdens imposed by a literal reading of the Clause and either reinterpret the Clause, or constitutionalize the hearsay rule. Because such an approach has little chance of adoption, another formulation must be considered.

C. Pre-White Trilogy—The Case Exceptions

Another construction, perfectly faithful to the case law, would allow exceptions to the prosecution's duty to produce the actual witness in court only if the testimony is presented through dying declarations, former testimony, and statements of co-conspirators.[237] Until *White*, these were the only exceptions to the hearsay

---

236. *See Mattox*, 156 U.S. at 243; HELLER, *supra* note 13, at 105 n.6; 5 WIGMORE, *supra* note 10, § 1397.

237. *Mattox*, 156 U.S. at 243, recognizes the dying declaration exception. Other cases make the point that former testimony is admissible when the out-of-court declarant is unavailable but was sworn and cross-examined by the accused at an earlier time. *See, e.g.*, *Reynolds*, 98 U.S. 145, 161 (1878) (in a case where the defendant kept the witness away from the present trial, the Court noted: "The accused was present at the time the [prior] testimony was given, and had full opportunity of cross-examination. This brings the case clearly within the well-established rules."). In *Motes*, 178 U.S. 458 (1900), the Court found a violation of the Confrontation Clause where the witness who gave the prior testimony was absent "manifestly due to the negligence of the officers of the Government." *Id.* at 478. This was so even though the witness had been cross-examined by the defendant's counsel at the preliminary hearing at which he gave the testimony. *See id.* at 468. However, in dictum, the Court went on to note that the case would have turned out differently had the witness been absent "by the procurement or with the assent of . . . the accused." *Id.* at 474.

In Pointer v. Texas, 380 U.S. 400 (1965), the Court, in commenting on a witness who had subsequently moved to another state, noted that "[t]he case before us would be quite a different one had [the witness'] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross examine." *Id.* at 407. In Barber v. Page, 390 U.S. 719, 724 (1968), the Court ruled that the prosecution needs to show a good-faith effort to obtain the presence of a witness

rule that the Court had reconciled with the Confrontation Clause. An argument can be made for limiting the hearsay exception under the Clause to those three exceptions. First, they are the only exceptions sanctioned by pre-*White* case law. Secondly, assuming that the Clause was expected to accommodate some hearsay, these are logical candidates. According to one scholar, the dying declaration was the only extant exception to the hearsay rule when the Clause was ratified.[238] During that bygone era, it was widely believed that a deathbed witness, aware of his imminent demise, would be of the condition "that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth."[239]

The former testimony exception to the hearsay rule, likewise is not offensive to the Confrontation Clause because the accused confronted the witness and had an opportunity for cross-examination at a prior judicial proceeding. Further, the requirement of unavailability, which case law reads into this exception, provides an additional safeguard because only necessary hearsay will be admitted.[240]

Finally, the co-conspirator exception may be explained under the conspiracy law rationale.[241] At common law, all members of a conspiracy were deemed to be partners in crime authorized to speak for each other. Accordingly, under this classical agency rationale, the acts of one were the acts of all and the statements of one were the statements of all.[242] As a threshold matter, once

---

at trial. *See also* Green v. California, 399 U.S. 149 (1970) (prior testimony of present witness admissible because it was "given under circumstances closely approximating those that surround the typical trial."); Mancusi v. Stubbs, 408 U.S. 204, 209-16 (1972). Finally, Dutton v. Evans, 400 U.S. 74 (1970), United States v Inadi, 475 U.S. 387 (1986), and Bourjaily v. United States, 483 U.S. 171 (1987), certify the admissibility of a co-conspirator's statement made in furtherance of the conspiracy.

238. HELLER, *supra* note 13, at 105 n.6.

239. Kirby v. United States, 174 U.S. 47, 61 (1899) (citing Mattox v. United States, 146 U.S. 140, 151 (1892)).

240. *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980).

241. *See* United States v. Gooding, 25 U.S. 460, 469-70 (1827) (the first case in which the Supreme Court articulated the co-conspirator exception).

242. *See* 4 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE § 801(d)(2)(E)(01) (1991) (citing Van Riper v. United States, 13 F.2d 961, 967 (2nd Cir.), *cert. denied*, 273 U.S. 702 (1926)). The authors refer the reader to the following passage for the classical agency rationale:

> Such declarations are admitted upon no doctrine of law of evidence, but of the substantive law of crime. When men enter into an agreement

the offering party had established that a conspiracy existed, that the offered statement was made during the course of the conspiracy, that the declarant was a participant in the conspiracy, and that the statement was made in furtherance of the conspiracy, the offered declaration was admissible and competent proof against other co-conspirators.[243] Hence, construed as an authorized statement by the accused, a co-conspirator declaration would not collide with the dictates of the Confrontation Clause.[244]

Under the "case exceptions" approach, the Confrontation Clause would tolerate only the above three exceptions to the hearsay rule. Because pre-*White* case law has already recognized these three exceptions and because many constitutional scholars contend that the Confrontation Clause was expected to accommodate some hearsay, there is authority for this approach. However, its shortcoming is obvious. This approach would not countenance the holding in *White*. Other hearsay exceptions, such as excited utterances, business records, and public records, would simply be cast into oblivion, unless the out-of-court declarant eventually testified.

D. Non-Substantive Hearsay Approach

An approach which would not do great violence to the hearsay rule, but still would serve the ends of the Confrontation Clause, is a "non-substantive hearsay rule" approach. A non-substantive hearsay rule would allow the prosecution to use the hearsay exceptions as warranted, except to make out a prima facie case capable of surviving a defendant's motion for judgment as a matter of law.[245] Thus, under the Confrontation Clause, the prosecuting

---

> for an unlawful end, they become ad hoc agents for one another, and have made "a partnership in crime." What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all.

Id. (quoting *Van Riper*, 13 F.2d at 967).

243. *See* PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 474-95 (2d ed. 1990).

244. At present, this exception is provided in Federal Rule of Evidence 801(d)(2)(E): "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 the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E).

245. *See generally* Michael H. Graham, *The Confrontation Clause, the Hearsay Rule and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978) (applying the confrontation clause to devastating or crucial evidence and requiring the state to produce the witness when the witness' statement is accusatory).

attorney would be compelled to call live witnesses vital to establishing the essential elements of the charged offense.[246] Hearsay elicited during the trial would be deemed non-substantive relative to the elements of the offense. As such, any elicited, admitted hearsay merely would corroborate or impeach other evidence.[247] Hence, the accused would be accorded the right to confront and cross-examine the witnesses necessary to establish the government's prima facie case, and the prosecuting attorney and accused still would be able to utilize hearsay exceptions.

E. The Preferred Alternative

The final and preferred approach is that championed by *Roberts*.[248] *Roberts* strikes a reasoned balance between the approaches of literalism and *White*, in harmony with that of the pre-*White* cases, while furthering at least the spirit of the Confrontation Clause's intent. *Roberts* ruled that the Confrontation Clause restricts the range of admissible hearsay by requiring unavailability and indicia of reliability.[249] These two requirements, unavailability and indicia of reliability, taken together constitute a sound approach which is consistent with the aims of the Confrontation Clause.[250] The *White* Court's reasons were twofold: First, requiring the out-of-court declarant to appear and testify does not promise to convey the significance of the statement because it is not possible to replicate the context in which the declarant made the statement. Secondly, the unavailability rule poses far more problems than benefits.[251] However, the Court's reasoning appears rooted more in convenience than in concern for the accused who wishes to cross-examine the accuser. The Court is blind to the increasing

---

246. *See generally* Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972) (defining "witnesses against" as "principal witnesses" for the prosecution whose statements are "crucial").

247. *See* Tennessee v. Street, 471 U.S. 409 (1985) (introduction of an accomplice's confession for rebuttal purposes does not violate the defendant's rights under the Confrontation Clause).

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

249. *Id.* at 65-66.

250. *See* Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189 (1993).

251. White v. Illinois, 112 S. Ct. 736, 742 (1992). The Court adopted the *Inadi* standard for the admission of hearsay used under the "spontaneous declaration" and "statements made for medical treatment" exceptions to the hearsay rule. *See* United States v. Inadi, 475 U.S. 387, 395 (1986).

number of convictions which will be secured primarily upon hearsay testimony. Unbound by any "unavailability requirement," some prosecutors will deliberately choose to present hearsay evidence through an honest, credible in-court declarant, instead of chancing a conviction on the testimony of the actual declarant, who is less credible and more susceptible to cross-examination.[252] The hapless accused will not be able to explore adequately the accused's motive, powers of discernment, angle of observation, or intelligence.[253] Instead, the accused will be confronted with the more credible messenger whose words may spell doom to the accused.

Nor is it a satisfactory answer that the accused may call the witness to testify.[254] First, it would result in the jury hearing the damaging testimony twice—a circumstance certain to prejudice the accused. Second, it would conflict with the accused's presumption of innocence and the state's burden of proof. By allowing the state to use hearsay, when the out-of-court declarant is available, the Court places the accused in a predicament: the accused may either suffer a conviction based on insufficiently cross-examined (or noncross-examined) testimony, or call the witness who is sure to give damaging testimony.

Imagine the dilemma of the accused in *White*. The youthful victim did not testify. Should the accused call her and chance a repeat account of her version of the facts? Should the accused call her and risk further jury sympathy for the child when they see her? Can he risk her tears or her innocence? The jury understands that to prove its case the state is required to call the victim, and that the accused, no matter how despicable, is permitted to cross-examine.[255] But will the jury be equally understanding when the accused calls the victim as a witness during his case-in-chief? The *White* rule opens a door to the prosecution which, in time, will impact adversely upon the accused's right at trial to stand mute and require the state to prove its case against him.

---

252. *See* Comment, *supra* note 8, at 1438-39.

253. *See* Edward J. Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL ADVOC. 183 (1985). Professor Imwinkelried demonstrates how "[c]ross-examination plays a crucial role in eliciting unfavorable demeanor by witnesses." *Id.* at 217.

254. *But see* Anthony C. Porcelli, Note, *Sixth Amendment—Right to Confront One's Accuser When the Victim Does Not Testify*, 83 J. CRIM. L. & CRIMINOLOGY 868, 892-93 (1993).

255. *See* Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992).

The *White* Court, in moving away from an "unavailability" rule was also myopic to the actual reliability of hearsay. Reading *White*, one may be persuaded that the "firmly rooted" exceptions to the hearsay rule indeed are reservoirs of "reliability." Apparently, the Court is convinced that the "firmly rooted" exceptions possess an "indicia of reliability" based upon the rationale for the exception and its age.[256] This trust in the reliability of the hearsay exceptions is simply overbroad. Consider the excited utterance exception. Just because a person made a statement in excitement does not mean that the out-of-court declarant could accurately visualize, perceive and describe the event in question.[257] Likewise just because an entry appears in a business record does not mean that the out-of-court declarant had no reason to falsify the record. The *White* Court seems to have forgotten the shortcomings of hearsay evidence. Instead, the Court raises hearsay evidence to constitutional stature and unleashes it unchecked on the accused in criminal trials.

The *White* Court's emphasis on problems for the criminal justice system is similarly shortsighted. The Court mentions the problems of finding and holding witnesses and of scheduling "unavailability" hearings.[258] Surely, similar concerns for a proliferation of hearings were raised when the Court began requiring *Miranda* warnings[259] or Fourth Amendment suppression hearings.[260] Surely, similar concerns regarding locating and holding witnesses were raised when the Court required in-court witnesses to provide proof on the chain-of-evidence. An "unavailability" hearing would be quite simple in comparison to a *Miranda* hearing or a Fourth Amendment suppression hearing. The Court only needs to provide clear guidelines for the lower courts to decide the issue.[261] Although

256. *White*, 112 S. Ct. at 742 n.8.

257. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 436-40 (1928); Lawrence S. Kubie, *Implications for Legal Procedure of the Fallibility of Human Memory*, 108 U. PA. L. REV. 59 (1959).

258. 112 S. Ct. at 742.

259. Miranda v. Arizona, 384 U.S. 436, 475 (1966) ("[A] heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").

260. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (to show a waiver, the government must demonstrate "an intentional relinquishment or abandonment of a known right or privilege").

261. Already in Reynolds v. United States, 98 U.S. 145 (1879), Mattox v.

the *White* Court pointed to the increased difficulty imposed on a prosecutor having to amass and hold witnesses, and painted a dismal picture of all the hardships such a rule would engender,[262] the Court ignored the body of jurisprudence that would palliate the harshness of the rule. Without the *White* decision, hearsay evidence from witnesses who meet the "unavailability test" could still be presented by hearsay exceptions. The witness simply must be unavailable, due to no fault of the state,[263] and the state must have made a diligent effort to locate the witness.[264] Moreover, nothing would preclude local jurisdictions from enacting rules of court requiring pre-trial conferences wherein prosecution and defense counsel would sort out unwanted witnesses and submit reasons to the court why apparently minor witnesses are required to attend in person.

The *Roberts* approach would sidestep the burden imposed upon the prosecution of requiring *all* witnesses to be in court. Further, the *Roberts* approach would fit neatly into the pre-*White* case approach which made unavailability a staple of the Confrontation Clause.[265]

The *Roberts* approach would enhance the accuracy of the fact-finding aspect of trial. If all available witnesses are required to be present in court and subject themselves to cross-examination, the trier of fact would certainly be in a superior position to judge the credibility of the testimony, as opposed to instances where the fact-finder is exposed only to hearsay.

Finally, the *Roberts* approach maintains hearsay in its proper place, an evidentiary rule, not a constitutional device. *White* would place the rules of hearsay on a constitutional pedestal. The literal approach could eviscerate hearsay altogether. The pre-*White* cases recognized only three hearsay exceptions. Justice Thomas' approach is also limited. The *Roberts* approach incorporates the strengths and evades the weaknesses inherent in these approaches. Moreover, under the *Roberts* approach, the accused would have

---

United States, 156 U.S. 237 (1895), Barber v. Page, 390 U.S. 719, 724-25 (1968), and California v. Green, 399 U.S. 149, 189 n.22 (1970), the Court had begun the effort.

262. *White*, 112 S. Ct. at 742.

263. *See* Motes v. United States, 178 U.S. 458 (1900). *See generally White*, 112 S. Ct. at 742 n.6.

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

265. Although co-conspirator statements do not require unavailability, admission of co-conspirator statements was a common law practice that pre-dated the clause. *See generally supra* notes 131-61 and accompanying text.

some measure of satisfaction that the Confrontation Clause stands for something.

The Confrontation Clause certainly should stand for something. At present, it is only a reflex to the rules of evidence. The Framers intended the Clause to occupy a more prestigious position. Coupled with the probing device of cross-examination, the requirement of face-to-face confrontation was intended to provide the accused with a meaningful defense. In trials after *White*, cross-examination promises to be a hollow right, and face-to-face confrontation a vanishing guarantee.

V. Conclusion

The Confrontation Clause was meant to endow an accused with some right, and some protection. The glare of *White* makes it difficult to see any trial protection. The Confrontation Clause is now basically an automaton for the rules of evidence. The *White* Court has lost sight of the hallowed protection that the Clause was intended to provide. Under *White*, we return to the same pre-constitutional evil inflicted on those accused who pleaded for the Confrontation Clause; the accused will suffer convictions based upon testimony generated by unseen witnesses who send their words, instead of their bodies, to court.[266]

I have criticized *White* and its reasoning while exploring other formulations which may be true to the purpose of the Confrontation Clause. The suggested constructions are offered in the fervid hope that they will produce interest, discussion, and, eventually, a better formulation of the relationship between the Confrontation Clause and the rules of hearsay evidence than that presented in *White*.

---

266. The case of Sir Walter Raleigh comes to mind. Viewed by some historians as one of the principal cases which inspired the Framers to adopt the Confrontation Clause, Sir Walter's case epitomized the danger of hearsay evidence. Charged with plotting to seize the throne, Sir Walter was convicted on the strength of an accusatory affidavit submitted by one Lord Cobham, who the prosecution refused to call as a witness, even though Raleigh had received a retraction of the accusation from the affiant. *See* Stephen, *supra* note 12. Fifteen years after his trial, Sir Raleigh was executed in 1618.