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Sixth Amendment--Right to Confront One's Accuser When the Victim Does Not Testify

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SIXTH AMENDMENT—RIGHT TO CONFRONT ONE'S ACCUSER WHEN THE VICTIM DOES NOT TESTIFY

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

I. INTRODUCTION

In *White v. Illinois*,[1] the United States Supreme Court, in a unanimous decision, expanded the scope of cases in which hearsay testimony is admissible without the declarant testifying. The issue before the Court was whether the Confrontation Clause of the Sixth Amendment required the prosecution to show that the declarant was unavailable to testify at trial before the court could admit the declarant's out-of-court statements—through the testimony of non-declarant witnesses—under the "spontaneous declaration" and "medical examination" exceptions to the hearsay rule. The Court extended *United States v. Inadi*,[2] and concluded that the hearsay statements of a four-year-old sexual assault victim were admissible despite the failure to show the unavailability of the victim.

The majority opinion, written by Chief Justice Rehnquist, held that a showing of witness unavailability was not a prerequisite of admissibility where the statements at issue fell within well-rooted exceptions to the hearsay rule. Justices Thomas and Scalia concurred in the judgment, but they disagreed with the majority's discussion of the phrase "witnesses against" in the Confrontation Clause.

This Note will focus on several aspects of the Supreme Court's decision in *White v. Illinois*.[3] The Note begins with an examination of the decision itself. Although the holding in *White* appears overly broad on its face, leading to a "slippery slope," the decision presents a proper balance between the constitutional guarantees of the Confrontation Clause and the need for reliable testimony. The Note then argues that *White* is a valid extension of precedent, a con-

[1] 112 S. Ct. 736 (1992).

[2] 475 U.S. 387 (1986). The Court held that the Confrontation Clause did not require a showing of the unavailability of the declarant in order for recorded out-of-court co-conspirator statements to be admitted. *Id.* For a more complete discussion, *see infra* notes 68-80 and accompanying text.

[3] 112 S. Ct. 736 (1992).

clusion disputed by the petitioner in briefs filed with the Court. This Note concludes with an analysis of the rule proposed by Justices Thomas and Scalia in their concurrence.

II. FACT SUMMARY

At four o'clock in the morning on April 16, 1988, Tony DeVore was baby sitting for S.G., who was four years old at the time,[4] when DeVore was awakened by S.G.'s scream.[5] DeVore went to S.G.'s bedroom and witnessed a man, later identified as the defendant, White, exit the room and then the house.[6] DeVore recognized the defendant because he was a friend of Tammy Grigsby, S.G.'s mother.[7] DeVore then asked S.G. what had happened.[8] DeVore testified at trial that S.G. said that the defendant had put his hand over her mouth, choked her, and threatened to whip her if she screamed.[9] DeVore further testified that S.G. then said that the defendant had "touch[ed] her in the wrong places."[10] DeVore testified that S.G. pointed to and identified her vaginal area as the location of the touching.[11]

Approximately thirty minutes later, S.G.'s mother, Tammy Grigsby, returned home. At trial, Grigsby testified that S.G. appeared "scared" and a "little hyper."[12] Grigsby questioned her daughter, and S.G. told her mother that the defendant had choked and threatened her, and that he had "put his mouth on her front part."[13] Grigsby noticed bruises and red marks on S.G.'s neck which were not present earlier that evening.[14] Grigsby then called the police.[15]

Officer Terry Lewis of the Georgetown Police Department arrived at the Grigsby home at approximately 4:47 a.m.[16] Lewis asked Grigsby to examine S.G.'s "front part."[17] Grigsby noticed that it was a "little red."[18] Lewis then questioned S.G. alone in the

4 People v. White, 555 N.E.2d 1241, 1243 (1990).
5 *White*, 112 S. Ct. at 739.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 People v. White, 555 N.E.2d 1241, 1244 (1990).
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*

kitchen.[19] Lewis initially spoke to S.G. about cartoons in order to "[get] her at ease."[20] S.G. told Lewis the same story that she had told Grigsby with one slight addition: Lewis testified that S.G. talked about her pants being wet.[21] Lewis asked her if she "peed" in her pants.[22] S.G. answered, "I don't pee in my pants," and stated that the defendant had caused them to become wet.[23] Officer Lewis testified that, when questioned as to how the defendant caused her pants to become wet, S.G. replied that the defendant pulled her pants to one side and used his tongue on her private parts.[24] Lewis noticed that S.G. had fresh scratches on the right side of her mouth and on her neck.[25] Lewis photographed S.G. at six o'clock in the morning and this photograph, which was admitted into evidence, showed the scratches that he mentioned.[26]

S.G. then went to the emergency room and was interviewed by Cheryl Reents, an emergency room nurse who was on duty at the time.[27] Reents questioned S.G. about the assault, using open-ended questions.[28] At trial, Reents testified that S.G. related the same story that she had told DeVore, Grigsby, and Lewis, with one difference.[29] Reents testified that when asked if this had ever happened before, S.G. replied that it had happened once when "it was cold out."[30] Reents further testified that S.G. also said that, "he put his mouth on her, but he did not hurt her that time."[31] Reents also noticed that S.G.'s neck was bruised.[32]

Dr. Michael Meinzen was the doctor on duty in the emergency room when S.G. was brought in, and he spoke with her next.[33] Dr. Meinzen asked several background questions in order to render accurate and proper treatment.[34] S.G. told Dr. Meinzen essentially the same story that she had told the others, and Dr. Meinzen testified accordingly at trial.[35]

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19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.* at 1245.
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*

III. PROCEDURAL HISTORY

White was convicted in the Circuit Court of Vermilion County, Illinois, of aggravated criminal sexual assault, residential burglary, and unlawful restraint.[36] He was sentenced to ten years for aggravated criminal sexual assault, six years for residential burglary, and two years for unlawful restraint.[37]

S.G. never testified at the trial.[38] The prosecution attempted on two occasions to call her to the stand, but she experienced emotional difficulties upon entering the courtroom.[39] The defendant also never called S.G. as a witness.[40] DeVore, Grigsby, Officer Lewis, Reents, and Dr. Meinzen all testified as to S.G.'s statements on the morning of the assault.[41] The defense made hearsay objections to the testimony of each of these witnesses because the testimony included statements made by S.G.[42] The trial court overruled the hearsay objections with respect to DeVore, Grigsby, and Officer Lewis on the ground that S.G.'s statements were admissible under the hearsay exception for spontaneous declarations.[43] The court overruled the objections made regarding the testimony of Reents and Dr. Meinzen because S.G.'s statements fell into both the spontaneous declaration exception and the exception for statements made while securing medical treatment.[44] The court also denied the defense's motion for a mistrial, which was based on S.G.'s presence in the courtroom and her failure to testify.[45]

White appealed the decision to the Fourth District Appellate Court of Illinois.[46] On appeal, the defendant contended that the trial court erred in admitting the out-of-court statements made by the victim, and that his Sixth Amendment Confrontation Clause rights were violated because the prosecution did not produce the declarant for cross-examination or demonstrate that the declarant was unavailable.[47]

The appellate court held that the availability of the declarant was "totally irrelevant to the determination of whether an out-of-

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36 White v. Illinois, 112 S. Ct. 736, 736 (1992).
37 *White*, 555 N.E.2d at 1256.
38 *White*, 112 S. Ct. at 739.
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.* at 739-40.
43 *Id.* at 740.
44 *Id.*
45 *Id.*
46 People v. White, 555 N.E.2d 1241, 1241 (1990).
47 *Id.* at 1246.

court statement of that declarant is admissible under an exception or exemption to the hearsay rule."[48] The Court examined only the testimony of Grigsby, Officer Lewis, Reents, and Dr. Meinzen to determine whether they met an exception to the hearsay rule. The defendant conceded that the statements made to DeVore met the requirements for admission as spontaneous declarations.[49] The appellate court determined that the trial court did not abuse its discretion in allowing the witnesses to testify as to S.G.'s statements because each of the statements qualified as either a spontaneous declaration or a statement made while securing medical treatment.[50] Accordingly, the appellate court affirmed the trial court's decision.[51]

The Illinois Supreme Court denied discretionary review. White then petitioned the United States Supreme Court for a writ of certiorari.[52]

IV. Decision Of The United States Supreme Court

The Supreme Court granted certiorari but limited its review to the following issue: whether a petitioner's Sixth Amendment rights were violated when a child sexual assault victim did not testify at trial, was not shown to be unavailable to testify, and where the victim's statements were admitted through the testimony of others based on two well-rooted hearsay exceptions.[53] The Court assumed that the testimony was properly within the relevant exceptions to the hearsay rule for spontaneous declarations and statements made while securing medical treatment.[54]

B. MAJORITY OPINION

Chief Justice Rehnquist delivered the opinion of the Court.[55]

1. "Witnesses Against"

The United States submitted an *amicus curiae* brief in support of the respondent, the State of Illinois. In its brief, the United States claimed that the Confrontation Clause did not apply to this case.[56]

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48 *Id.* at 1252.
49 *Id.* at 1248.
50 *Id.* at 1250-51.
51 *Id.* at 1257.
52 White v. Illinois, 112 S. Ct. 736, 740 (1992).
53 *Id.*
54 *Id.* at n.4.
55 *White*, 112 S. Ct. at 738. Chief Justice Rehnquist was joined by Justices White, Blackmun, Stevens, O'Connor, Kennedy, and Souter. *Id.*
56 *Id.* at 740.

The Confrontation Clause states that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[57] According to the United States, S.G. was not a "witness against" the defendant as required by the Confrontation Clause. In support of this claim, the United States argued that the purpose of the Confrontation Clause was to prevent the prosecution of an individual through the use of ex parte affidavits without the affiants ever testifying.[58] Therefore, the United States asserted, the Confrontation Clause should only restrict hearsay testimony in cases where the admitted hearsay was in the nature of an ex parte affidavit.[59]

The Court rejected the United States' argument[60] because such a narrow reading of the Confrontation Clause would virtually eliminate the power of the Confrontation Clause to restrict the admission of hearsay testimony.[61] In addition, the Court held that the argument "[came] too late in the day to warrant reexamination."[62] Because the Court found that the Confrontation Clause was applicable, the Court next had to consider whether White's Confrontation rights had been violated.

2. The Confrontation Clause and the Admission of Hearsay Testimony

In bringing this case to the Supreme Court, White relied on *Ohio v. Roberts* to argue that S.G.'s statements were improperly admitted;[63] the Supreme Court, however, relied on *United States v. Inadi* to hold that the admission of S.G.'s statement was proper.[64] In order to understand the Court's holding, a discussion of these two cases is necessary.

The United States Supreme Court in *Ohio v. Roberts*[65] held that

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57 U.S. CONST. amend. VI.

58 *White*, 112 S. Ct. at 740. The origins of the confrontation right stemmed from the abuses in 16th and 17th Century England whereby defendants were convicted based on ex parte affidavits without the affiants ever being produced at trial. *Id.*

59 *Id.* at 740-41.

60 The majority's discussion of the definition of "witnesses against," as raised by the United States in its brief, led to the concurring opinion of Justices Thomas and Scalia. Except for the majority's discussion of the definition of "witnesses against," Justices Thomas, and Scalia joined the Court in its holding on the Confrontation Clause. *White*, 112 S. Ct. at 748.

61 *Id.* at 741 n.5. The position of the United States regarding the phrase "witnesses against" was considered once before by the Court. It only gained the favor of one Justice in his concurrence. *See* Dutton v. Evans, 400 U.S. 74, 93 (1970) (Harlan, J., concurring).

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

63 448 U.S. 56 (1980).

64 475 U.S. 387 (1986).

65 448 U.S. 56 (1980).

the prior testimony of a witness who did not testify at trial could be admitted at trial, if the testimony had been subject to questioning equivalent to cross-examination and if the witness was found to be unavailable.[66] The Court stated:

> . . . [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[67]

Six years after *Roberts*, the issue before the court in *United States v. Inadi*[68] was whether the Confrontation Clause required a showing of a declarant's unavailability in order to admit the recorded out-of-court statements of unindicted, non-testifying co-conspirators.[69] The *Inadi* Court first stated that the *Roberts* decision should be limited only to the facts of that case. Proof of unavailability is required for introduction of prior testimony by a non-testifying witness, but such a requirement should not be applied broadly to all cases dealing with out-of-court statements.[70] The Court in *Inadi* explicitly stated, "*Roberts* cannot fairly be read to stand for the radical proposition that *no* out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."[71]

The *Inadi* Court further distinguished *Roberts* based on the type of testimony offered.[72] In *Roberts*, the prosecution attempted to offer the prior testimony of the declarant.[73] According to the *Inadi* Court, former testimony is merely a weaker substitute for live testimony because, "it seldom has independent evidentiary significance of its own."[74] The Court reasoned that when the declarant testifies, he will present the same testimony as previously given, making the use of the prior testimony merely a replacement for the live testimony.[75] When two versions of the same evidence are available, the longstanding principles of hearsay favor the better, or live, evidence.[76] Thus, the prior testimony in *Roberts* was properly excluded

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66 *Id.*
67 *Id.* at 66.
68 475 U.S. 387 (1986).
69 *Id.*
70 *Id.* at 392-93.
71 *Id.* at 394 (emphasis added).
72 *Id.* at 395.
73 *Id.*
74 *Id.* at 394.
75 *Id.*
76 *Id.*

in favor of live testimony at trial.

The *Inadi* Court stated that these same principles did not apply, however, to the type of recorded out-of-court co-conspirator statements at issue in *Inadi*.[77] Recorded co-conspirator statements, made while a conspiracy is in progress, provide evidence of the conspiracy's context that cannot be replicated.[78] Unlike prior testimony, this evidence cannot be reproduced at trial because time passes, and the circumstances and alliances existing at the time of the conspiracy change.[79] Based on these differences and the greater evidentiary value of the recorded out-of-court co-conspirator statements, the *Inadi* Court held that the Confrontation Clause did not require a showing of the unavailability of the declarant in order for recorded co-conspirator statements to be admitted.[80]

Contending that the language in *Ohio v. Roberts*[81] required that S.G. either be produced or shown to be unavailable before her out-of-court statements were admitted, the petitioner in *White* argued that the admission of S.G.'s statements was reversible error.[82] The Court rejected this argument because such a broad reading of *Roberts* was expressly negated by the Court in *Inadi*.[83]

The *White* Court utilized the same basic analysis of hearsay statements as used in *Inadi*.[84] First, the *Inadi* Court noted that statements made during the commission of a conspiracy have greater evidentiary significance than statements made on the witness stand after the conspiracy has ended.[85] Since the declarant's status will likely change between the commission of the conspiracy and the time of trial, in-court repetition of the prior out-of-court statements would be a poor substitute for the statements made during the ongoing conspiracy.[86] The Court noted that this was not true of prior in-court testimony, which was at issue in *Roberts*.[87] The Court therefore concluded that recorded co-conspirator statements should be admissible without showing unavailability, while prior testimony would not be admissible absent such a showing.

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77 *Id.* at 395.
78 *Id.*
79 *Id.*
80 *Id.* at 400.
81 Ohio v. Roberts, 448 U.S. 56 (1980).
82 White v. Illinois, 112 S. Ct. 736, 741 (1992).
83 *Id.*
84 *Id.* at 741-42.
85 *Id.* at 742.
86 *Id.*
87 *Id.*

With respect to the reliability of S.G.'s statements in *White*, the Court noted:

> . . . [T]he evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.[88]

In other words, spontaneous declarations and statements made in the course of receiving medical care are "firmly rooted" exceptions to the hearsay rule; they supply the reliability as required by the Confrontation Clause.[89] The Court also noted that the factors that contribute to the statements' reliability, namely the contexts in which the statements are made, cannot be recaptured by later in-court testimony.[90] The Court stated that live testimony, in the case of statements like those offered in *Roberts*, is preferred over hearsay testimony because of the importance of cross-examination.[91] The Court held that the two firmly rooted exceptions to the hearsay rule at issue in *White v. Illinois* provided sufficient guarantees of reliability so as to satisfy the Confrontation Clause.[92] Since the type of hearsay involved in this case had a probative value that could not be duplicated by live testimony at trial, the Court found that it would be the "height of wrongheadedness" if the Confrontation Clause did not allow such statements to be admitted.[93]

The *White* Court next reiterated its holding in *Inadi* that there would be little benefit and great burdens in having an "unavailability rule."[94] An unavailability rule would offer little benefit because it would not prevent hearsay statements from being admitted.[95] Prosecutors could simply either produce the declarant or show his unavailability.[96] In either scenario, the statements could be introduced.[97] In addition, the defendant could elicit the declarant's testimony by calling the declarant to the stand, a right guaranteed by the Sixth Amendment's Compulsory Process Clause.[98] While little ben-

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88 *Id.*

89 *Id.* at 742 n.8.

90 *Id.* at 742.

91 *Id.* at 743.

92 *Id.*

93 *Id.*

94 *Id.* at 742 n.6. An "unavailability rule" requires either a showing of the declarant's unavailability or the production of the declarant at trial before hearsay testimony can be introduced. *Id.*

95 *Id.* at 742.

96 *Id.*

97 *Id.*

98 *Id.*

efit would be reaped by an unavailability rule, the burdens of such a rule would be great; an unavailability rule would require locating and having the declarant continuously available throughout the trial, even though the declarant may never be called to testify.[99]

The petitioner also advanced the theory that the cases of *Coy v. Iowa*[100] and *Maryland v. Craig*[101] stood for the proposition that a showing of necessity is required in cases where the defendant will not face his accuser.[102] The Supreme Court in *Coy* vacated a conviction in which a child witness testified at trial from behind a screen, and a showing of necessity[103] was not made.[104] The Court in *Craig* upheld a conviction in which a child witness testified via closed circuit television where a showing of necessity was made.[105]

The Court distinguished *Coy* and *Craig* from the case at hand because *Coy* and *Craig* addressed "in-court procedures" that must be followed in order to protect a defendant's rights under the Confrontation Clause once a witness testifies.[106] On the other hand, the *White* case involved a witness who never testified.[107] Since *Coy* and *Craig* were factually dissimilar from *White* and did not address the issue of a non-testifying declarant, the Court held that the necessity requirement did not apply to the present case.[108]

The Court concluded that witness unavailability was not necessary in order to admit out-of-court statements, which fell into established exceptions to the hearsay rule, namely spontaneous declarations and statements made while securing medical treatment.[109] As a result, the Court did not find a violation of the petitioner's Sixth Amendment rights and upheld the judgment of the

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99 *Id.*

100 487 U.S. 1012 (1988).

101 497 U.S. 836 (1990).

102 *White*, 112 S. Ct. at 743.

103 *Id.* A finding of necessity is made where the measures employed are necessary to protect the child's physical and psychological well-being.

104 *Id.* The Court in *Coy* said that the measures employed at the trial level "would surely be allowed only when necessary to further an important public policy" and "[s]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here [that of the Iowa Supreme Court affirming the conviction of the defendant] could not be sustained by any conceivable exception." *Coy*, 487 U.S. at 1021.

105 *White*, 112 S. Ct. at 743. The Court in *Craig* stated that it was consistent with their holding that, "the Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate." Maryland v. Craig, 497 U.S. 836, 858 (1990).

106 *White*, 112 S. Ct. at 743-44.

107 *Id.*

108 *Id.* at 744.

109 *Id.*

Illinois Appellate Court.[110]

C. CONCURRING OPINION

Justice Thomas and Justice Scalia joined the majority opinion, with the exception of the initial discussion of the narrow definition of the "witnesses against" clause found in the Sixth Amendment.[111]

The Confrontation Clause states that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."[112] Justice Thomas noted that courts have always assumed that all hearsay declarants are "witnesses against" the defendant, and no court has examined the phrase "witnesses against" to determine whether this interpretation holds logically true.[113] For example, there is no evidence as to what the authors of the Confrontation Clause intended this phrase to mean.[114] Justice Thomas stated that the strictest reading of the phrase, and the one he attributed to John Henry Wigmore, was that only those who actually testify at trial are "witnesses against" the defendant and that the defendant has the right to cross-examine and confront only them.[115] Justice Thomas noted that in *Craig*,[116] Justice Scalia, in his dissent, stated that the meaning of "witness" was one who testified and, as such, the phrase "witnesses against" referred only to those who actually testified in court.[117]

Justice Thomas, however, noted a problem with defining "witnesses against" as those persons who actually testify at trial.[118] Such a definition conflicts with the reasons for the Confrontation Clause:[119] a need to eliminate convictions of individuals based on ex parte interrogatories that are presented at trial in the form of depositions, confessions of accomplices, and letters, and which do not permit the defendant an opportunity to confront the declarant face-to-face.[120] In its brief, the United States suggested that the Confrontation Clause should only apply to in-court testimony or its equivalent, "such as affidavits, depositions, or confessions that are

110 *Id.*
111 *Id.* at 748 (Thomas, J., concurring).
112 U.S. CONST. amend. VI.
113 *White*, 112 S. Ct. at 744 (Thomas, J., concurring).
114 *Id.* (Thomas, J., concurring).
115 *Id.* (Thomas, J., concurring).
116 Maryland v. Craig, 497 U.S. 836 (1990).
117 *White*, 112 S. Ct. at 745 (Thomas, J., concurring) (quoting *Craig*, 497 U.S. at 865 (Scalia, J., dissenting)).
118 *Id.* (Thomas, J., concurring).
119 *Id.* (Thomas, J., concurring).
120 *Id.* (Thomas, J., concurring).

made in the contemplation of legal proceedings."[121] Justice Thomas stated that this would be more consistent with the rationale for the Confrontation Clause.[122] The statements made in affidavits, depositions, prior testimony, or confessions are considered to be similar to in-court statements because they are made in contemplation of a trial.[123] But, Justice Thomas noted, attempting to limit the Confrontation Clause only to "statements made in the contemplation of legal proceedings" would be fraught with difficulties.[124]

Justices Thomas and Scalia therefore suggested a simplified rule: the Confrontation Clause should apply only to those out-of-court statements that are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, because they are the source of the abuse that the Confrontation Clause originally sought to remedy.[125] Moreover, Justices Thomas and Scalia argued that their proposition simplified the question of which out-of-court statements should be admitted, and did so in a way that eliminated the problem of determining whether an exception was so firmly rooted as not to be restricted by the Confrontation Clause.[126]

V. ANALYSIS

A. THE FUTURE: POTENTIAL PROBLEMS AND A SOLUTION

The Supreme Court's holding in *White v. Illinois* allows testimony that meets a well-rooted hearsay exception to be admitted at trial, even without a showing of a declarant's unavailability to testify. Because the *White* decision is not limited to child abuse victims, a wide range of hearsay testimony may now be admissible without proof of unavailability. After *White*, it is possible that a woman who has been raped may not have to testify at the trial of her alleged attacker, and that he may be convicted without her testimony and absent a showing of her unavailability to testify. This Note argues that, although it appears that the Court has started down a "slippery slope" with its decision in *White*, in reality it has not, due to the Sixth Amendment's Compulsory Process Clause.[127] This Note uses facts from an actual rape case, as well as the facts of *White*, to analyze the

121 *Id.* at 747 (Thomas, J., concurring).
122 *Id.* (Thomas, J., concurring).
123 *Id.* (Thomas, J., concurring).
124 *Id.* (Thomas, J., concurring).
125 *Id.* (Thomas, J., concurring).
126 *Id.* at 748 (Thomas, J., concurring).
127 U.S. CONST. amend. VI. The Compulsory Process Clause allows defendants to compel witnesses to testify.

potential problems with the *White* holding and to demonstrate that the Compulsory Process Clause provides a solution to these problems.

HYPOTHETICAL:[128] Late one evening, a man attacks a woman in an alley. Before she is raped, the woman breaks free, darts out of the alley, and encounters a police officer. The woman's appearance and emotional state clearly indicate that she has been attacked. Before her attacker can escape, the woman identifies him to the police officer. She says to the police officer, "He was trying to rape me, get him away from me!" The officer then arrests the suspect, who is convicted of second-degree rape.

QUESTION: If the woman does not testify at trial, would the admission of her statements to the police officer violate the defendant's Sixth Amendment confrontation rights? According to *White*, as long as the statements are admitted based on a well-rooted exception to the hearsay rules, the defendant's confrontation rights will not be violated.

The question raised by both the hypothetical and the *White* case relates to how far the doctrine of admitting hearsay statements can extend without violating the confrontation rights of a defendant. Under *White*, one need not produce the witness or show the unavailability of a witness in order for testimony to be admitted, so long as the testimony falls within the hearsay exceptions for spontaneous declarations or statements made while receiving medical treatment. This would appear to apply regardless of the age of the victim or the nature of the crime.[129]

As the hypothetical demonstrates, the *White* holding is arguably very broad in scope. It allows statements by child abuse victims to be admitted without a showing of unavailability; but it also allows statements by rape victims, child victims of any crime, or even adult victims who fear repercussions from confronting the defendant in

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[128] These facts are taken from Washington v. Palomo, 783 P.2d 575 (1989), *cert. denied*, 111 S. Ct. 80 (1990). The officer in *Palomo* walked by the scene of the attempted rape and witnessed the crime. The woman never testified at trial but her statements were admitted pursuant to the exception to the hearsay rule for excited utterances. The Supreme Court of Washington held that the admission of the hearsay statement did not violate the defendant's confrontation rights, but even if it did violate those rights, it would be harmless error in this case because of the officer's firsthand knowledge of the incident. The facts have been slightly altered because, unlike *Palomo*, there was no eyewitness in *White*.

[129] One major difference between *White* and the hypothetical is that the victim in *White* was a young child, and the victim in the hypothetical is an adult. This distinction becomes important because society may have more sympathy for a child-victim and be more willing to allow a conviction in the absence of a child's testimony as opposed to the absence of a grown woman's testimony.

court. In addition, this journey down the "slippery slope" may continue if courts use other well-rooted hearsay exceptions to justify the admission of testimony without proof of unavailability. Eventually, courts could allow *all* hearsay exceptions until the general rule contained in the Confrontation Clause, that a defendant has a right to confront "witnesses against him," is swallowed up.

Furthermore, the holding in *White* may infringe too much on defendants' rights in general. For example, after *White*, the prosecution need not always call the victim to testify in order to obtain a conviction. This is advantageous to the prosecution if the victim is not as credible as the prosecution would like, or if there is a risk of impeachment if the witness takes the stand. For example, a rape victim, called to testify years after the incident, may be emotionally scarred by the incident, or her memory may have eroded with time. After *White*, the prosecution arguably has the option of not calling the victim to the stand, instead relying only on hearsay testimony to convict the defendant.[130]

One possible solution to this "slippery slope" dilemma is to limit the *White* decision to its facts. For example, if the *White* holding were limited to its own facts, namely to a child victim of sexual assault, then the woman in the hypothetical would have to testify or be proven unavailable. By taking such an approach, the range of cases covered by *White* might arguably be limited. However, there is no guarantee that the courts in the future will limit the holding of *White*, nor should they have to.

In contrast to the "solution" of limiting *White* to its facts, this Note argues that the potential "slippery-slope" problem of *White* is nullified by the Compulsory Process Clause. The petitioner in *White* wanted the court to require a showing of S.G.'s unavailability to testify and, if a showing was not made, then the petitioner wanted the court to require the prosecution to produce S.G. to testify at trial.[131] Seemingly, the Confrontation Clause required such a result. However, the problem with the petitioner's argument was that the prosecution need not prove witness unavailability in order for the hearsay statements to be admitted at trial.

The Sixth Amendment's Compulsory Process Clause states

130 This scenario may not hold true in every case, and arguably may not always be the "safest" option. For example, the woman may never forget the attempted rape because it is permanently ingrained into her memory, whereas the police officer, who deals with many crimes daily, may not recall what actually happened and what was said in this particular case. Still, the example does illustrate a potential advantage the prosecution may have if the victim is less than credible on the witness stand.

131 Brief for Petitioner at 28, White v. Illinois, 112 S. Ct. 736 (1992) (No. 90-6113).

that, "In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor. . . ."[132] This right to call witnesses to testify at trial implicitly protected the petitioner's interests in *White*, and it will protect future defendants, such as the defendant in the hypothetical, as well. For example, in *White*, the petitioner could have called S.G. to testify during the presentation of his defense.[133] Likewise, in the hypothetical, the defendant could call the victim to the stand during the presentation of his case. In short, due to the rights given a defendant by the Compulsory Process Clause, *White* does not constitute an infringement on defendants' rights.

To further illustrate, if the petitioner had called S.G. to the stand as part of the defense, one of two things would have happened. First, S.G. would have taken the stand, and the petitioner would have had the opportunity to question her. In this scenario, the petitioner would have "confronted" S.G. at trial. In the alternative, upon calling S.G. to the stand she could have been found unavailable to testify. As a result, the hearsay statements would likely have been admitted, but the statements would have been admitted only after a showing of unavailability. Either way, as a constitutional matter, the petitioner's confrontation rights would not have been violated.[134] Even though White chose not to compel S.G. to testify, he retained the right to confront S.G. throughout his trial. The Compulsory Process Clause guaranteed the preservation of his confrontation rights.

In addition to preserving the rights of defendants, the Compulsory Process Clause gives the appropriate amount of protection to victims and leeway to prosecutors. The rule protects victims of crimes by not forcing them to take the stand regardless of their age or the sensitivity of the crime. Testifying in court can be an anxiety-filled experience; for some sexual assault victims, the experience can be terrifying and even traumatic. Fear and trauma is likely to be even greater if the victim is a child; facing a molester could have long-lasting emotional effects on a child.[135] Aside from the possibil-

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132 U.S. CONST. amend. VI.

133 White v. Illinois, 112 S. Ct. 736, 742 (1992). The majority states that the defense can take advantage of the Compulsory Process Clause in order to obtain a declarant's live testimony (citing United States v. Inadi, 475 U.S. 387, 396-98 (1986)).

134 Conceptually, though, there may still be a problem with a showing of unavailability because in such a case the defendant will not get to face the declarant.

135 The Court has recognized these possible effects and has set up safeguards in an attempt to minimize them. *See* Maryland v. Craig, 497 U.S. 836 (1990) (if a proper showing of necessity is made prior to the child's testimony, the Court would allow the child to testify via a one-way closed circuit television).

ity that the defense may call the victim to the stand, the victim may be shielded from the pressure of testifying in public. Therefore, under *White*, the trauma of testifying can be reduced in appropriate situations.

In addition, after *White*, the prosecutor has greater flexibility in prosecuting criminals. He has the choice of whether to call the victim to the stand without automatically infringing on the defendant's constitutional rights. The prosecution may use admissible hearsay statements either alone or in conjunction with the victim's actual testimony on the witness stand.

As previously discussed, the defendant can combat the tactics of the prosecution and confront the victim at trial through the constitutional guarantee of compulsory process. Moreover, the Federal Rules of Evidence allow a defendant to call a witness in his defense and, after demonstrating a need, question the witness as if doing so on cross-examination.[136] For example, in the hypothetical, the defendant could call the woman to the stand and after showing that she is a hostile witness, the defense might be permitted to ask leading questions as if the woman was being cross-examined.[137] Thus, not only do defendants have the opportunity to call victims as witnesses, but in some cases, they may have the added benefit of being able to treat them as if on cross-examination.

One criticism of this "solution" is that the defendant may not actually have the "choice" of whether to call a victim to the stand. For example, the jury may develop a negative opinion of the defendant who forces a sexual assault victim to take the stand and testify about her traumatic experience. The jurors may be further angered if the defense attempts to "beat up" the victim on the witness stand. Therefore, even though the defendant may have the right to call a victim to the stand, in reality, the defendant may be forced to relinquish this right in order to receive a favorable verdict from the jury. In response, even though the decision to call the victim to the stand and to examine her is a delicate matter, the fact remains that the defendant has the right to question the victim. Moreover, talented defense counsel can question the victim in a manner which will not offend the jury and that may even sway the jury in the defense's favor.

In conclusion, neither the *White* decision itself nor its effect deprives defendants of their confrontation rights. The petitioner

136 "When a party calls a hostile witness, an adverse party, or *a witness identified with an adverse party*, interrogation may be by leading questions." FED. R. EVID. 611(c) (emphasis added).

137 *Id.*

could have called S.G. to the stand and either questioned her or forced a showing of unavailability, if he so desired. Likewise, in the hypothetical, the defendant could call the woman to the stand and either question her or force a showing of unavailability. In *White*, the decision not to call S.G. was a conscious one and, once made, the petitioner's argument that his confrontation right had been violated lost its persuasiveness. As for future cases, such as the hypothetical, other defendants should not be able to argue convincingly that their rights were violated when they waive their constitutional right to call the victim to the stand.

B. *WHITE* CORRECTLY EXTENDS PRECEDENT

The petitioner, in his Supreme Court brief, relied heavily on the cases of *Ohio v. Roberts*[138] and *Idaho v. Wright*[139] in making his argument that unavailability of the declarant should have been proven before the hearsay testimony of S.G. was admitted.[140] The holdings, reasoning, and analysis in these cases simply do not support the petitioner's argument. This section contends that despite the petitioner's use of these cases to support his argument, the *White* Court correctly extended existing precedent to find that S.G.'s hearsay statements could be admitted without a showing of unavailability.

The petitioner stated that in cases where various procedures are used in an attempt to avoid face-to-face confrontations between child witnesses and defendants at trial, the Supreme Court traditionally applies a variation of the "rule of necessity."[141] The "rule of necessity," articulated by the *Roberts* Court,[142] states: "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable."[143] As an example of the rule of necessity, the petitioner cited *Coy v. Iowa*,[144] in which the Court held that the placement of a screen between the defendant and a child witness while the child testified violated the defendant's confrontation rights, absent a showing of necessity for the use of the screen.[145] Since necessity

138 448 U.S. 56 (1980).

139 497 U.S. 805 (1990).

140 Brief for Petitioner at 27, White v. Illinois, 112 S. Ct. 736 (1992) (No. 90-6113).

141 Brief for Petitioner at 12-13, *White* (No. 90-6113).

142 *Roberts*, 448 U.S. 56.

143 *Id.* at 66.

144 487 U.S. 1012 (1988).

145 *Id.*

was not shown, the Court held that the defendant's rights were violated.

As further support for the "rule of necessity," the petitioner cited *Maryland v. Craig*,[146] where the Court allowed a child victim of sexual abuse to testify via closed-circuit television after showing that it was necessary to deny the defendant a face-to-face confrontation.[147] The interest of the state in protecting the emotional well-being of the child from the trauma of facing the defendant while testifying about the abuse was important enough to merit the use of a special procedure.[148]

Based on *Coy* and *Craig*, the petitioner advocated the use of the rule of necessity in *White*. The petitioner reasoned that the *Coy* and *Craig* cases are analogous to *White* because the use of hearsay testimony in *White* "shielded" the child witness from the trauma of testifying in the same way as the screen in *Coy* or the closed-circuit television in *Craig*.[149] The petitioner also claimed that the prejudice to White's confrontation right was more severe than the prejudice in *Coy* or *Craig* because the child in *White* never testified; therefore, the defendant was not even allowed to cross-examine the child, as were the defendants in *Coy* and *Craig*.[150] The petitioner concluded that the rule of necessity should be applied in *White* to determine whether the defendant's confrontation rights were outweighed by the "state's important interest in the physical and psychological well-being of the child witness" because S.G. never testified and because the petitioner's confrontation right was not merely infringed upon, as was the case in *Coy* and *Craig*, but dispensed with entirely.[151]

The Supreme Court in *White*, however, declined to engage in the suggested balancing test. The Court held that in both *Coy* and *Craig*, the confrontation issue was based on "in-court procedures" and the constitutionality of these procedures "once a witness is testifying."[152] In contrast, the issue in *White* was whether S.G. had to testify or be shown to be unavailable as a legal matter. The majority stated that, "[s]uch a question [as in *Coy* and *Craig*] is quite separate from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations."[153]

146 497 U.S. 836 (1990).
147 *Id.*
148 *Id.*
149 Brief for Petitioner at 13, *White* (No. 90-6113).
150 *Id.*
151 *Id.*
152 White v. Illinois, 112 S. Ct. 736, 744 (1992).
153 *Id.*

Although the petitioner made an interesting analogy based on the theoretical aspects of the decisions, the Court correctly held that the factual differences between *White* and the cited cases invalidated the analogy.[154]

The petitioner also criticized the decision made by the Illinois Appellate Court because it did not differentiate between statutory hearsay exceptions and firmly rooted exceptions to the hearsay rule, nor did it require that the hearsay statements possess an indicia of reliability.[155] According to the petitioner, the holding of the appellate court was in direct conflict with the Court's holding in *Idaho v. Wright*.[156] The petitioner stated the holding in *Wright* as follows: "Hearsay statements made to a physician, admitted pursuant to a statutory exception to the hearsay rule, violated the Confrontation Clause since the exception was not 'firmly rooted' and the prosecution failed to establish that the statements possessed sufficient 'particularized guarantees of trustworthiness.' "[157] This summation of the *Wright* holding, however, was taken out of context, and when read in light of the facts of the *Wright* case, does not apply to the case at hand for two reasons.

First, although *Wright* discussed the reliability of statements made while securing medical treatment, the *Wright* case never dealt with the issue of whether the declarant must be found unavailable in order for the hearsay statements to be admissible. The unavailability of the declarant was shown before the issue of the reliability of the hearsay statements was addressed. In *White*, the main issue was whether proving S.G.'s unavailability was a prerequisite to the admission of the hearsay statements. This crucial issue was not addressed in *Wright*, and *Wright* thus is distinguishable from *White*.

Second, the Court in *Wright* focused on the particular facts of that case, which differ greatly from the present case, in deciding whether the victim's statements made to the pediatrician had a sufficient indicia of reliability.[158] The pediatrician in *Wright* had extensive experience with child abuse cases;[159] he therefore conducted the interview in a suggestive manner, resulting in the child making various statements to the physician which the prosecution sought to have admitted.[160] Furthermore, the hearsay statements in the

154 *Id.* at 743-44.
155 Brief for Petitioner at 16-17, *White* (No. 90-6113).
156 *Id.*
157 *Id.*
158 Idaho v. Wright, 497 U.S. 805 (1990).
159 *Id.* at 809.
160 *Id.* at 826.

Wright case were admitted at trial based on the residual exception to the hearsay rule found in the Idaho Rules of Evidence 803(24), not on a specific, "well-rooted" exception to the hearsay rule.[161] The *Wright* court found that, based on the totality of the circumstances, the statements did not have a sufficient indicia of reliability, and thus the admission of such statements violated the defendant's Confrontation Clause rights.[162]

In contrast with the facts and holding in *Wright*, the hearsay statements in *White*, were admitted based on the "well-rooted" exception to the hearsay rule for statements made while seeking medical treatment. In *Wright*, however, the exception was not firmly rooted.[163]

The distinction between *White v. Illinois* and *Idaho v. Wright* becomes clearer when the facts of each case are closely examined. Illinois added the medical treatment exception to the hearsay rule on January 1, 1988.[164] Although the statute was relatively new in Illinois at the time of the *White* decision, the exception was "well-rooted" prior to codification and remained that way after the statute was passed. When a patient seeks medical treatment, the information that the person gives the doctor regarding his ailment bears a sufficient indicia of reliability because that person wants a correct diagnosis and proper medical treatment. Even the Federal Rules of Evidence recognize this exception to the hearsay rule as being well-rooted.[165] The Illinois legislature realized the importance of such a rule and passed the Illinois version, which is strikingly similar to the version in the Federal Rules of Evidence. The fact that Illinois waited until 1988 to pass their medical treatment exception does not lessen its status as a well-rooted exception under the Federal Rules of Evidence.

In contrast, in *Wright*, the statements in question fell under a residual, catch-all exception to the hearsay rule and were admitted

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161 *Id.* at 817.

162 *Id.* at 826-27.

163 *Id.* at 817. Since the exception relied on in *Wright* was not a firmly rooted exception, the Court then made a determination about whether it bore particularized guarantees of trustworthiness. *Id.* at 817-27.

164 The appellate court relied on the wording of the statute, as well as the factually similar case of *People v. Rushing*, when it stated that the *White* case fell within the statutory exception. People v. White, 555 N.E.2d 1241, 1250 (1990) (citing People v. Rushing, 548 N.E.2d 788, 793-94 (1989)).

165 This exception has been part of the Federal Rules of Evidence for many years as Rule 803(4). Even the Court in *Idaho v. Wright* recognized the indicia of reliability behind this exception when it stated that the "medical treatment" exception is based on the belief that persons making such a statement are highly unlikely to lie. *See Wright*, 497 U.S. at 820.

by the trial court as such.[166] Furthermore, the reliability of the evidence admitted under the exception in *Wright* was insufficient in part because it did not flow from statements made while securing medical treatment *immediately after the alleged incident.*[167] In fact, the statements in *Wright* were made approximately two to three days after the alleged incident,[168] whereas the statements in *White* were made just hours after the assault.[169] Moreover, in *Wright*, there was some evidence that the doctor conducted the interview in a "suggestive manner,"[170] whereas no such evidence existed with respect to the interview of the child victim in *White*. For these reasons, the statements that fell under the residual exception in *Wright* were insufficient as measured against the defendant's constitutional confrontation rights, and they were clearly distinguishable from the hearsay statements in *White*.

C. THE "THOMAS-SCALIA" RULE: A MECHANICAL RULE AIMED AT SIMPLIFICATION THAT DOES NOT WORK

Justices Thomas and Scalia joined the majority's opinion, except for the discussion of the narrow reading of the phrase "witnesses against."[171] The majority rejected the contention that S.G. was not a "witness against the defendant."[172] In contrast, Justices Thomas and Scalia contended that the Court's cases "have complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence."[173] They attempted to formulate a new rule, along the lines suggested by the United States in its brief in support of the respondent. They argued that their rule was faithful to the text and history of the Confrontation Clause.[174] In formulating the "Thomas-Scalia" rule,[175] Justice

166 *Id.* at 811-12. Recall that the Supreme Court held that the admission of the hearsay statements violated the defendant's Confrontation Clause rights. *Id.* at 827.

167 *Id.* at 821-22. The Court stated that spontaneity and consistent repetition were factors in determining whether statements bore "particularized guarantees of trustworthiness." *Id.*

168 *Id.* at 809.

169 White v. Illinois, 112 S. Ct. 736, 739 (1992). The statements by S.G. were made approximately four hours after the incident occurred. *Id.*

170 *Wright*, 497 U.S. at 826.

171 *White*, 112 S. Ct. at 748 (Thomas, J., concurring).

172 *Id.* at 740-41.

173 *Id.* at 744 (Thomas, J., concurring).

174 *Id.* at 747 (Thomas, J., concurring).

175 *Id.* (Thomas, J., concurring) The rule that Justice Thomas formulated is as follows: "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."

Thomas attempted to unravel the connection that had been observed between the Confrontation Clause and the hearsay rules,[176] while at the same time adhering to the strict definition of "witnesses against" that he attributed to John Henry Wigmore and Justice Harlan.[177] However, in formulating this rule, Justice Thomas erred when describing the "Wigmore-Harlan" definition; furthermore he created a rule that is not in line with recent case law, especially the case of *Idaho v. Wright*.[178] If adopted, the Thomas-Scalia rule would change the way cases like *Wright* are decided in the future.

Justice Thomas found support for the new rule in what he termed the "Wigmore-Harlan" definition of "witnesses against" and in the history which led to the origination of the confrontation right. Justice Thomas first discussed the meaning of the phrase "witnesses against," stating that Wigmore believed that the phrase referred only to "those witnesses who actually appear and testify at trial."[179] He then stated that Justice Harlan "endorsed" Wigmore's view in Justice Harlan's concurrence in *Dutton v. Evans*.[180] After making this statement, Justice Thomas labeled this definition of the meaning of "witnesses against" as the "Wigmore-Harlan" view.[181] This label is misleading because Wigmore did not subscribe to such a narrow interpretation of the phrase "witnesses against." In the same treatise that Justice Thomas cites for his position, Wigmore acknowledged the potential problems with such a narrow interpretation of "witnesses against." According to Wigmore,

> . . . [B]ecause the erroneous answer has occasionally been advanced that the 'witness' who is to be 'brought face to face' is merely the person now reporting another's former testimony or dying declaration, . . . the constitutional provision is satisfied by the production of the second person.[182] The fallacy here is that the statements of the former witness of dying declarant are equally testimony, since they are offered as assertions offered to prove the truth of the fact asserted . . . and the question must therefore still be faced whether these testimonial statements are covered by the constitutional provision.[183]

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176 *Id.* at 744 (Thomas, J., concurring).

177 *Id.* at 747 (Thomas, J., concurring).

178 497 U.S. 805 (1990).

179 *White*, 112 S. Ct. at 744 (Thomas, J., concurring).

180 *Id.* at 745 (Thomas, J., concurring).

181 *Id.* (Thomas, J., concurring).

182 5 JOHN HENRY WIGMORE, EVIDENCE § 1397, at 161 (1974), (citing Woodsides v. State, 3 Miss. (2 How.) 655, 665 (1837) ("[In dying declarations] the murdered individual is not a witness . . . His declarations are regarded as facts or circumstances connected with the murder . . . It is the individual who swears to the statements of the deceased that is the witness, not the deceased.")).

183 *Id.* (citing State v. Houser, 26 Mo. 431, 437 (1858) ("To say that the witness who must meet the accused 'face to face' is he who repeats what the dying man has said, is a

A narrow definition of "witnesses against" should not be attributed to Wigmore because it is evident that he contemplated just such an argument and stated that it was a fallacy.

Justice Thomas next addressed the history behind the development of the right to confrontation.[184] Justice Thomas attempted to dispel the notion that the Confrontation Clause should bar unreliable hearsay.[185] Justice Thomas noted that "[a]lthough the historical concern with trial by affidavit and anonymous accusers does reflect concern with the reliability of the evidence against a defendant, the [Confrontation] Clause makes no distinction based on the reliability of the evidence presented."[186] Justice Thomas stated that reliability was a due process concern and that the Confrontation Clause should not be strained to provide criminal defendants with a protection that has already been provided for in a different constitutional provision.[187]

Justice Thomas stated that the Court has interpreted the confrontation right to admit hearsay only if it is "firmly rooted" or it has "particularized guarantees of trustworthiness."[188] Justice Thomas stated that these hearsay exceptions are just the evils, however, that the confrontation right originally sought to prevent. Merely because an ex parte affidavit is found to be reliable or firmly rooted does not mean that it should be admitted.[189] Historically, ex parte affidavits were clearly prohibited as the primary object of the Confrontation Clause.[190] By admitting evidence, such as ex parte affidavits, on the basis of reliability, the Court is allowing a violation of the right to confrontation as it historically developed.[191]

The United States, in its brief, suggested that in-court testi-

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mere evasion. . . . [He is not] the witness whose testimony is to affect the life or liberty or property of the accused. It is the dying man who is speaking through him, whose evidence is to have weight and efficacy sufficient, it may be, to take away the prisoner's life. The living witness is but a conduit-pipe—a mere organ through whom this evidence is conveyed to the Court and jury.")).

184 *White*, 112 S. Ct. at 745 (Thomas, J., concurring). The common law developed a confrontation right in response to the trial and conviction of defendants based solely on out-of-court depositions, affidavits, and confessions which were presented to the court without the declarant ever testifying at trial. The defendant was not even allowed to be present when the out-of-court statements were made and was not able to confront the declarants face-to-face. In response to these cases, the common-law right to confrontation emerged in England in the 16th and 17th centuries. *Id.*

185 *Id.* at 746 (Thomas, J., concurring).

186 *Id.* (Thomas, J., concurring).

187 *Id.* at 747 (Thomas, J., concurring).

188 *Id.* at 746 (Thomas, J., concurring).

189 *Id.* at 746-47 (Thomas, J., concurring).

190 *Id.* at 746 (Thomas, J., concurring).

191 *Id.* at 746-47 (Thomas, J., concurring).

mony and its functional equivalents, such as statements made in the contemplation of legal proceedings, should be subject to the Confrontation Clause requirements.[192] According to Justice Thomas, there is no dispute that in-court statements should be subject to the Confrontation Clause, but a problem arises when dealing with out-of-court statements. The inherent problem with out-of-court statements is that too much room for interpretation exists, especially when deciding what statements were made in the contemplation of legal proceedings. For example, consider the case in which a person makes statements to an investigating police officer. It would be extremely hard to draw the line between those statements that were made in the contemplation of legal proceedings and those that were not. Any statement made to an investigating police officer could arguably have been made with an eye toward trial.[193]

In order to combat this problem, Justice Thomas proposed a mechanical rule that could be applied easily to the facts of most cases. Justice Thomas's rule states: "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."[194] Since the right to confrontation developed in response to abuses related to the use of out-of-court depositions, affidavits, and confessions, the right to confrontation should continue to protect the defendant from abuses related only to these specific types of out-of-court statements.[195]

The "Thomas-Scalia" rule can be applied with greater ease than the criteria used by the majority because the "Thomas-Scalia" rule does not require a court to determine whether a particular exception to the hearsay rule is "firmly rooted."[196] However, although the "Thomas-Scalia" rule is mechanical and easier to apply, the inquiry used by the majority may still be more advantageous. Specifically, the "Thomas-Scalia" rule may have a more negative effect on defendants' rights as compared to the rule promulgated by the majority.

The facts of *Idaho v. Wright*[197] provide a good illustration of the potential problems defendants may face under the "Thomas-Scalia"

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192 *Id.* at 747 (Thomas, J., concurring).
193 *Id.* (Thomas, J., concurring).
194 *Id.* (Thomas, J., concurring).
195 *Id.* (Thomas, J., concurring).
196 *Id.* (Thomas, J., concurring).
197 497 U.S. 805 (1990).

rule. The trial court in *Wright* admitted hearsay statements under the residual exception to the hearsay rule, an exception that was not "firmly rooted."[198] The Court in *Wright* found that the defendant's confrontation right had been violated. The hearsay statements in *Wright*, however, do not fit the definition as one of the formalized testimonial materials set forth by the "Thomas-Scalia" rule[199] and thus would not violate the defendant's confrontation right. Thus, the "Thomas-Scalia" rule would have lead to the opposite result reached in the *Wright* case. The rule would allow hearsay statements falling under the residual exception to the hearsay rule, which do not possess particularized guarantees of trustworthiness, to be used against a defendant because the statements were not presented in one of the enumerated forms of evidence prohibited by the "Thomas-Scalia" rule. Therefore, the Thomas-Scalia rule may sacrifice reliability of evidence for the ease of a mechanical rule.

Idaho v. Wright was decided by a 5-4 decision, with Justice Scalia joining the majority opinion.[200] The new "Thomas-Scalia" rule contradicts the *Wright* decision but, more importantly, it also contradicts Justice Scalia's position in the *Wright* decision, decided only two years prior to *White*. The "Thomas-Scalia" rule appears to be a mechanical rule that can be easily applied to any case; however, the rule also introduces some disadvantages for defendants. Specifically, evidence previously excluded as not sufficiently reliable (as in *Idaho v. Wright*) would now be admissible against defendants. The "Thomas-Scalia" rule, though aimed at the evils that prompted the original common law confrontation rights, makes defendants more vulnerable than the majority's rule.

VI. CONCLUSION

The majority correctly ruled that a defendant's Confrontation Clause rights are not violated when, in a case such as *White*, hearsay statements are admitted based on well-rooted hearsay exceptions, and the declarant never testifies.

While the Supreme Court's holding in *White* might be criticized as being too broad and having the potential to lead to greater infringements on defendants' constitutional rights in the future, this Note argued that the decision is sufficiently limited. The Court has

198 For a more complete discussion of why the hearsay exception in *Wright* was not a firmly rooted exception, *see infra* notes 163-70 and accompanying text.

199 In other words, the hearsay statements in *Idaho v. Wright* were not contained in "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *See infra* note 175.

200 *Wright*, 497 U.S. at 806.

not started down a "slippery slope" with its decision in *White* because the Compulsory Process Clause allows defendants to compel witnesses to testify. Since defendants have this right, hearsay statements will not be admitted against a defendant without an opportunity to question the witness or to force a showing of unavailability by the prosecution. Either of these results may be accomplished by calling the witness to the stand during the presentation of the defense's case.

In addition to analyzing the limits of the *White* decision, this Note asserts that the *White* decision was consistent with precedent, despite the petitioner's arguments to the contrary. The petitioner's arguments were unpersuasive and based on the misapplication of prior case law.

Justices Thomas and Scalia in their concurrence made a well-intentioned, yet unsuccessful, attempt to create a mechanical rule for determining when a declarant is a "witness against" the defendant for Confrontation Clause purposes. Their goal was to create a rule that accurately reflected the original reasons for the emergence of the confrontation right. Instead, they created a rule that runs contrary to prior case law, and which might actually disadvantage defendants more than the majority's rule. The majority's rule, which allows any hearsay statement that meets a well-rooted exception to be admissible at trial without a showing of unavailability, is a better disposition of the conflict between hearsay testimony and a defendant's Confrontation Clause rights. The majority's rule, in conjunction with the Compulsory Process Clause, ensures that a defendant's confrontation rights are not violated.

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