Duquesne Law Review

Volume 31 | Number 1 Article 10

1992

Constitutional Law - Confrontation Clause - Unavailability of Out-of-Court Declarant

John E. McGrady III

CONSTITUTIONAL LAW—CONFRONTATION CLAUSE—UNAVAILABILITY OF OUT-OF-COURT DECLARANT—The United States Supreme Court held the Sixth Amendment of the United States Constitution does not require that the prosecution either produce the declarant at trial or the trial court find the declarant unavailable before testimony may be admitted under the spontaneous declaration or medical examination exceptions to the hearsay rule.

Randall D. White v Illinois, ____ US ____, 112 S Ct 736 (1992).

Randall D. White (hereinafter "Petitioner") was convicted in the State of Illinois of aggravated criminal sexual assault, residential burglary, and unlawful restraint.[1] The victim of the sexual assault and unlawful restraint was a four year old girl referred to by the Court only as S.G..[2] Testimony at the trial indicated that on April 16, 1988, S.G.'s babysitter was awakened by S.G.'s scream.[3] The babysitter went to S.G.'s bedroom and witnessed the Petitioner leaving the room and subsequently exiting the house.[4] Upon inquiry S.G. stated to the babysitter that the petitioner had placed his hand over her mouth, choked her, and threatened to whip her if she screamed.[5] S.G. also indicated that she had been touched in the vaginal area.[6] Similar statements were made by S.G. to her mother, investigating police officer, and the attending emergency room nurse and physician.[7] The State of Illinois (hereinafter

---

1. *White v Illinois*, ____ US ____, 112 S Ct 736, 739 (1992). Aggravated criminal sexual assault is a Class X felony under Ill Rev Stat ch 38, § 12-14(c) (1987). *People v. White*, 198 Ill App 3d 641, 555 NE2d 1241, 1256 (1990). It is a non-probationable offense that carries a possible prison sentence of not less than 6 years nor more than 30 years pursuant to Ill Rev Stat ch 38, § 1005-8-1(a)(3) (1987). *White*, 555 NE2d at 1256. Residential burglary is a Class 1 felony under Ill Rev Stat ch 38, § 19-3(b) (1987). Id. It carries a possible prison sentence of not less than 4 years and not more than 15 years pursuant to Ill Rev Stat ch 38, § 1005-8-1(a)(4)(1987). Id. Unlawful restraint is a Class 4 felony under Ill Rev Stat ch 38, § 10-3(b) (1987). Id. It carries a possible prison sentence of not less than 1 year nor more than 3 years pursuant to Ill Rev Stat ch 38, § 1005-8-1(a)(7) (1987). Id. The petitioner was sentenced to concurrent 10 year, 6 year and 2 year prison terms. Id.

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

3. Id.

4. Id.

5. Id.

6. Id.

7. S.G.'s statements were made to her mother approximately 30 minutes after the incident; statements to the police officer were made approximately 45 minutes after the incident; statements to the attending medical personnel were made approximately 4 hours

"State") attempted to have S.G. testify at trial, but due to emotional difficulties S.G. did not testify.[8] The Petitioner did not attempt to call S.G. as a witness.[9] Furthermore, the trial court did not make, nor was it asked to make, a finding that S.G. was unavailable to testify.[10]

The Petitioner objected on hearsay grounds to the admission of the testimony of the babysitter, S.G's mother, the police officer, and the nurse and physician regarding S.G.'s out-of-court statements describing the alleged sexual assault.[11] The trial court overruled the Petitioner's objection.[12] The testimony of the babysitter, S.G.'s mother and the police officer was permitted pursuant to the Illinois hearsay exception for spontaneous declarations.[13] The testimony of the nurse and physician was permitted under the spontaneous declaration exception as well as an exception for statements made in the course of securing medical treatment (hereinafter "medical examination" exception).[14] The trial court also denied the Petitioner's motion for a mistrial based on S.G.'s presence at trial and failure to testify.[15]

The Petitioner was found guilty by a jury in the trial court, and the Appellate Court of Illinois affirmed the conviction.[16] The appellate court held that the trial court did not abuse its discretion afforded it under state law in ruling that the testimony of the out-of-court statements of S.G. qualified for admission under the spontaneous declaration or medical examination exceptions to the hear-

---

after the incident. Id.

8. The State made two separate attempts to call S.G. as a witness, however, in both instances she did not testify. Id.

9. Id.

10. Id.

11. Id at 739-40.

12. Id at 740.

13. Id. The Illinois common law spontaneous declaration exception applies to "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Id at 740 n 1, citing *White*, 555 NE2d at 1246.

14. *White*, 112 S Ct at 740. Ill Rev Stat ch 38, § 115-13 provides:

> In a prosecution for violation of Section 12-13, 12-14, or 12-16 of the 'Criminal Code of 1961', statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

Id at 740 n2, citing Ill Rev Stat 38, § 115-13 (1989).

15. *White*, 112 S Ct at 740.

16. Id. See note 1.

say rule.[17] The appellate court also rejected the Petitioner's Confrontation Clause argument based principally on the United States Supreme Court's decision in *Ohio v Roberts*.[18] The appellate court, citing the Supreme Court's decision in *United States v Inadi*,[19] did not believe that as a antecedent to the introduction of hearsay testimony the prosecution must either produce the declarant at trial or show that the declarant is unavailable.[20] The Illinois Supreme Court denied discretionary review and the U.S. Supreme Court granted certiorari[21] limited to the constitutional question of whether the Petitioner's Sixth Amendment Confrontation Clause rights were violated by permitting the challenged testimony.[22]

---

17. Id at 740. In his appeal, the petitioner argued that S.G.'s statements to S.G.'s mother, police officer, and nurse and physician were not spontaneous declarations because S.G. had "calmed down" and was no longer reacting to the startling occurrence. *White*, 555 NE2d at 1248-49.

Additionally, the petitioner argued that S.G.'s statements to the attending nurse and physician did not fall within the exception for statements made in the course of securing medical treatment. Id at 1251. The petitioner argued that the treating medical personnel may testify about a patient's statements concerning presently existing bodily conditions, but may not relate the patient's statements which concern details of the alleged offense. Id.

The appellate court found the petitioner's argument unpersuasive noting that S.G. had neither the time nor opportunity to fabricate the statements. Id at 1249-50. Additionally, the appellate court recognized that it is unlikely that a child of tender years will have any reason to fabricate stories of sexual abuse. Id. For a more comprehensive list of the factors the appellate court considered in regards to the trial courts discretion, see *White*, 555 NE2d at 1246-1251. The appellate court also concluded that Ill Rev Stat ch 38, § 115-13 was designed to remove the restraints imposed by prior case law concerning the ability of a physician to testify about what his patient told the physician for purposes of medical diagnosis or treatment. Id at 1251.

18. *White*, 112 S Ct at 740. The petitioner, citing *Ohio v Roberts*, 448 US 56 (1980), argued that:

> [E]ven where the evidence falls within a firmly rooted hearsay exception, the prosecution still must either produce the declarant for cross-examination or demonstrate that he is unavailable. . . . Since the prosecution neither produced the declarant [S.G.] for cross-examination nor established that she was unavailable, [the petitioner] was denied his Sixth Amendment right to confront the witnesses against him.

White, 555 NE2d at 1251.

The appellate court noted that the petitioner failed to cite or discuss *United States v Inadi*, 475 US 387 (1986) or *People v Ingram*, 162 Ill App 3d 257, 515 NE2d 1252, two decisions which analyzed *Roberts*. Id.

The Sixth Amendment to the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." US Const, Amend VI.

19. 475 US 387 (1986).

20. *White*, 112 S Ct at 740.

21. *White v Illinois*, 111 S Ct 1681 (1991).

22. *White*, 112 S Ct at 740. For the purpose of the U.S. Supreme Court's discretionary review of this case, the Court has taken as a given that the challenged testimony properly falls within the relevant hearsay exceptions. Id.

Chief Justice Rehnquist, writing for the Court,[23] began his analysis by identifying the primary question under consideration: whether the Confrontation Clause of the Sixth Amendment to the United States Constitution requires that, before a trial court admits testimony under the spontaneous declaration and medical examination exceptions to the hearsay rule, the prosecution must either produce the declarant at trial or the trial court must find that the declarant is unavailable.[24] As a preliminary matter the Court considered an argument urged by the United States as amicus curiae in support of the State.[25] The United States contended that the Confrontation Clause's limited purpose is to prevent prosecuting a defendant through the presentation of ex parte affidavits without the affiants ever being produced at trial.[26] It was argued that because S.G.'s out-of-court statements do not fit this description, S.G. was not a witness against the Petitioner within the meaning of the Confrontation Clause.[27] The Court, however, believed that such a narrow reading of the Confrontation Clause would virtually eliminate its rule in restricting the admissions of hearsay testimony and that such an argument is foreclosed by prior cases.[28] The Court further stated that the argument posed by

---

23. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, Blackman, Stevens, O'Conner, Kennedy, and Souter joined. Justices Scalia and Thomas joined except for the discussion rejecting the United States' proposed reading of the "witness against" Confrontation Clause phrase. Justice Thomas filed an opinion concurring in part and concurring in the judgement, in which Justice Scalia joined. Id at 738-739.

24. Id at 739.

25. Id at 740.

26. Id.

27. Id at 740-41. The United States argued that the Confrontation Clause is generally inapplicable to the introduction of out-of-court statements admitted under accepted hearsay exceptions. Id. Under this position the Confrontation Clause would only apply to a hearsay exception where the statement sought to be admitted was in the character of an ex parte affidavit, i.e. under circumstances suggesting that the statement was made for the principal purpose of accusing or incriminating the defendant. Id at 741.

28. Id at 741. The Court pointed out that, citing *Idaho v Wright*, 497 US 805 (1990), they have been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. Id at 741. Rather the Court reasoned that they have consistently sought to steer a middle course which recognizes that the purposes of the Confrontation Clause and hearsay rules are to protect similar values. Id at 741 citing *Roberts* 448 US at 68 n 9, and *California v Green*, 399 US 149, 155 (1970). The Court also distinguished *Mattox v United States*, 156 US 237 (1895), upon which the United States relied, indicating that the admittance of testimony in that case was based on a "firmly rooted" hearsay exception and not because the hearsay testimony was unlike an ex parte affidavit. Id at 741.

The Court also recognized that the United States' position has been previously considered by the Court and has only gained the support of one Justice. Id citing *Dutton v Evans*, 400 US 74, 93 (1970) (Harlan concurring).

the United States came too late in the day to warrant reexamination.[29]

The Court then turned to the Petitioner's principal contention that before a trial court admits testimony under the spontaneous declaration[30] and medical examination[31] exceptions to the hearsay rule, the prosection must either produce the declarant at trial or find that the declarant is unavailable.[32] The Court, however, was of the opinion that such an expansive reading of the Confrontation Clause is negated by their decision in *Inadi*.[33] The Court in *Inadi* refused to extend the unavailability requirement established in *Roberts* to all out-of-court statements admitted under a hearsay exception.[34] *Roberts* stands for the proposition that an unavailability analysis is a necessary part of the confrontation inquiry only

---

29. Id at 741.

30. See note 12.

31. See note 13.

32. *White*, 112 S Ct at 741. The petitioner's argument is based on the Court's holding in *Ohio v Roberts* 448 US 56 (1980), where the Court considered a Confrontation Clause challenge to the introduction of a transcript containing testimony from a probable-cause hearing. Id. The transcript included testimony of a witness not produced at trial but who had been subject to examination by the defendant's counsel at the probable-cause hearing. Id. The Court recognized that the language they used in rejecting the Confrontation Clause claim might suggest that the Confrontation Clause generally requires either that the declarant be produced at trial or be found unavailable before his out of court statement be admitted. Id.

33. Id at 741, citing *United States v Inadi*, 475 US 387 (1986). In *Inadi* the Court considered the admission of out-of-court statements made by a co-conspirator in the course of a conspiracy. Id at 741. The Court rejected the proposition that *Roberts* established a rule requiring an out-of-court statement would not be admitted without a showing of unavailability of the declarant. Id, citing *Roberts*, 475 US at 392. Rather, the Court concluded that *Roberts* "must be read consistently with the question it answered, the authority it cited, and its own facts." Id, citing *Roberts*, 475 US at 394. Therefore, the Court concluded that *Roberts* stands for the proposition that an unavailability analysis is a necessary consideration within a Confrontation Clause inquiry only when the out-of-court statements were made during a prior judicial proceeding. Id, citing *Roberts*, 475 US at 394.

34. *White*, 112 S Ct at 741-42. The Courts decision in *Inadi* rested on two factors. Id at 742. First, co-conspirator statements, unlike former in-court testimony, provide evidence of the conspiracy's context which cannot be duplicated even if the declarant testifies in court as to the same matter. Id at 742, citing *Inadi*, 475 US at 395. Furthermore, considering the declarant's likely change in status at the time of the trial, such testimony would not contain the full evidentiary significance that would flow from statements made during the course of the conspiracy. Id, citing *Inadi*, 475 US at 395. Secondly, the Court stated that little benefit would be derived from imposing an "unavailability rule" in that such a rule would not impose an absolute bar to the introduction of out-of-court statements and, therefore, would do little to improve the accuracy of fact finding while imposing substantial burdens on the fact finding process. Id at 742, citing *Inadi*, 475 US at 396-98.

The "unavailability rule" means a rule that requires as an antecedent to introducing hearsay testimony either a showing of the declarant's unavailability or producing the declarant at trial. *White*, 112 S Ct at 742 n 6.

when the challenged out-of-court statements of the declarant were made in the course of a prior judicial proceeding.[35] Although *Inadi* was considered in the context of evaluating co-conspirator statements, it was the Court's opinion that such statements applied in full force to the case at hand.[36] The exceptions here in question provide substantial guarantees of trustworthiness that cannot be recaptured with in-court testimony.[37] The Court did not believe the same could be said about the challenged statements in *Roberts* where there was no threat of lost evidentiary value if the out-of-court statements were replaced with in-court testimony of the declarant.[38] The Court emphasized the evidentiary importance of cross-examination but continued, however, to state that the Confrontation Clause is satisfied where proffered hearsay testimony has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule.[39]

In summary, the Court reasoned that the out-of-court statements in this case had substantial probative value that could not be duplicated merely through the declarant's in-court testimony;[40] that the basic purpose of the Confrontation Clause is to promote the integrity of the fact finding process;[41] that statements qualifying for admission under firmly rooted hearsay exceptions are so trustworthy that adversarial testing is unlikely to add to their reliability;[42] and that establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation.[43] The Court reasoned that the out-of-court statements in this case should not be afforded any different treatment from the statements in *Inadi* in that neither *Inadi* or *Roberts* provided a basis for excluding the out-of-court statements under the aegis of the Confrontation Clause with regard to evidence admitted under the hearsay exceptions of spontaneous declarations and medical

---

35. Id at 741, citing *Roberts*, 475 at 394.

36. Id at 742.

37. Id. The Court cited *Idaho v Wright*, 497 US 805 (1990), and *Bourjaily v United States*, 483 US 171 (1987), noting that "firmly rooted" hearsay exceptions carry sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause. Id at 742 n 8.

38. Id at 743.

39. Id.

40. Id.

41. Id, citing *Coy v Iowa*, 487 US 1012 (1988)(quoting *Kentucky v Stincer*, 483 US 730 (1987)).

42. Id at 743, citing *Wright*, 497 US 805 (cited in note 28).

43. Id at 743.

examinations.[44]

In a second line of argument the Petitioner contended that hearsay testimony offered by a child should be permitted only upon a showing of necessity to protect the child's physical and psychological well being.[45] In *Coy v Iowa*[46] and *Maryland v Craig*[47] the Court addressed the question of what in-court procedures are constitutionally required to guarantee a defendant's confrontation right once a witness is testifying.[48] The Court distinguished *Coy* and *Craig* from the case at hand recognizing that they did not address the question of what requirements the Confrontation Clause imposes as a predicate to the introduction of out-of-court declarations.[49] Here the Court found that there was no basis for importing the necessity requirement announced in *Coy* and *Craig* to those cases dealing with the admission of out-of-court statements under established exceptions to the hearsay rule.[50]

Based upon the Court's foregoing analysis, the judgment of the Illinois Appellate Court was affirmed.[51]

Justice Thomas, with whom Justice Scalia joined, filed an opinion concurring in part and concurring in the judgment.[52] Justice Thomas argued that the Court's assumption that all hearsay declarations are witnesses against the defendant is not warranted by history or the text of the Confrontation Clause.[53] Rather, Justice

---

44. Id.

45. Id.

46. *Coy v Iowa*, 487 US 1012 (1988). In *Coy* the Court considered whether the petitioners Sixth Amendment rights were violated by allowing two child witnesses to testify from behind a screen which blocked the petitioner from their sight. *Coy*, 487 US at 1014. The Court held that the Confrontation Clause guarantees the petitioner a face-to-face meeting with the witnesses appearing against him, and that the petitioner's Sixth Amendment rights were violated since there was no showing that the witnesses needed special protection. Id at 1014-22.

47. *Maryland v Craig*, ___ US ___, 110 S Ct 3157 (1990). In *Craig* the Court considered whether the petitioner's Sixth Amendment rights were violated when a child witness testified against the petitioner, outside his presence, via closed circuit television. *Craig*, 110 S Ct at 3160. The Court recognized that actual face to face encounter is not necessary at every trial and concluded that the State's interest in protecting the physical and psychological well-being of a child abuse victim provides an adequate showing of necessity to outweigh the petitioner's right to face the witness in court. Id at 3162-71.

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

49. Id at 744.

50. Id.

51. Id.

52. Id.

53. Id. Justice Thomas argued that the interpretation urged by the United States' as amicus curiae was more consistent with the text and history of the Confrontation Clause than the Court's current jurisprudence. Id at 747.

Thomas urged that a narrow reading should be given to the phrase witnesses against whereby 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."[54] Such an interpretation would avoid the problem posed by the Court's focus on hearsay exceptions that are "firmly rooted" in the common law.[55]

The Sixth Amendment of the Constitution of the United States, adopted in 1787, provides in part that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him. . . ."[56] The primary purpose of this constitutional provision, known as the Confrontation Clause, has been construed to prevent the use of depositions and ex parte affidavits against a defendant without requiring the witness to be produced at trial.[57] Although the specific language of the Confrontation Clause does not appear to allow for exceptions, it has been interpreted to allow for the introduction of some evidence under certain hearsay exceptions.

In *Mattox v United States*[58] the petitioner alleged, inter alia, that the court below erred in admitting into evidence the reporter's notes of the testimony of two witnesses from the former trial.[59] Both witnesses were present and subject to cross-examination at the former trial, but had subsequently died prior to the second trial.[60] The petitioner argued that his Sixth Amendment right to be confronted with the witnesses against him was infringed by the admission of such testimony.[61] In responding to the petitioner's ar-

---

54. Id.

55. Id at 748. Justice Thomas reasoned that his approach would be consistent with the majority of the Supreme Court's cases because virtually all the cases decided before *Ohio v Roberts*, 448 US 56 (1980), involved prior testimony or confessions (such formalized testimony being a primary focus of the Confrontation Clause). Id at 747-48.

56. US Const, Amend VI.

57. *Mattox*, 156 US at 242. In *Mattox* the Court pointed out that the primary objective of the Confrontation Clause "was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and shifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Id at 242-43.

58. 156 US 237 (1895).

59. Id at 238.

60. Id at 240.

61. Id.

gument the Court first noted that in both England and the United States the majority of courts recognize that testimony of a deceased or unavailable witness is admissible provided the right of cross-examination had been exercised.[62] Under such circumstances the Court believed it would work no hardship upon the defendant to allow the testimony of the deceased to be read into evidence.[63] The Court also pointed out, as it did in *Reynolds v United States*,[64] "that if the witness is absent by the procurement or connivance of the defendant himself, he is in no condition to assert his constitutional immunity."[65] The Court was of the opinion that general rules of law must occasionally give way to considerations of public policy and necessity, and that to allow a criminal to go free simply because of the death of a witness would be carrying the constitutional protection to an unwarrantable extent.[66] Therefore, the Court concluded that the introduction of an authenticated stenographic report containing former testimony of a deceased witness was competent evidence in light of the facts of the case.[67] Also recognized by the Court was that many of the Constitution's provisions in the nature of the Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not

---

62. Id at 240-241. Specifically the Court stated:

> The idea that this cannot be done seems to have arisen from a misinterpretation of a ruling in the *Case of Sir John Fenwick*, 13 Howell's State Trials, 537, 579 *et seq.*, which was a proceeding in Parliament in 1696 by bill of attainder upon a charge of high treason. It appeared that Lady Fenwick had spirited away a material witness, who had sworn against one Cook on his trial for the same treason. His testimony having been ruled out, obviously because it was not the case of a deceased witness, nor one where there had been an opportunity for cross-examination on a former trial between the same parties, the case is nevertheless cited by Peake in his work on Evidence (p. 90) as authority for the proposition that the testimony of a deceased witness cannot be used in a criminal prosecution. The rule in England, however, is clearly the other way. Buller's N.P. 242; *King v Jolliffe*, 4 TR 285, 290; *King v Radbourne*, 1 Leach Cr Law 457; *Rex v Smith*, 2 Starkie 208; *Buckworth's case*, T Raym 170. As to the practice in this country, we know of none of the States in which such testimony is now held to be inadmissible.

63. Id at 242.

64. *Reynolds v United States*, 98 US 145 (1878). In *Reynolds* the petitioner alleged, among others, that the admission of testimony by his wife at a former trial was a violation of his Sixth Amendment rights. Evidence indicated that the petitioner assisted in preventing the prosecution from obtaining the wife's presence at the trial. The Court held that when absence of the witness is obtained by the petitioner's own procurement and evidence is supplied in some lawful way, the petitioner is in no condition to assert that his constitutional rights have been violated.

65. *Mattox*, 156 US at 242.

66. Id at 243.

67. Id at 244.

interfering with its spirit.[68]

For the next seventy years, Confrontation Clause challenges were predominately limited to cases involving prior or former testimony. Emphasis in these cases has primarily addressed the importance of cross-examination and personal presence of the witness at trial.[69] However, in 1965, the Supreme Court held, in *Pointer v Texas*,[70] that the Confrontation Clause was applicable to the States.[71] In *Pointer* the Court held that the Sixth Amendment's right of an accused to confront the witness against him is a fundamental right made obligatory on the States by the Fourteenth

---

68. Id. In dictum, the Court also stated that the introduction of evidence under the dying declaration hearsay exception would not violate the Confrontation Clause. Id at 243-44. The Court recognized that some exceptions arise simply from necessities of the case and the need to prevent the manifest failure of justice. Id.

69. McCormick on Evidence provides the following analysis:

> The right of cross-examination as evolved at common law has generally been thought to be fulfilled by affording an opportunity to cross-examine; cross-examination need not in fact take place (citation omitted). Under the confrontation clause, the matter has been further refined. If the former testimony was given at an earlier full trial of the same case and is now offered at a retrial in place of the live testimony of the witness, who has become unavailable, mere opportunity without actual cross-examination probably suffices (citation omitted). However, if the former testimony was given on an occasion other than a full trial, commonly a preliminary hearing, concern focuses on whether cross-examination did in fact take place and whether it was the "equivalent of significant cross-examination (citation omitted)."
>
> Under the confrontation clause, as under the hearsay rule (citation omitted), unavailability of the witness is a condition precedent to the admissibility of former testimony (citation omitted). Since the fact that the witness is unavailable at the time of trial lends no added weight or credibility to his former testimony, it is apparent the requirement of unavailability is a means of effecting a policy of preferring the testimony of the witness in person at the trial over a presentation of his testimony as given on the former occasion. However, if the cross-examination requirement discussed above has been satisfied, use of the former testimony will not violate the confrontation clause if the witness is shown to be unavailable. Hence the confrontation cases have devoted considerable attention to what constitutes unavailability.

Edward W. Cleary, *McCormick on Evidence* at 751, (West Publishing Co., 3rd, 1984).

70. *Pointer v Texas*, 380 US 400 (1965).

71. Id at 403. In *Pointer* the petitioner was arrested and brought before the state court for a preliminary hearing on a robbery charge. Id at 401. The alleged victim testified against the petitioner who was not represented by counsel and who did not cross-examine the witness. Id. The petitioner was indicted and tried. Id. The witness having moved out of state did not attend the trial, however, his testimony from the preliminary hearing was admitted. Id at 402. The Court held that the petitioner's Sixth Amendment guarantee of confrontation was denied because the witness's statements were not given under circumstances affording the petitioner, through counsel, an adequate opportunity to cross-examine the witness. Id at 406-07. Here again, the Court recognized that the major reason underlying the Confrontation Clause is to give a defendant charged with a crime an opportunity to cross-examine the witness against him, citing *Dowdell v United States*, 221 US 325 (1911); *Motes v United States*, 178 US 458 (1900); *Kirby v United States*, 174 US 47 (1899); and *Mattox v United States*, 156 US 237 (1895). Id.

Amendment.[72] This decision opened the avenue for a significant increase in the number of confrontation clause challenges which would eventually lead to conflict with the ever expanding list of hearsay exceptions.

In 1970, the Court in *California v Green*[73] permitted the substantive use of prior inconsistent out-of-court statements, where the witness testifies at trial, to be used for the truth of the matter asserted.[74] Additionally, the Court considered whether a witness's prior inconsistent testimony given at a preliminary hearing could be introduced for its truth when the witness testified at the trial.[75]

The Court did not believe the Confrontation Clause was violated by admitting a declarant's prior inconsistent out-of-court statements provided the declarant is testifying as a witness and subject to full and effective cross-examination.[76] This conclusion was supported by a comparison of the purpose of the Confrontation Clause to the potential dangers of admitting an out-of-court statement. The Court stated:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"[77]; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[78]

Although the out-of-court statement may not have been made under conditions subject to the above protections, the Court believed that if the declarant was present and testifying at the trial the out-of-court statement regained most of the lost protections.[79]

---

72. Id at 403.

73. 399 US 149 (1970).

74. Id at 153-64. Section 1235 of the California Evidence Code, effective January 1, 1967, provided that evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with the witnesses testimony at the hearing and is offered in compliance with Section 770 of the Code. Id. Section 770 of the California Evidence Code requires that the witness be given an opportunity to explain or deny the prior statement at some point in the trial. Id, see n 1. The Court noted that California's codification of the *prior* inconsistent statement hearsay exception represents a minority view in that it allows the statement to be used for the truth of the matter asserted. Id at 154. The majority view would only allow the statements to be introduced under appropriate limiting instruction to impeach the credibility of the witness. Id.

75. Id at 165-68.

76. Id at 157-58.

77. Id at 158, citing 5 Wigmore § 1367.

78. Id at 158.

79. Id.

Furthermore, the Court was of the opinion that the inability to cross-examine the witness at the time of his prior statement was not of crucial significance provided that petitioner was assured full and effective cross-examination at the time of trial.[80] Finally, the Court recognized that none of its previous decisions interpreting the Confrontation Clause required exclusion of out-of-court statements of a witness who is available and testifying at trial;[81] the majority of cases addressed the exact opposite situation where statements had been admitted for the truth under a recognized hearsay exception and the declarant was not available for cross-examination.[82] The Court concluded that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements as long as he is testifying as a witness at trial and subject to full cross-examination.[83]

In addressing the introduction of the preliminary hearing testimony, the Court reasoned that such testimony was admissible regardless of the petitioner's opportunity to confront the witness at the subsequent trial.[84] Here the Court recognized that the witness testified under oath; the petitioner was represented by counsel; the petitioner had every opportunity to cross-examine the witness; and the proceedings were conducted before a judicial tribunal.[85] Additionally, the Court noted that the petitioner's counsel did not appear in any way to have been significantly limited in the scope or nature of his cross-examination at the prior hearing.[86] In allowing such testimony the Court stated "the right of cross-examination

---

80. Id at 159.

81. Id at 161-64. The Court cited *Pointer v Texas*, 380 US 400 (1965) (prior hearing testimony of unavailable witness was not permitted where petitioner did not have adequate opportunity to cross-examine); *Barber v Page*, 390 US 719 (1968) (State had not made a good-faith effort to obtain the presence of an allegedly unavailable witness); *Douglas v Alabama*, 380 US 415 (1965), (petitioner could not cross-examine accomplice concerning confession because accomplice refused to testify on self-incriminating grounds); and *Bruton v United States*, 391 US 123 (1968) (violation of confrontation rights in the admission of co-defendant's confession when co-defendant did not take the stand.) Id.

82. Id at 161.

83. Id at 158.

84. Id at 165.

85. Id. Compare the Court's observation in *Barber v Page*, 390 US 719 (1968):

> The right to confrontation is basically a trial right. It includes both the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probably cause exists to hold the accused for trial.

Barber, 390 US at 725.

86. Id at 166.

then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the state."[87] The Court additionally considered whether such testimony should be restricted in light of the fact that the declarant was available for cross-examination.[88] In rejecting such an argument the Court stated that as a constitutional matter it would be untenable to construe the Confrontation Clause to permit the use of prior testimony to prove a case where the declarant is unavailable, but to bar that testimony where the declarant is present at trial.[89]

In its next term the Court, in *Dutton v Evans*,[90] addressed the issue of whether the petitioner's Sixth Amendment rights were violated when evidence was admitted against him under the co-conspirator hearsay exception.[91] The petitioner, tried for murder in the State of Georgia,[92] alleged that his Sixth Amendment rights were violated because the co-conspirator hearsay exception applied by the State did not identically conform to the hearsay exception applicable in federal courts.[93] The Court recognized, however, as it did in *Green*,[94] that merely because evidence is admitted in violation of an established hearsay rule does not automatically lead to the conclusion that an individual's Confrontation Rights have been violated.[95] The Court reasoned that the limitations placed on the federal co-conspirator hearsay exception were not required by the Sixth Amendment Confrontation Clause but rather were defined by the Court in its exercise of its rule making power, arising out of the Court's disfavor of the broadening net of conspiracy prosecutions.[96]

For more than a decade after the decisions in *Green* and *Dutton*,

---

87. Id.

88. Id.

89. Id at 166-67.

90. 400 US 74 (1970). A plurality of four Justices was joined by Justice Harlan in affirming the rejection of the accused's confrontation arguments.

91. Id at 79.

92. *Evans v State*, 222 Ga 392, 150 SE2d 240 (1966).

93. *Dutton*, 400 US at 80. Georgia's co-conspirator exception, unlike the federal co-conspirator exception that only applies if a statement was made in the course or in furtherance of the co-conspiracy, allows into evidence a co-conspirator's out-of-court statement made during the concealment phase of the co-conspiracy, i.e., engaged in concealment of the criminal enterprise. Id at 81.

94. See note 74.

95. 400 US at 81.

96. Id at 82.

the Court made no further attempts to clarify the scope or meaning of the Confrontation Clause. However, in 1980, the Court in *Ohio v Roberts*[97] once again addressed the issue of whether the use of prior testimony from a preliminary hearing could be used against the petitioner when the witness was shown to be unavailable.[98] Petitioner's counsel did not cross-examine the witness at the preliminary hearing; the witness was, however, subject to defense counsel's direct examination.[99] The Supreme Court of Ohio[100] analyzed that *Green* went no further than to suggest that cross-examination actually conducted at a preliminary hearing may afford adequate confrontation for purposes of a later trial.[101] The Supreme Court of Ohio held the preliminary hearing testimony to be inadmissible in that mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial.[102]

In addressing the issue in this case the United States Supreme Court began its analysis by pointing out that the Confrontation Clause reflects a preference for face-to-face confrontation at trial that is secured primarily through the right of cross-examination.[103] The Court then stated that the Confrontation Clause restricts the scope of admissible hearsay in two ways: first, the Confrontation Clause normally requires a showing that the witness is unavailable;[104] and second, the witness's statement is only admissible if it bears adequate indicia of reliability.[105] It was the Court's opinion

---

97. 448 US 56 (1980).

98. Id at 58. Ohio Rev Code Ann § 2945.49 (Baldwin 1992) provides that:

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

Ohio Rev Code Ann § 2945.49 (Baldwin 1992).

99. Id.

100. *Ohio v Roberts*, 55 Ohio St 2d 191, 378 NE2d 492 (1978) (citation omitted).

101. *Roberts*, 448 US at 62.

102. Id.

103. Id at 63.

104. Id at 65.

105. Id at 65. The Court noted that this principal was recently formulated in *Mancusi v Stubbs*, 408 US 204 (1972), where it noted:

> The focus of the Court's concern has been to insure that there are 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant' (citation omitted), and to 'afford the trier of fact a satisfactory basis for evaluating the truth of

that reliability can be inferred where evidence falls within a firmly rooted hearsay exception.[106]

Following these criteria the Court addressed the facts of the case. Here, the Court was satisfied that the prosecution satisfied the good faith standard required by the Confrontation Clause in establishing unavailability of the witness.[107] The Court was of the opinion that "the ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to the trial to locate and present the witness.[108] The Court was satisfied that this requirement was met through the prosecution's issuance of five separate subpoenas to produce the witness as well as other attempts to personally locate the witness.[109] The Court also examined whether there was compliance with the reliability standard and concluded that the defense counsel's interrogation of the witness at the preliminary hearing was equivalent to cross-examination;[110] it provided a basis to challenge whether the witness was sincerely telling the truth and whether the witness accurately perceived and remembered what he conveyed.[111] The broad language used by the Court in this opinion would eventually lead to the Court addressing the unavailability requirement, once again.

In 1986 the Court in *United States v Inadi*[112] addressed the question of whether the Confrontation Clause requires a showing of unavailability before admission of a non-testifying co-conspirator's out-of-court statements, even though those statements otherwise satisfy the requirement of Federal Rule of Evidence 801(d)(2)(E).[113] The Court of Appeals for the Third Circuit,[114] interpreting *Roberts*, concluded that *Roberts* created a clear constitutional rule requiring a showing of unavailability as a condition to

---

the prior statement' (citation omitted). It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability'."

Id at 65-66, quoting *Mancusi*, 408 US at 213.

106. *Roberts*, 448 US at 66.

107. Id at 74-77.

108. Id at 74.

109. Id at 75.

110. Id at 68-72.

111. Id at 71, citing Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv L Rev 1378 (1972).

112. 475 US 387 (1986).

113. Id at 388. Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." FRE 801(d)(2)(E)

114. *United States v Inadi*, 748 F2d 812 (1984), rev'd 475 US 387 (1986).

admission of any out-of-court statements.[115] The Supreme Court, however, did not believe that *Roberts* stood for such a wholesale revision of the law of evidence, noting that under the Third Circuit's interpretation no out-of-court statements would be admissible without a showing of unavailability.[116]

In addressing the issue before it, the Court, based on certain limiting statements noted in the *Roberts* decision,[117] stated that *Roberts* should be limited to the actual question before it: the constitutionality of the introduction into evidence of the preliminary hearing testimony of a witness not produced at the subsequent trial.[118] The Court then pointed out that the Court in *Roberts* found in a long line of Confrontation Clause cases involving prior testimony that before such statements can be admitted it must be demonstrated that the declarant is unavailable.[119] Therefore, *Roberts* "must be read consistently with the question it answered, the authority it cited, and its own facts."[120]

In addressing why the Court did not believe the unavailability rule was applicable to co-conspirator's out-of-court statements, the Court reasoned that the considerations requiring a showing of unavailability before the introduction of prior testimony are not applicable to co-conspirator statements.[121] Unlike former testimony, often only a weaker substitute for live testimony, a co-conspirators' statements provide evidence of a co-conspiracy's context that cannot be replicated even if the declarant testifies at trial.[122] Furthermore, co-conspirators' statements often derive their significance from the circumstances in which they were made while in-court testimony seldom will provide the evidencing value of statements made during the course of the conspiracy.[123] Based on these factors, in addition to others, it was the Court's opinion that the admission of co-conspirators' statements into evidence actually furthers the mission of the Confrontation Clause which is to advance

---

115. *Inadi*, 475 US at 391, citing *United States v Inadi*, 748 F2d 812 (1984)(citing *Ohio v Roberts*, 448 US 56 (1980)).

116. *Inadi*, 475 US at 392 (citations omitted).

117. See *Inadi*, 475 US at 392 (citations omitted).

118. *Inadi*, 475 US at 392-93.

119. Id at 393 (citations omitted). See *Mancusi v Stubbs*, 408 US 204 (1972); *California v Green*, 399 US 149 (1970); *Barber v Page*, 390 US 719 (1968); *Berger v California*, 393 US 314 (1969). Id.

120. *Inadi*, 475 US at 394.

121. Id.

122. Id at 394-96.

123. Id.

the accuracy and truth-determining process in criminal trials.[124] Additionally, the Court pointed out that the benefits derived from the imposition of an unavailability rule would be slight while imposing substantial burdens on the entire criminal system; in those cases involving co-conspirator statements the prosecution would be required to identify with specificity each declarant, locate such declarants, and ensure their continuing availability for trial.[125] The Court concluded by affirming the continued validity of the co-conspirator statements and declining "to require a showing of the declarant's unavailability as a prerequisite to their admission."[126]

Recently the Court, in *Idaho v Wright*,[127] addressed the issue of whether the admission at trial of certain hearsay statements made by a child to an examining pediatrician violates the petitioner's Sixth Amendment rights.[128] The hearsay statements were admitted by the trial court under Idaho's residual hearsay exception.[129] The Supreme Court of Idaho,[130] however, held that the admission of the hearsay testimony violated the petitioner's "constitutional right to confrontation because the testimony did not fall within a traditional hearsay exception."[131] Passing on the question of whether the child must be shown to be unavailable before her statements are admissible, the Court believed that the crux of the question presented in this case is whether the child's statements

---

124. Id at 396 (citations omitted).

125. Id at 396-400.

126. Id at 400.

127. ___ US ___, 110 S Ct 3139 (1990).

128. Id at 3143.

129. Id at 3144. Idaho's residual hearsay exception provides in relevant part:

> Rule 803. Hearsay exceptions; availability of declarant immaterial.— The following are not excluded by the hearsay rule, even though the declarant is available as a witness. . .
>
> . . .
>
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the Court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

Wright, 110 S Ct at 3144-45, quoting Idaho Rule Evid 803(24).

130. *Idaho v Wright*, 116 Idaho 382, 775 P2d 1224 (1989).

131. *Wright*, 110 S Ct at 3145. The Supreme Court of Idaho reasoned that the hearsay statements lacked trustworthiness because the pediatrician's interview with the child consisted of leading questions and was performed by someone with a preconceived notion of what the child should be disclosing. Id.

bore sufficient indicia of reliability.[132]

In determining whether the requirement of indicia of reliability has been met, the Court recognized that there are basically two tests: where the hearsay statement falls within a firmly rooted hearsay exception, or where the statement is shown to be supported by particularized guarantees of trustworthiness.[133] The hearsay exception in this case was not found to be firmly rooted for Confrontation Clause purposes.[134] Rather the Court recognized that the residuary hearsay exception "accommodates ad hoc instances in which statements . . . might nevertheless be sufficiently reliable to be admissible at trial."[135] However, the residuary exception does not share the same tradition of reliability supporting admissibility of statements falling under firmly rooted hearsay exceptions.[136] In determining whether a statement contains the particularized guarantees of trustworthiness required for admission under the Confrontation Clause, the Court believed that such guarantees must be determined from "the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief."[137] Such statements would be so "trustworthy that adversarial testing would add little to its reliability."[138] Based on these criteria the Court upheld the Supreme Court of Idaho's decision, concluding that the prosecution had not shown that the statements were made under circumstances that contain particularized guarantees of trustworthiness.[139]

In *White v Illinois*[140] the United States Supreme Court once again revisited the Confrontation Clause requirement of unavailability as it pertains to the introduction of out-of-court statements into evidence.[141] The *White* Court appears to have decided to reexamine this requirement in order to clarify the language it used in its *Roberts* and *Inadi* opinions. The *White* Court recognized that the language it used in the *Roberts* opinion might have suggested that the "Confrontation Clause generally requires that a declarant

132. Id at 3147.
133. Id, citing *Ohio v Roberts*, 448 US 56 (1980).
134. Wright, 110 S Ct at 3147.
135. Id.
136. Id at 3148.
137. Id at 3149.
138. Id.
139. Id at 3150.
140. ___ US ___, 112 S Ct 736 (1992).
141. Id at 740-41.

either be produced at trial or be found unavailable before his out-of-court statements can be admitted . . .";[142] however, the Court believed this generalization to be negated by its holding in *Inadi*.[143]

The Court in *White* reaffirmed it reasoning in *Inadi* where it refused to extend an unavailability requirement to all out-of-court statements.[144] This reasoning recognized that certain statements provide evidence that cannot be replicated even if the declarant testifies at trial.[145] Furthermore, an unavailability rule would not likely produce much additional meaningful testimony while imposing "substantial additional burdens on the factfinding process."[146] Although the Court in *Inadi* expressed its opinion in relation to co-conspirator statements, the Court in *White* recognized that such statements were also applicable to the spontaneous declarations and medical examination exceptions.[147] This conclusion is based on the reasoning that it is the context in which the statements are made that gives them their reliability.[148] The same factors which give the statement its reliability cannot be duplicated merely by having the declarant testify at trial.[149] It would appear, based on the Court's reasoning, that if the reliability of a statement arises from the context in which the statement is made such that its value could not be duplicated by later in-court testimony, then an unavailability showing would not be required. A key factor in this determination appears to be whether there is a "threat of lost evidentiary value if the out-of-court statements were replaced with live testimony".[150]

Although the language in *White* appears to dispel any notion that a general unavailability analysis is required of out-of-court statements, such language does not appear consistent with the Court's recent decision in *Idaho v Wright*.[151] In *White* the Court states:

> In *Inadi* we considered the admission of out-of-court statements made by a

142. Id at 741, citing *Ohio v Roberts*, 448 US 56 (1980).
143. *White*, 112 S Ct at 741.
144. Id at 741-42 (citations omitted).
145. Id at 742.
146. Id.
147. Id at 742-43 (citations omitted).
148. Id at 742. The admission of out-of-court statements under the guise of hearsay exception must be shown to contain sufficient indicia of reliability.
149. Id.
150. Id at 743.
151. ___ US ___, 110 S Ct 3139 (1990).

> co-conspirator in the course of the conspiracy. As an initial matter, we rejected the proposition that *Roberts* established a rule that 'no out-of-court statements would be admissible without a showing of unavailability' (citations omitted). To the contrary, rather than establishing 'a wholesale revision of the law of evidence' under the guise of the Confrontation Clause, (citation omitted), we concluded that '*Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts.' (citations omitted). So understood, *Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding. (citation omitted).[152]

Compare this language to the Court's statements in *Idaho v Wright* where the Court states:

> In *Ohio v Roberts*, we set forth 'a general approach' for determining which incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. (citation omitted). We noted that the Confrontation Clause 'operates in two separate ways to restrict the range of admissible hearsay' (citation omitted). 'First, in conformance with the Framer's preference for face-to-face accusation, the Sixth Amendment established a rule of necessity. In the usual case . . ., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.' (citation omitted). Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability'. . .[153]
>
> . . .
>
> We have applied the general approach articulated in *Roberts* to subsequent cases raising Confrontation Clause and hearsay issues . . .[154]
>
> . . .
>
> Applying the *Roberts* approach to this case . . . .[155]

Although *Inadi* and *White* stand for the proposition that the unavailability requirement does not extend to all out-of-court statements, such cases may be limited to include only those out-of-court statements whose evidentiary value could not be duplicated by later in-court testimony. Arguably, based on the language in *Roberts* and *Wright*, a general showing of unavailability is still required although such a showing does not extend to all out-of-court statements. For the time being, it appears that the Court will continue to address the requirement of unavailability on a case by case basis.

Although the United States Supreme Court has avoided develop-

---

152. *White*, 112 S Ct at 741.
153. *Idaho v Wright*, 110 S Ct at 3146.
154. Id.
155. Id at 3147.

ing a litmus test concerning the admissibility of certain hearsay exception testimony, there are some generalizations that can be made. First, a showing of unavailability is not required in all instances. Where in-court testimony, subject to cross-examination, is likely to add to the evidentiary value of such out-of-court statements, a showing of unavailability will be required. However, where the out-of-court statements gain their reliability from the context in which they are spoken, a showing of unavailability will most likely not be required because the factors which give the statement its reliability cannot be duplicated merely by having the declarant testify at trial. Secondly, the Confrontation Clause requires that the out-of-court statements contain sufficient indicia of reliability. This showing of indicia of reliability can be met where the statement falls within a firmly rooted hearsay exception, or where the statement is supported by particularized guarantees of trustworthiness. In determining whether a statement contains particularized guarantees of trustworthiness, the Court will consider the totality of circumstances that surround the making of the statement to ascertain whether the declarant is particularly worthy of belief.

John E. McGrady III