Louisiana Law Review

Volume 54 | Number 1
September 1993

White v. Illinois and the "Hearsay Clause" of the Sixth Amendment

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White v. Illinois and the "Hearsay Clause" of the Sixth Amendment

I. INTRODUCTION

Late one evening in April of 1988, a baby-sitter awoke to the scream of the four-year-old girl left in her charge. Upon investigation, the baby-sitter saw Randall White, a friend of the child's mother, leave the child's room and exit the house. When asked by the baby-sitter what had happened, the child replied that White had "touch[ed] her in the wrong places."[1] Approximately thirty minutes later, the mother returned home. The child repeated to her, with a bit more specificity, what she had told the baby-sitter. The child later told three others that White had molested her: the investigating officer called to the scene, and the doctor and nurse who examined the child at the hospital.

White was apprehended and charged with the crimes of residential burglary, unlawful restraint, and aggravated sexual assault. The prosecution called the child as a witness, but she experienced emotional difficulty upon taking the stand and did not testify. The trial court, however, did not find the child to be unavailable.[2] The prosecution then called to the stand the three witnesses to whom the child had spoken. Despite White's objections to the hearsay nature of their testimony, the trial court admitted their accounts of the child's statements under exceptions to the hearsay rule. White again objected, claiming that the introduction of the witnesses' testimony violated his Sixth Amendment right to confront the witnesses against him. Relying on the earlier pronouncement by the United States Supreme Court in *Ohio v. Roberts*,[3] White maintained that the non-testifying declarant must be found unavailable as a condition precedent to the admission of her hearsay statements. The trial court overruled the objection, and White was convicted of the charged offenses.[4]

The state appellate court affirmed White's conviction, and the Illinois Supreme Court refused writs.[5] The U.S. Supreme Court then granted certiorari in order to resolve the constitutional issue of whether the introduction of the statements in question violated White's Sixth Amendment right to confrontation.[6] Again, White contended that the admission of the hearsay statements without the requisite finding of declarant unavailability, as per *Roberts*, violated

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1. White v. Illinois, 112 S. Ct. 736, 739 (1992).
2. *Id.*
3. Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980).
4. *White*, 112 S. Ct. at 739.
5. People v. White, 555 N.E.2d 1241 (Ill. App. Ct.), *writ refused*, 561 N.E.2d 705 (1990).
6. White v. Illinois, 111 S. Ct. 1681 (1991).

his confrontation rights. However, reiterating its earlier position taken in *United States v. Inadi*,[7] the Court stated that *Roberts* is applicable only to statements made during the course of prior judicial proceedings. A unanimous Court in *White v. Illinois*[8] held that the Confrontation Clause does not require that the prosecution either produce or demonstrate the unavailability of the declarant of statements otherwise admissible under the medical diagnosis or excited utterance exceptions to the hearsay rule as a condition precedent to their introduction.

II. JURISPRUDENCE

As one commentator has noted, an "intractable problem in criminal trials is to reconcile the accused's constitutional right 'to be confronted with the witnesses against him' with the government's invocation of various exceptions to the rule against hearsay."[9] After the Court in *Pointer v. Texas*[10] held the Sixth Amendment right to confrontation applicable to the states, this problem was exacerbated by the states' codifications of evidence law and their various expansions of hearsay exceptions. Notwithstanding the increased frequency of Confrontation Clause challenges during this period, no clear rules emerged as to when this Clause allowed the introduction of hearsay.

In *Ohio v. Roberts*,[11] the Court attempted to provide guidance to the lower courts in their efforts to define the reach of the Confrontation Clause. At Roberts' trial, the prosecution introduced the preliminary hearing testimony of an absent witness. Roberts objected on the grounds that the admission of the statement violated his confrontation rights, but the judge overruled him. The jury then found Roberts guilty. The Supreme Court ultimately affirmed Robert's conviction.

In a manner consistent with prior jurisprudence, Justice Blackmun, writing for the majority, stated:

> [T]he 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.[12]

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7. 475 U.S. 387, 106 S. Ct. 1121 (1986).

8. 112 S. Ct. 736 (1992).

9. Graham C. Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. Fla. L. Rev. 207, 207 (1984).

10. 380 U.S. 400, 85 S. Ct. 1065 (1965).

11. 448 U.S. 56, 100 S. Ct. 2531 (1980).

12. *Id.* at 63, 100 S. Ct. at 2538 (emphasis added).

In a footnote, the Court explained the phrase "usual case," stating that "[a] demonstration of unavailability . . . is not always required"[13] and cited the case of *Dutton v. Evans*[14] as an example of a situation where "the utility of trial confrontation [was] so remote that [the Confrontation Clause] did not require the prosecution to produce a seemingly available witness."[15]

When production is required and the prosecution has successfully demonstrated the unavailability of the declarant, the "statement is admissible only if it bears adequate 'indicia of reliability.'"[16] The Court further explained: "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."[17] With this pronouncement, the Court established two presumptions: one of constitutional admissibility with firmly rooted exceptions and the other of constitutional inadmissibility with less traditional exceptions.[18] Since it is possible for the state to overcome the presumption of inadmissibility by demonstrating that a statement bears particularized guarantees of trustworthiness, it logically follows that the defendant also should be allowed to rebut the firmly rooted presumption by demonstrating that a statement lacks adequate indicia of reliability.

This conclusion is mandated by *Chambers v. Mississippi*.[19] The Court in *Chambers* held that the constitutional right of a criminal defendant to due process of law is violated by the operation of any rule of evidence that prohibits a defendant from presenting and questioning material witnesses.[20] If the presumption is conclusive, i.e., if the "hearsay is held to be trustworthy simply by virtue of falling within a preexisting exception," then "the defendant may be

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13. *Id.* at 63 n.7, 100 S. Ct. at 2538 n.7.

14. 400 U.S. 74, 91 S. Ct. 210 (1970). In *Dutton*, the trial court admitted a statement made by an alleged accomplice of Evans' to a fellow prisoner even though the declarant had not been previously cross-examined nor had he testified at trial. Despite the availability of the declarant, a plurality of the Court found no Confrontation Clause violation and affirmed Evans' conviction primarily because of the relatively insignificant impact of the statement.

15. *Roberts*, 448 U.S. at 63 n.7, 100 S. Ct. at 2538 n.7.

16. *Id.* at 66, 100 S. Ct. at 2539.

17. *Id.*

18. The rebuttable nature of this conclusion, as least as far as the prosecution is concerned, was acknowledged in the case of Lee v. Illinois, 476 U.S. 530, 106 S. Ct. 2056 (1986). The Court stated that "[i]n *Roberts*, we recognized that even if certain hearsay evidence does not fall within a 'firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet the Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.' [T]he Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Id.* at 543, 106 S. Ct. at 2063.

19. 410 U.S. 284, 93 S. Ct. 1038 (1973).

20. In *Chambers*, Mississippi evidentiary law prevented defendant from eliciting exculpatory testimony from certain witnesses.

provided with no more than a ritualistic trial—a trial that he enters with the deck constitutionally stacked against him."[21]

In *United States v. Inadi*,[22] the Supreme Court examined, for the first time, the general unavailability requirement that *Roberts* held was dictated by jurisprudence. *Inadi* involved the issue of whether the statement of a non-testifying declarant offered under the co-conspirator exemption to the hearsay rule could be introduced without first demonstrating that the declarant was unavailable. On appeal, the Seventh Circuit reversed the lower court, holding that such a statement is admissible only if the declarant is unavailable. In reversing the appellate court's finding that Inadi's confrontation rights were violated, the Court limited *Roberts* to its facts, i.e., unavailability was required only in the case of prior testimony.[23] However, in doing so, the Court ignored the fact that unavailability was already required by the prior testimony exception to the hearsay rule.

Freed from the general unavailability requirement of *Roberts*, the Court then analyzed its applicability to the co-conspirator exemption. Justice Powell, writing for the majority, concluded:

> There appears to be little, if any, benefit to be accomplished by the Court of Appeals' unavailability rule. First, if the declarant either is unavailable, or is available and produced by the prosecution, the statements can be introduced anyway. . . . Second, an unavailability rule is not likely to produce much testimony that adds anything to the "truth-determining process" over and above what would be produced without such a rule.[24]

However, exemptions to the hearsay rule are theoretically grounded in the adversarial mode of trial and not on any inherent guarantees of trustworthiness. As Justice Marshall points out in dissent:

> [W]hen the prosecution invokes the co-conspirator exemption to the hearsay rule, as it does in this case, it is urging the truth of the matters asserted in the extrajudicial statements. The question here must be whether we have so much confidence in the factual accuracy of statements made by conspirators in furtherance of their conspiracy that we deem the testing of these statements by cross-examination unnecessary to guarantee the reliability of a trial's result.[25]

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21. Stanley A. Goldman, *Not So Firmly Rooted: Exceptions to the Confrontation Clause*, 66 N.C. L. Rev. 1, 9-10 (1987) (footnote omitted).

22. 475 U.S. 387, 106 S. Ct. 1121 (1986).

23. *Id.* at 394, 106 S. Ct. at 1125.

24. *Id.* at 396, 106 S. Ct. at 1126-27.

25. *Id.* at 404, 106 S. Ct. at 1131 (Marshall, J., dissenting).

Not surprisingly, the dissent answers this question in the negative. "This agency theory," Justice Marshall continued, "which even the Advisory Committee on the proposed Federal Rules of Evidence labeled 'at best a fiction,' might justify the exemption conferred upon co-conspirator declarations from the traditional rule against hearsay. But it speaks not to the Confrontation Clause's concern for reliable factfinding."[26]

As the dissent noted, the *Inadi* "decision [did] nothing to resolve the conflict among the lower courts as to whether declarations of co-conspirators who are not present in court for cross-examination must be shown to have particularized 'indicia of reliability' before they can be admitted for substantive purposes against a criminal defendant."[27] Nevertheless, after *Inadi*, the unavailability requirement was no longer applicable to the co-conspirator exemption to the hearsay rule.

The question of the firmly rooted status of the co-conspirator exemption to the hearsay rule was answered in *Bourjaily v. United States*.[28] In a rather circular opinion, the Court first held that the judge may look to the statement itself in determining the existence of a conspiracy. The Court then stated that the co-conspirator exemption was a firmly rooted exception, thereby circumventing the final, post-*Inadi* Confrontation Clause obstacle to the statement's admissibility. This conclusion was supported not by analyzing the inherent reliability of the exemption, but rather by noting the use of the exemption in an 1827 case.[29] In explaining its deviation from *Dutton*'s particularized inquiry into reliability, the Court noted that the unorthodox extension of the state's co-conspirator exemption at issue in that case warranted that approach; *Bourjaily* involved no such extension. Thus, despite the theoretical inconsistency of basing the firmly rooted classification on anything other than reliability, the Court determined that the mere existence of this exception in early jurisprudence, at least in this case, was determinative.

In dissent, Justice Blackmun, the author of *Roberts*, points out that, "unlike many common law hearsay exceptions, the co-conspirator exemption from hearsay with its agency rationale was not based primarily upon any particular guarantees of reliability or trustworthiness."[30] Justice Blackmun criticizes the majority for wanting to "have it both ways: it cannot transform the exemption, as it admittedly does, *and* then avoid Confrontation Clause concerns by conjuring up the 'firmly rooted hearsay exception' as some benign genie who will extricate the Court from its inconsistent analysis."[31]

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26. *Id.* at 406, 106 S. Ct. at 1132 (Marshall, J., dissenting) (citations omitted).

27. *Id.* at 401 n.1, 106 S. Ct. at 1129 n.1 (Marshall, J., dissenting).

28. 483 U.S. 171, 107 S. Ct. 2775 (1987).

29. United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827), is apparently the earliest confirmed use of this exception in the federal jurisprudence.

30. *Bourjaily*, 483 U.S. at 189, 107 S. Ct. at 2786 (Blackmun, J., dissenting).

31. *Id.* at 201, 107 S. Ct. at 2792 (Blackmun, J., dissenting).

Theoretically, the accused should still be afforded the opportunity to rebut the firmly rooted classification, but the *Bourjaily* majority suggests that this presumption is conclusive. "The Confrontation Clause," declared the majority, "does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirement [of a firmly rooted exception]."[32] After *Bourjaily*, the Court had only examined the co-conspirator exemption and the prior testimony exception to the hearsay rule. The Rule 803 exceptions, those in which declarant unavailability was not mandated by the Federal Rules of Evidence as a condition precedent to admissibility, would provide the next opportunity for the Court to test its new interpretation.

This question arose in the case of *Idaho v. Wright*.[33] In reversing the petitioner's conviction, the Supreme Court applied the two-pronged test of *Roberts* to the statement of a three-year-old child admitted under Idaho's omnibus exception to the hearsay rule. While finding that the child was technically unavailable, the Court went on to hold that the exception in this case was not firmly rooted. Moreover, the statement did not bear particularized guarantees of trustworthiness sufficient to satisfy the Confrontation Clause. Although the Court declined to define unavailability, the application of the *Roberts* test nevertheless seems to contradict the Court's holding in *Inadi* that a finding of unavailability was required only in cases involving prior testimony. Despite this inconsistency, *Wright* would seem to indicate that *Roberts* would at least apply to exceptions from the hearsay rule (since *Inadi* involved an exemption).

Ohio v. Roberts stands for the proposition that, except where production would be of more than marginal benefit to the defendant, a declarant's unavailability must be established as a condition precedent to the admissibility of hearsay statements. Despite language in *Roberts*, however, which indicated that the unavailability requirement might apply to the introduction of all hearsay statements, *Inadi* held that no general unavailability requirement exists, at least as to statements admitted under the co-conspirator exemption to the hearsay rule.

So when does the Confrontation Clause, outside the *Roberts* context, require a finding of declarant unavailability as a condition precedent to the admission of hearsay statements of absent declarants? Notwithstanding the response given by the Court in *Wright*, the question remained largely unanswered by the time of *White v. Illinois*.

III. *WHITE* ANALYSIS

In arguing that the Confrontation Clause required a finding of unavailability in the case of the spontaneous utterance and medical testimony exceptions to the hearsay rule, petitioner White claimed that the *Roberts* approach was clearly

32. *Id.* at 183-84, 110 S. Ct. at 2783.
33. 497 U.S. 805, 110 S. Ct. 3139 (1990).

applicable. Moreover, petitioner argued that *Maryland v. Craig*[34] and *Coy v. Iowa*[35] demonstrated that only a specific showing of necessity will justify any infringement of a defendant's confrontation rights.[36]

In response to petitioner's arguments, Chief Justice Rehnquist, writing for the majority, reiterated *Inadi*'s confinement of *Roberts* to its facts (i.e., to statements made in the course of prior judicial proceedings). The majority then distinguishes *Craig* and *Coy* on the basis that they both involve issues relating to in-court testimony by witnesses and not the admissibility of hearsay statements of non-produced declarants.[37]

The majority next addresses the argument posed by the United States as amicus curiae in support of Illinois. In contending that White's confrontation rights are in no way implicated by the admission of the statements in question, the United States argued that the original purpose of the Confrontation Clause was to prevent the prosecution of defendants "through the presentation of ex parte affidavits, without the affiants ever being produced at trial . . . ."[38] Thus, unless the statement is in the character of an ex parte affidavit, i.e., made for the principal purpose of accusing the defendant, the declarant is not a "witness against" the defendant, and the Confrontation Clause does not apply. Since the child's statements in *White* do not fit this functional characterization of an ex parte affidavit, the Confrontation Clause should not apply to the question of their admissibility.

This is essentially the position taken by the concurring opinion with the qualification that Justice Thomas, joined by Justice Scalia, rejects the functional approach due to its inherent conceptual unmanageability. According to their concurrence, "Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically

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34. 497 U.S. 836, 110 S. Ct. 3157 (1990).

35. 487 U.S. 1012, 108 S. Ct. 2798 (1988).

36. Both *Craig* and *Coy* involved the question of what in-court procedures are permitted by the Confrontation Clause to protect the psychological well-being of child abuse victims. In *Craig*, the Court validated the use of closed-circuit television in light of the trial court's determination that the child would suffer emotional harm if required to testify in open court in the presence of the defendant. In *Coy*, the Court invalidated a statute which allowed a child to testify from behind a screen without any requirement of potential trauma. In both cases the defendants were able to cross-examine the children, yet the Court still held that to excuse face-to-face confrontation the Sixth Amendment requires that a special need be shown. Thus, White argued, a necessity requirement is certainly mandated in the case of hearsay statements where the defendant is denied the opportunity to cross-examine the declarant.

37. "*Coy* and *Craig* involved only the question of what *in-court* procedures are constitutionally required to guarantee a defendant's confrontation right once a witness is testifying. Such a question is quite separate from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations. *Coy* and *Craig* did not speak to the latter question." White v. Illinois, 112 S. Ct. 736, 743-44 (1992).

38. *Id.* at 738.

characterized as within or without a defendant's confrontation rights."[39] For instance, the child's statements presently at issue could arguably be classified as either.

For this reason, the concurring opinion suggests a more limited interpretation whereby a defendant's confrontation rights would be implicated only by the the introduction of formalized testimonial materials such as prior testimony or confessions by third parties. This approach, the opinion states, is not only in line with the historical purposes of the Clause, but is also reconcilable with the jurisprudence.[40] Moreover, this approach would avoid the reliability analysis of *Roberts*, since this is more appropriately a due process concern and has neither textual nor historical support.[41]

Despite the conceptual cogency and ease of application offered by this bright-line solution, it is summarily dismissed by the majority as coming "too late in the day to warrant reexamination . . . ."[42] This approach would virtually eliminate the Confrontation Clause's role in regulating the admission of hearsay statements, a role established by the jurisprudence as early as 1895.[43]

Concluding that the Confrontation Clause applies to the admission of the statements at hand, the majority then turns to the question of whether the Clause requires a finding of declarant unavailability. In examining why the Court refused to apply this requirement in *Inadi*, the opinion isolates two principal factors. First, the evidentiary significance of statements admitted under the co-conspirator exemption is unlikely to be replicated at trial. Second, there is little to be gained by an unavailability rule since the statements will come in whether the declarant is unavailable or is available and produced for trial.[44] Chief Justice Rehnquist states, "while an unavailability rule would therefore do little to improve the accuracy of factfinding, it is likely to impose substantial additional burdens on the factfinding process."[45]

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39. *Id.* at 747.

40. *Id.* Justice Thomas notes that virtually all of the Confrontation Clause cases involved the introduction of either prior testimony or confessions.

41. As Justice Thomas states, "Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them." *Id.*

42. *Id.* at 741.

43. In 1895, the Court decided the case of Mattox v. United States, 156 U.S. 237, 15 S .Ct. 337 (1895). The Court held that the Confrontation Clause permitted the introduction of the cross-examined testimony of witnesses from a defendant's prior trial who had since died. According to the majority in *White*, this result "was justified not because the hearsay testimony was unlike an *ex parte* affidavit, but because it came within an established exception to the hearsay rule." White v. Illinois, 112 S. Ct. 736, 741 (1992).

44. Chief Justice Rehnquist observes that the lack of an unavailability requirement will not prejudice the defendant, since the Sixth Amendment's Compulsory Process Clause and evidentiary rules allow a defendant to treat a witness as hostile. These devices should adequately preserve the defendant's ability to question hearsay declarants at trial.

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

The majority then finds that both of these observations "apply with full force to the case at hand."[46] Unlike the prior testimony exception at issue in *Roberts*, in the cases of the medical testimony and the spontaneous utterance exceptions to the hearsay rule, both are spoken under circumstances which are thought to insure their reliability. These circumstances would be impossible to replicate in the courtroom. Moreover, requiring the production of the declarant in this situation would add little to the statement itself while unnecessarily burdening the prosecution with having to keep track of each declarant whose statements could possibly be of use. These considerations, which justified dispensing with the unavailability requirement in *Inadi*, serve the same end in *White*.

Having decided that the Confrontation Clause mandates no unavailability requirement in the case of these two exceptions, the opinion finally addresses the issue of reliability. Are the statements sufficiently trustworthy to satisfy the confrontation rights of the defendant? In paraphrasing from *Roberts*, the Court holds 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."[47]

To answer this question, the Court relies in part on the earlier examination of the probative attributes of the two exceptions. These attributes, when combined with the respective pedigrees of the two exceptions and their widespread acceptance among the states, cause the majority to conclude that both are, without a doubt, firmly rooted. Thus, both satisfy the sole requirement of the Confrontation Clause in this case, that of reliability.

IV. CONCLUSION

In deciding *White v. Illinois*, the majority purports to retain the *Roberts* view when defining the function of the Confrontation Clause in regulating the admission of hearsay. The Court acknowledges that the Clause promotes a preference for face-to-face confrontation whenever it serves a useful purpose. However, if it serves no such end, thus eliminating the preference, the Clause still demands that the hearsay be sufficiently reliable to justify its admission.

The majority's justifications for excusing the preference for face-to-face confrontation in the case of the two exceptions in question in *White* also apply to most of the other Rule 803 hearsay exceptions. Since these exceptions necessarily involve circumstances which are impossible to replicate in the courtroom and which serve to indicate the reliability of the statement, they should satisfy the *White* criteria. Thus, *White* appears to indicate that the Confrontation Clause will rarely require the prosecution to produce a declarant or to demonstrate his unavailability prior to admitting his statements under Rule 803.

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46. *Id.*
47. *Id.* at 743.

Clearly then, the main function of the Clause in regulating the admission of this class of hearsay exceptions is to provide for the reliability analysis. In an effort to avoid a case-by-case examination of each statement, *Roberts* created the firmly rooted exception which allows a court to infer reliability without more. Expanding on this concept, the *White* Court finds that two of the more questionable hearsay exceptions are firmly rooted.[48] Considering the factors isolated in this determination, the majority again formulates an approach which seems to justify conferring firmly rooted status on most of the remaining Rule 803 exceptions.

Application of the reasoning of *White* to the other Rule 803 exceptions demonstrates that all firmly rooted exceptions could prove to be impervious to Confrontation Clause challenges. This result, in effect, gives prosecutors the choice of foregoing the live testimony of an otherwise available witness if his extrajudicial statements fall within a firmly rooted exception, thus forcing the defendant to rely on the Compulsory Process Clause if he wishes to cross-examine the declarant.

In addressing this allocation of the burden of production of witnesses to the defendant, Justice Marshall has noted that "only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure."[49]

Nevertheless, the Court has spoken, and the *White* opinion gives no reason to believe that the list of firmly rooted exceptions exempted from an unavailability requirement will not continue to grow. But scenarios involving prosecutorial abuse of this discretion are not difficult to envisage. For instance, given the choice between calling as a witness an unpredictable or particularly unsavory declarant and a respectable and objective member of the medical profession who could testify to the same end, the prosecutor would likely choose the safety of the latter course of action. In light of the narrow applicability of the Confrontation Clause in the hearsay area, the Due Process Clause and state constitutional provisions should be expected to emerge more frequently in defense challenges to such conduct.[50]

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48. Since the exception for excited utterances draws its reliability justification from the spontaneity of the statement, that a considerable amount of time had passed between the alleged incident and the child's utterance undermines the exception's rationale. Statements admitted pursuant to the medical testimony exception, which draws its justification from the belief that the declarant is unlikely to lie for fear of misdiagnosis, lose their theoretical justification when spoken by a four-year-old child. Moreover, many states take the position that statements identifying the alleged perpetrator of a criminal act are not admissible under this exception because they are not relevant to diagnosis.

49. United States v. Inadi, 475 U.S. 387, 410, 106 S. Ct. 1121, 1134 (1986) (Marshall, J., dissenting) (quoting New York Life Ins. Co. v. Taylor, 147 F.2d. 297, 305 (1945)).

50. The Louisiana Constitution, for example, provides, in pertinent part, "An accused is entitled to confront *and cross-examine* the witnesses against him . . . ." La. Const. art. I, §16 (emphasis added).