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Rescuing the Confrontation Clause

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RESCUING THE CONFRONTATION CLAUSE

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I. INTRODUCTION

> *"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."*[1]

This Sixth Amendment to the United States Constitution gives the accused in all criminal prosecutions "the right . . . to be confronted [by] the witnesses

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

against him."[2] Those seemingly simple words known as the Confrontation Clause have been exalted by the United States Supreme Court as a crucial trial right, diminished by that same Court as "not absolute," revered by those who see its merits, and decried by those who favor expedient, simple convictions. Whether the Confrontation Clause was prompted by the beheading of Sir Walter Raleigh; foreshadowed by the writings of Pierre Ayrault; or ordained by its early connections with the church, the state, and demands for fairness, the history of the right in this country has been almost as jaded as its origin. The rights protected by the Clause have flourished and waned and have been laid to rest and resurrected. And, as much as any other constitutional issue in the last century, the Confrontation Clause has provided the backdrop for a rare commentary on the High Court's parsing of rights and rationales. This Article will explore the ambiguities and conflicts created by a Court faced with untangling itself from its former grasp of a fundamental concept of fairness—the right of confrontation in a criminal case.

For more than one hundred years, the United States Supreme Court has grappled with the eight words in the Sixth Amendment, collectively referred to as the Confrontation Clause. The Court's opinions have been varied and astonishingly inconsistent. Unequivocal statements in holdings have been repudiated or explained away in often inexplicable ways. What has emerged, most commentators agree, is a complicated, unsettled constitutional right.

What is the reason for the various interpretations of those few words? Is it attributable to the history surrounding the Sixth Amendment? Can it be explained simply by change in membership and philosophy of the Court? Have changes in trial process caused the Court to revise its interpretations? Are the different interpretations a result of the four primary kinds of cases that raise confrontation issues? Or is some combination of these and other factors responsible for the hodgepodge jurisprudence of the Confrontation Clause?

The thesis of this Article is that the Court's present interpretation of the Confrontation Clause is inconsistent, undisciplined, and result-oriented. That indictment is largely due to the Court's decisions which ultimately replaced a fundamental constitutional right with a rule of evidence. This approach resulted in the virtual elimination of a crucial constitutional guarantee. This Article concludes by recommending that the Court reevaluate its current interpretation in light of relevant history and early Confrontation Clause cases. Furthermore, the Article suggests the Court restore the confrontation right to constitutional significance as one of an intertwined bundle of fundamental trial rights, the purpose of which is to assure the integrity of the American adversarial system of justice.

Part II discusses various views of the history of the Confrontation Clause. Part III describes and analyzes the four kinds of cases in which the Court has addressed Confrontation Clause issues. This delineation is necessary because,

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2. *Id.*

at times, the Court's interpretation appears case-type specific. The delineation is used throughout the Article to describe the history of the Confrontation Clause in this country and the approaches to resolving confrontation issues. The second section of Part III discusses the Court's major Confrontation Clause cases in chronological order. The chronology is used to explore whether the Court's varied interpretations can be explained based on when the cases were decided in relation to decisions in other types of confrontation cases. Part IV of the Article categorizes and discusses each approach used by the Court in applying the Confrontation Clause, including specific, unique approaches used by individual Justices. Part V suggests a consistent approach for applying the Confrontation Clause in all situations.

II. HISTORY OF THE CONFRONTATION CLAUSE

The history of the Confrontation Clause has been debated frequently, yet its genesis is claimed to be undeterminable.[3] Many trace its origin to the trial and conviction of Sir Walter Raleigh in the early 1600s.[4] However, most recognize much earlier beginnings of a right to confrontation and attach the Clause's origin to ancient civilizations.[5]

Regardless of the origins of the right, courts in this country have repeatedly linked the Confrontation Clause, and its interpretation, to English common law as it existed at the time of the Bill of Rights. This linkage has misled courts into defining the rights conferred by the Sixth Amendment's Confrontation Clause as being consistent with confrontation rights that existed in England.

Persuasive scholars have suggested that the American right to confrontation is not an outgrowth of either the English common law or constitutional law, but is rather a byproduct of the American adversarial system

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3. In the words of Justice Harlan, "[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause." California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring). *See, e.g.*, ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE 73 (1992) (concluding that the "origins of confrontation are obscure"); FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION OF THE UNITED STATES 33 (1951) (suggesting that the development of the right to confrontation cannot be definitively traced); Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332 n.181 (1981) ("The clause was debated for a mere five minutes before its adoption."); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L. REV. 77, 77 (1995) ("The origins of the Confrontation Clause are murky."); Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH L. REV. 67, 67 (1969) ("The precise source of this use of the word 'confront' is obscure . . . .").

4. HELLER, *supra* note 3, at 33; Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383, 384 (1990); *see generally* Jonakait, *supra* note 3, at 81 n.18 (listing articles).

5. *See* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 482-533 (1994) (noting the Court's quotation of *Acts* 25:16 in *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988)).

created by the American colonists.[6] While this view is supported by history and consistent with the development of an adversarial trial process, many argue, nonetheless, that the history of the Confrontation Clause cannot be conclusively established.[7]

The relevance of the genesis of confrontation rights and of the Sixth Amendment's Confrontation Clause can be seen in its effect on modern interpretation. Should the clause be interpreted consistently with the narrow protection said to have been afforded in England—to be free from conviction on the basis of ex parte affidavits?[8] Or is it more correctly viewed as a part of a "confluence of advocacy tools" originating with the founding of the American adversary system in pre-Revolutionary America?[9]

A. The Trial of Sir Walter Raleigh and the Confrontation Clause

Many attribute the inclusion of a Confrontation Clause in the American Bill of Rights to the beheading of Sir Walter Raleigh in 1618 at the Tower of London for "High Treason."[10] History teaches that the Clause has far earlier beginnings,[11] but it remains emotionally linked with the conviction, and eventual beheading, of Raleigh based on proof made through ex parte affidavits. Raleigh, in his last letter to his wife, demonstrated a keen awareness of the role the absence of confrontation played in his trial and conviction. His

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6. *See* Jonakait, *supra* note 3, at 81-82.

7. *See* Larkin, *supra* note 3, at 67.

8. This was the limited construction that the government urged the Court to accept in *White v. Illinois*, 502 U.S. 346 (1992). The Court's opinion, authored by Chief Justice Rehnquist, rejected this construction. *Id.* at 352 ("Such a narrow reading of the Confrontation Clause, which would virtually eliminate its role in restricting the admission of hearsay testimony, is foreclosed by our prior cases."). At least at that time, Justice Thomas was not so quick to discard the argument. *Id.* at 358 (Thomas, J., concurring) ("[O]ur Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself."). *But see infra* notes 452-58 and accompanying text (discussing development of Justice Thomas's views on the Confrontation Clause).

9. Jonakait, *supra* note 3, at 164.

10. Raleigh, a favorite of Queen Elizabeth I, was accused of plotting to overthrow the English throne shortly after Elizabeth I died and was replaced by James, King of Scotland and son of Mary, Queen of Scots. Despite early indications that the King would disfavor him, Raleigh continued efforts to work with and gain the King's regard. Even after the King removed him from his position of Governor of Jersey, Raleigh appeared to ride with the King in a hunt. Instead, the King had Raleigh removed and interrogated by the Privy Council about treason. Notwithstanding Raleigh's claimed lack of knowledge, the Council arraigned Raleigh for trial. Christopher Smith, *Biography of Sir Walter Raleigh*, *in* BRITANNIA BIOGRAPHIES, pt. 15, *at* http://www.britannia.com/bios/raleigh/out.html (last visited Nov. 14, 2002).

11. Early Roman law required that the accuser be present in court to state the charge and produce evidence and that the accused have the opportunity to encounter the accuser. Herrmann & Speer, *supra* note 5, at 485-86. An early amendment to the Justinian Code of 534, Novel 90, made in 539, required that prosecution witnesses be produced in the presence of the accused. *Id.* at 491. The early canon law similarly required that opposing witnesses be encountered in court. *Id.* at 496-99.

words were these: "That Almighty God . . . teach me to forgive my persecutors and false accusers, and send us to meet in his glorious Kingdome."[12]

On the morning of trial, Raleigh heard the five charges[13] against him for the first time. The prosecution, led by Sir Edward Coke, introduced evidence in the form of a sworn confession from Raleigh's alleged co-conspirator, Lord Cobham. Raleigh complained and attempted to call Lord Cobham as a witness, inferring a recantation.

> But it is strange to see how you press me still with my Lord Cobham, and yet will not produce him . . . . [H]e is in the house hard by, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof.[14]

Cobham was not called to the witness stand, but Raleigh was allowed to introduce a letter written by the witness.[15] The prosecution produced a rebuttal letter and a witness. The witness, a boat pilot, testified that someone in Portugal told him, "Your king [James] shall never be crowned for Don Cobham and Don Raleigh will cut his throat before he can be crowned."[16] Raleigh reportedly objected to this testimony claiming "[t]his is the saying of some wild Jesuit or beggarly priest; but what proof is it against me?"[17] Thus, the witnesses against

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12. The letter from Sir Walter Raleigh to his wife, Lady Elizabeth Raleigh, can be viewed at http://www.rgjeib.com/thoughts/dust/dust.html.

13. Raleigh was charged with plotting with Lord Cobham to overthrow the King in favor of the King's cousin; with plotting to capture the King and force him to relax anti-papal legislation (the Bye Plot); with encouraging the King's cousin to write the King of Spain for support; with instigating another to raise 600,000 crowns; and with respect to a lost manuscript book which allegedly confirmed the treasonous plot. *See* Smith, *supra* note 10.

14. Raleigh's Trial, 2 How. St. Tr. 15 (1603).

15. *Id.* In another twist, historians report that the letter arrived in Raleigh's cell at the Tower of London wrapped around an apple and thrown through his window. *See* Smith, *supra* note 10.

16. Note:The Treason Trial of Sir Walter Raleigh, *available at* http://www.law.harvard.edu/publications/evidence/articles/note-treasontrial.htm.

17. *Id. See generally* 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 333-36 (Burt Franklin 1973) (1883); 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 216, 217, 226-28 (1926); J.G. PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (1850).

Raleigh[18] consisted of an ex parte affidavit, a letter, and hearsay on hearsay.[19] Within a quarter of an hour, Raleigh was convicted.[20]

Even though English procedure at the time did not require the production of witnesses or their examination in court,[21] Sir Walter Raleigh demanded the right to meet his accusers, a right recognized 1000 years earlier in secular and ecclesiastical law.[22] Because Raleigh was denied that right and quickly sentenced to die, one of the four trial judges[23] later lamented that the trial had "injured and degraded the justice of England."[24]

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18. Compare Raleigh's "witness" to the rights afforded by the Confrontation Clause. *See* U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy . . . the right to be confronted with the witnesses against him . . . .").

19. *But cf.* FED. R. EVID. 805 (requiring each component of hearsay within hearsay to conform to an exception). Recently, historians have begun to question America's romantic version of Raleigh and his unfair trial. Uncovering so-called "untouched" documents from the prosecution's case, Cambridge University archivist Mark Nicholls claims to have located proof that Raleigh plotted to spy for Spain and to assist in a Spanish invasion of Britain. Rather than being convicted unfairly, some contend that Raleigh's charm and wit overwhelmed the prosecution.

20. Raleigh was later pardoned by the King, but was kept in the tower of London. There he lived for thirteen years. His wife was allowed to visit privately and there conceived and gave birth to their second son. During his time there, Sir Walter Raleigh authored three books including *History of the World*. He befriended the King's wife and began tutoring her son, the Prince of Wales, who reportedly stated that "none but my father would keep such a bird in a cage." Smith, *supra* note 10, at pts. 15-16.

In 1615, when a proposed marriage between Prince Charles, the other son of King James and Queen Anne, and the "Spanish Infanta" broke down, King James, desperate for money, began to consider sending Raleigh on a gold-seeking voyage. In 1616, Sir Walter Raleigh was released from the Tower in order to seek the gold that he believed could be found near the River Orinoco. The voyage failed miserably. Raleigh lost his second-born son to battle, his long-time friend to suicide, and his captains to desertion. When he arrived back in England, he was arrested and eventually returned to the Tower. *Id.*

After his return, Raleigh was charged with additional offenses. Now, it was explained that his treason was not pardonable and that he would be executed. A little more than two months after his return, Sir Walter Raleigh was beheaded in the Old Palace Yard in Westminster. *Id.* at pts. 17-19.

21. Witnesses did testify before juries in England by the time of the Raleigh trial, but whether they were called to testify or testified by deposition was largely up to the prosecution. *See* P.R. Glazebrook, *The Reign of Mary Tudor*, 1977 CRIM. L. REV. 582, 585.

22. *See* Herrmann & Speer, *supra* note 5, at 496-99 & nn.83-98.

23. Raleigh's trial judges included Sir John Popham, Chief Justice of the King's Bench; Sir Edmund Anderson, Chief Justice of Common Pleas; and two prison judges, Sandys and Warburton. Smith, *supra* note 10, at pt.15.

24. *Id.* One of the judges during the trial was cynical about Raleigh's demand for Cobham's appearance: "My lord Cobham, perhaps, been laboured withal; and to save you, his old friend, it may be that he will deny all that which he hath said." Trial of Sir Walter Raleigh, 2. T.B. Howell, at col. 18.

B. The Right of Confrontation Pre-Raleigh

History contradicts the claim of many historians that the trial and conviction of Sir Walter Raleigh was the impetus for the American Confrontation Clause. In fact, the right of an accused to confront witnesses existed centuries before the famous trial.[25] The roots of confrontation were in the accusatorial system of justice, a system utilized by the Romans in the first century.[26] Researchers verify the development in both secular and canon law, with each being influenced by the desire to assure trustworthiness as well as fairness in the proceedings.[27]

Confrontation rights first appeared in the codification of existing Roman law by Emperor Justinian in 534.[28] Among its many provisions were "time limits" for examination of witnesses subpoenaed to testify.[29] Though the provisions did not state explicitly that witnesses were required to testify in person, the procedural provisions were based on that assumption. However, five years later the Code was supplemented with Novel 90, a section on witnesses in which their mandatory appearance was specified.[30] The prosecution's witnesses were required to appear in court in the presence of the defendant and the factfinder.[31] The precursor to the modern-day deposition was provided for in civil cases in which witnesses could give their testimony in the province where they lived. But the importance of in-person confrontation in criminal cases was clear. Novel 90 stated that because of the "danger concerning great things, by all means [in criminal cases] witnesses are to be present [to testify] before the [fact-finder] judges."[32]

An appreciation for the importance of confrontation was obvious in ecclesiastical law. The church had patterned its dispute resolution practices after the adversarial system of the courts. Among the disputes resolved in the church were criminal disputes involving the violation of secular law by

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25. *See* Herrmann & Speer, *supra* note 5, at 496-99.

26. *Id.* at 485-86.

27. The importance of fairness is explicit throughout the early proceedings. For example, the Justinian Code noted that in criminal cases "in which there is danger concerning great things, by all means witnesses are to be present [to testify] before the judges." *Id.* at 491 & n.59. An early church writing explained the principle this way: "It is not just to make one-sided judgments." *Id.* at 494 n.74. The story of Daniel and Susanna perhaps best explains the relationship between confrontation and trustwortiness. *See id.* at 516-19 & nn.190-93. Susanna was about to be executed based on false accusations made by two elders. Daniel questioned the two separately about a detail of the alleged adultery charge against Susanna and received inconsistent answers. As a result, Susanna's condemnors were convinced that the elders were lying. *See Daniel* 13:1-63.

28. Herrmann & Speer, *supra* note 5, at 490.

29. *Id.*

30. *Id.* at 491.

31. *Id.*

32. *Id.* at 491 & n.59.

clergy.[33] In these proceedings, the church's criminal procedural rules mirrored those of the state.[34] As early as the third century, the church evidenced awareness of the unfairness of unconfronted accusations and alerted its judges not to "hear only one person, with the other person not present and not defending himself against the allegation."[35]

In its earliest form, the term "confrontation" referred to the right of an accused to be present when the accuser testified. However, this notion expanded to one in which the accused had a right to be present when any witness against the accused testified.[36] In the twelfth century, a procedure developed by which judges took witnesses' testimony in secret, outside the presence of other witnesses, and then had that testimony read.[37] The goal of this procedure was to assure that one witness's testimony was not influenced by another's, a problem that is today addressed by the sequestration rule.[38] In order to reconcile the new, secretive questioning procedure with that provided for in early Roman law, the jurists interpreted the early law to require only that the accused be present when the witness was sworn, but not necessarily when the witness testified.[39]

This relaxation of the confrontation requirement in the twelfth century was but a beginning. By the thirteenth century, a new emphasis on detection, prosecution, and punishment for crime had evolved. Grave controversies in the church led its leaders to seek a more expedient way to remove bad clergy.[40] Inquisitorial procedures replaced accusatorial ones and spread from the church courts to the secular ones.[41] By the fourteenth and fifteenth centuries, witnesses

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33. *See id.* at 493-94.

34. Herrmann & Speer, *supra* note 5, at 494.

35. *Id.* The official adoption of the state's rules on confrontation in civil matters occurred in 603 when Pope Gregory I directed an investigation into the trial of a Spanish bishop and specified, by quoting from Novel 90, that the investigator determine whether proof had been by witnesses under oath with the accused present or in writing. *Id.* at 497. The church continued to follow the Roman procedure even after the Roman Empire had fallen and the state had succumbed to use of Germanic procedural rules. *See id.* at 499. For a lengthy and interesting discussion of how the forgeries of legal texts by French clerics perpetuated the church's procedure, see *id.* at 503-11.

36. *See* Herrmann & Speer, *supra* note 5, at 485, 537-40. *But see* Herrmann & Speer, *supra* note 5, at 537 ("For the prosecution of serious crimes, France by the mid-fifteenth century was following a procedure *extraordinaire*, an inquisitional procedure stressing secrecy and torture.").

37. *Id.* at 515-16. Most attribute the popularity of this procedure to its biblical use by Daniel during the trial of Susannah for adultery. Two elders, whose advances were rebuffed by Susannah, accused her of adultery with a young man in an orchard. The two were interviewed separately by Daniel and were asked the type of tree under which the adultery was committed. Their differing answers convinced Daniel, and those determined to execute Susannah, that their testimony was false. *Id.* at 516-17. Arguably, the story lends more support to the importance of questioning accusers than to the use of secretive interrogations.

38. *See, e.g.*, FED. R. EVID. 615 (federal rule for the exclusion of witnesses).

39. *See* Hermann & Speer, *supra* note 5, at 518-19 n.198.

40. *See id.* at 523-24.

41. *Id.* at 526.

and defendants were routinely interrogated by inquisition.[42] While torture was not allowed until a second examination (presuming the first did not obtain the correct responses), it, too, became quite common.[43]

However, during this time period the words "confrontation" and "face-to-face" crept into the language of the courts and the church.[44] They were used to describe the prerequisites to the inquisition and torture of a defendant. Witnesses, who were secretively examined outside the defendant's presence and without the defendant's knowledge, would be called to appear before the defendant face-to-face where the defendant would "confront" (observe) them.[45] After the confrontation, if the reexamination of the witness (again, outside the defendant's presence) produced the same information, the defendant could be submitted to inquisition and torture to coerce a confession.[46] Thus, at the time of Sir Walter Raleigh's trial, confrontation included face-to-face in-court observation, but not examination in the accused's presence.

C. Ayrault's Vision

Fifteen years before Sir Walter Raleigh's trial, an early criminal scholar, Pierre Ayrault, provided provoking commentary on criminal procedure in his treatise *Ordre*. In contrasting the drastic differences between the protections in place in Rome and in France at the end of the sixteenth century, Ayrault criticized the justifications offered for abandoning many procedural protections.[47] As to the relaxation of confrontation rights, he noted:

> And in truth it seems that it is natural and consequently common to all men that the accused be heard; and that the witnesses who are charging him be brought before him, to sustain face to face the crime of which they are charging him, in order that if he has something to say against them, he may say it; and that the witnesses may see and recognize the person about whom they are deposing. . . . [F]or the interrogation [of a witness], to be good, [it] must be done captiously and subtly; . . . now in heat, now gently: which are all matters for the adversary, . . . not the judge . . . . These interrogations cannot be well suited to him who must be neutral or impartial between the accuser and the accused. . . . [All trial proceedings in antiquity took place]

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42. *See id.* at 532-37 (describing development of inquisition).

43. *Id.* at 532-33.

44. *See id.* at 539.

45. Herrmann & Speer, *supra* note 5, at 538-39.

46. *See id.* at 531. For a complete and gruesome description of the many methods of torture, *see* DANIEL KATKIN, THE NATURE OF CRIMINAL LAW 242-52 (1982).

47. *See* Herrmann & Speer, *supra* note 5, at 540-41 (citations omitted).

> outdoors and in public, in the presence of the people, with all the judges and the parties present. . . . It is easy, behind closed doors, to adjust or diminish [the evidence], to effect intrigues or pressures. The audience, by contrast, is the rein on the passions. It is the scourge of bad judges.[48]

Ayrault's commentary previewed much of what the United States Supreme Court would, at one time or another, assert as the essence of the right to confrontation. To confront, a witness must be brought face-to-face with the accused and questioned by one in a position adverse to the witness. The questioning must also occur in public, in the presence of not only the accused and the factfinder, but also the public "audience."[49]

D. After Sir Walter Raleigh

1. English Criminal Procedure Before the Revolution

Those who wed the Confrontation Clause to the trial, conviction, and eventual execution of Sir Walter Raleigh claim that, as a result, Sixth Amendment confrontation rights should reflect confrontation rights that existed in England.[50] Two aspects of English legal history significantly undermine this proposition.[51] The first is the infrequent appearance of counsel in English courts.[52] The second is the drastic difference in the role of English judges and juries and that of American judges and juries.[53]

In England in the 1600s, criminal defendants charged with serious offenses had no right to counsel. For example, it was 1696 before those charged with treason were granted the right to counsel.[54] Given the likely absence of counsel,

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48. *Id.* at 541-43 (citations omitted).

49. *See* Herrmann & Speer, *supra* note 5, at 542-43.

50. *See* Mattox v. United States, 156 U.S. 237, 243 (1895); Kirby v. United States, 174 U.S. 47, 63 (1899) (relying, in part, on English law); Dowdell v. United States, 221 U.S. 325, 330 (1911) (citations omitted).

51. *See* Jonakait, *supra* note 3, at 82-94 (describing English common law trials).

52. *See* Jonakait, *supra* note 3, at 83 n.23 (citing Alexander Holtzhoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L. REV. 1, 2, 4-6 (1944); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 308 (1978)).

53. *See* Jonakait, *supra* note 3, at 82-108 (describing systems); Stephen A. Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 513-14 (1990) (after the witness provided a narrative, the witness was critically questioned by the judge; thus, "judicial interrogation of witnesses . . . tended to concentrate power in the court's hands . . . ."); Langbein, *supra* note 52, at 285, 315 (trial judge examined the witnesses and the accused and dominated the proceedings; while the jury returned a verdict, "the judge had no hesitation about telling the jury how it ought to decide").

54. The Treason Act, 1696, 7 & 8 Will. 3, c. 3, § 1 (Eng.), attributed the grant of the right to counsel in treason cases to "great abuses [that] took place at treason trials during the years immediately preceding the Revolution of 1688." It is unlikely that the reference was to the treason trial of Raleigh some eighty-five years earlier.

judges interrogated the witnesses.[55] The accused was generally expected to testify, because without his speaking no defense was likely. Although juries were used, they based their verdict on the judge's recitation of the evidence. Thus, the forum itself was not conducive to confrontation.

However, by 1730, attorneys began to appear more regularly in the English courts to represent parties and question witnesses.[56] Once defense counsel became available to question witnesses on the defendant's behalf, criminal procedure and the trial process were dramatically altered. Lawyers honed their cross-examination skills, defendants were able to present a defense without testifying, and judges were able to play a more judicious role in the courts. The presence of lawyers meant, of course, that evidence would be challenged. Evidentiary challenges produced the need for rules of evidence.[57] Still, it was not until more than a decade after the adoption of the American Bill of Rights that a complete adversary system developed in the English courts.

2. *Criminal Procedure in Pre-Revolution America*

The nineteenth-century arrival of an adversary system in England is sufficient to lay to rest the most common misstatement about the Sixth Amendment's Confrontation Clause. Americans did not adopt the Clause to "secur[e] to every individual [the rights] he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta."[58] Any familiarity with the American Revolution and the documents recording its development makes it certain that the settlers did not intend to mimic the mother country's system of government. Instead they created a system in which individual rights were recognized and respected and in which governmental rights were circumscribed. The transgressions of the King, enumerated in the American Declaration of Independence; the separation of branches of government required by the Constitution; the reservation of rights to the states outlined in that same document; and the individual liberties set forth in the Bill of Rights establish without question that Americans would not be limited to the rights they had as British subjects. In each instance, the founders evidenced determination to limit the government's ability to reduce

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55. Landsman, *supra* note 53, at 514; Langbein, *supra* note 52, at 285; *see also* J.M. Beattie, *Scales of Justice: Defense Counsel and English Criminal Trials in the Eighteenth and Nineteenth Centuries*, 9 L. & HIST. REV. 221, 222 (1991) ("The judge acted as examiner and cross-examiner . . . .").

56. Jonakait, *supra* note 3, at 87-88.

57. Scholars differ as to when the rule excluding hearsay actually developed. *Compare* J. WIGMORE, 5 WIGMORE ON EVIDENCE § 1364 (James H. Chadbourn rev. 1974) (placing its origins in the seventeenth century), *with* Langbein, *supra* note 52, at 301-06, *and* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1070 (1994) (arguing that hearsay evidence was used frequently well into the eighteenth century).

58. Mattox v. United States, 156 U.S. 237, 243 (1895).

both the rights of individuals and of states.[59] Government was to be feared, not trusted, and the rights set forth in the Bill of Rights, in particular, were intended to assure that government could not encroach upon certain fundamental liberties.[60]

The presence of counsel in the courtroom helped impress upon the early colonists the importance of the right to confrontation.[61] Since counsel was more prevalent in the 1600s and 1700s in the American colonies than in England,[62] the importance of confrontation was more apparent. By the time the Bill of Rights was crafted, then, the right to counsel was much more a recitation of existing practice in the states than it was a respect for English common law.

Two uniquely American phenomena also suggest that confrontation was more an American-born than an English-borrowed right. The use of public prosecutors in most colonies (before that practice existed in England) boosted the use of criminal defense lawyers because of the inherent unfairness of a system in which only the government was represented.[63] Perhaps more important was the American distrust of judges who were seen as the instruments of government, subject to the will of the King. In England, judges were appointed largely as a result of social or political status.[64] They served, at least until the Glorious Revolution, at "the King's pleasure."[65]

A system of a government prosecutor and a government judge pitted against an unrepresented individual was unacceptable. This imbalance was one of the primary reasons for the creation of an accusatorial, adversarial system of justice.[66] If lawyers represented the accused, those lawyers could serve as a

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59. JOHN PHILIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 50 (1986).

60. "The American Revolution altered the relationships between people and authority . . . . [A] cultural climate evolved that generally distrusted . . . authority. . . . Empowered by their belief in the ideals of democratic representation and individual rights, people . . . entered into a national debate over the organization and application of authority." DANIEL E. WILLIAMS, PILLARS OF SALT: AN ANTHOLOGY OF EARLY AMERICAN CRIMINAL NARRATIVES 20 (1993).

61. *See* Jonakait, *supra* note 3, at 88.

62. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternate History*, 27 RUTGERS L. REV. 77, 95 (1995). Rhode Island, for example, allowed counsel as early as 1660, and Pennsylvania, Delaware, South Carolina, and Virginia were all seeing counsel as regularly in the 1750s as was the mother country.

63. The first public prosecutor's office in America was created in Connecticut in 1704, Jonakait, *supra* note 3, at 88 n.105, while victims continued to act as prosecutors in England at around the same time, *id.* at 82 n.22. Jonakait notes that "[i]n America, . . . where advocates increasingly presented the prosecution's case, the unjustness of the defense counsel prohibition must have been apparent." *Id.* at 99.

64. *Id.* at 103-04.

65. One of the paragraphs of the American Declaration of Independence that set forth the complaints with the King read: "He has made judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776). This complaint ultimately led to the creation of life-tenured federal judges.

66. *See* Jonakait, *supra* note 3, at 105.

check on the otherwise unbalanced system—a check on government prosecutors, untrusted judges, and government in general.

3. *Causes of Revolution and the Confrontation Clause*

Among the many British acts that prompted the call for American independence was the Stamp Act of 1765. While the colonists certainly opposed the taxation imposed by the Act, its "most grievous innovation"[67] was its grant of jurisdiction for breaches of the Act to nonjury courts of admiralty.[68] The British attempted similar encroachments into the right to trial by jury in a parliamentary resolution that followed the Stamp Act.[69] These and other acts served to increase the commitment in the new country to protect the right to a jury trial and all its penumbras.[70]

4. *Confrontation Under State Constitutions*

Despite the general agreement that confrontation rights have ambiguous beginnings and that no history of the Clause can be proclaimed with certainty, it is without question that the language ultimately used in the Sixth Amendment Confrontation Clause was derived from state constitutions.[71] For example, Section 8 of Virginia's 1776 Bill of Rights provided that "in all capital or criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses . . . ."[72]

In the next eight years, seven states included similar Confrontation Clauses in their constitutions.[73] All seven of these state constitutions predated the American Bill of Rights. For example, the Pennsylvania Constitution provided that the accused had the right to "be confronted with the witnesses," Delaware provided for the right "to be confronted with the accusers or witnesses," and Massachusetts and New Hampshire provided that the accused had the right "to

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67. DOCUMENTS OF AMERICAN HISTORY 57 (3d ed. 1943). John Adams used these words to describe the British displacement of the right to a jury trial.

68. *Id.*; Larkin, *supra* note 3, at 71.

69. R. FROTHINGHAM, THE RISE OF THE REPUBLIC OF THE UNITED STATES 231-32 (7th ed. 1899). The Act of Parliament provided that all "traitors" in the colonies would be taken to England and tried for treason, thereby denying the accused the right to be tried by a jury selected from the locality of the alleged crime and the right to call witnesses in their own defense. *Id.*

70. *See* Larkin, *supra* note 3, at 71-73.

71. Likewise, the states that adopted constitutions after the adoption of the Bill of Rights largely modeled their constitutions after the prior state constitutions on which the Bill of Rights relied.

72. Larkin, *supra* note 3, at 75 (citing 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3812-19 (F. Thorpe ed., 1909)). The June 29, 1776 Constitution of Virginia is part of the Avalon Project at the Yale Law School and can be viewed at http://www.yale.edu.lawweb/avalon/states/va05.htm.

73. Larkin, *supra* note 3, at 75-76 (citing SOURCES OF OUR LIBERTIES chs. 23-29 (R. Perry & J. Cooper eds., 1859) [hereinafter SOURCES]).

meet the witnesses against him face to face."[74] Only North Carolina's Constitution varied significantly by providing that the accused had the right "to confront the accusers and witnesses with other testimony."[75]

Every state that adopted a constitution prior to the adoption of the federal Constitution and the subsequent ratification of the Bill of Rights included provisions guaranteeing confrontation rights.[76] The most likely source of these constitutional provisions was Blackstone's *Commentaries on the Laws of England*,[77] which was published from 1765-1769 and very influential in the colonies.[78] On the subject of confrontation, Blackstone commented:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal .... Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance: for, besides the respect and awe with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in

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74. *Id.*

75. Larkin, *supra* note 3, at 76.

76. The amendments which would become the Bill of Rights were introduced on June 8, 1789. The Sixth Amendment was adopted on December 15, 1791. *Id.* at 76.

77. WILLIAM BLACKSTONE, COMMENTARIES.

78. Larkin, *supra* note 3, at 72. ("These volumes were avidly sought in the colonies and had inestimable impact there on the development and growth of the law and legal attitudes."). One author has noted that within the Virginia Constitution upon which many of the other state constitutions were based, could be gleaned expressions "from Sydney, from Locke, and from Burgh ... [but] the diction, the design, the thoughts are all [those of George Mason]." *Id.* at 75 n.30 (citation omitted).

> the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it.[79]

The state courts were required to interpret the language of state confrontation clauses long before the United States Supreme Court had to apply its language. Courts in Virginia, North Carolina, and Tennessee all issued opinions on the nature of confrontation rights before the United States Supreme Court spoke as a body on the issue.[80]

E. The Sixth Amendment Confrontation Clause

Those who drafted and ratified the Bill of Rights had contributed a decade earlier to the drafting of state constitutions.[81] They had observed the development of the American adversary system, complete with counsel, confrontation, and compulsory process. They had witnessed the attempts of England to interfere with those rights by removing the accused to England for trial. It is no surprise, then, that the draft of the Bill of Rights included those three guarantees to counsel, to confrontation, and to compulsory process, in what would become the Sixth Amendment.[82]

When James Madison introduced the Sixth Amendment it contained substantially the same language as that used in the Virginia Constitution. Precisely, the Amendment provided that an accused had the right to be confronted "with his accusers, and the witnesses against him."[83] After one revision deleting the words "his accusers," the Amendment passed.

III. CASES IN WHICH CONFRONTATION CLAUSE ISSUES ARISE

Cases that raise Confrontation Clause issues generally fall within one of four categories. Throughout this Article, cases will be referred to by reference to one of the following four categories:[84] hearsay cases, *Bruton* cases, protective devices cases, or cross-examination cases.

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79. 3 BLACKSTONE, *supra* note 77, at 373-74.

80. *See* United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807); State v. Webb, 2 N.C. (1 Hayw.) 77 (1794); State v. Atkins, 1 Tenn. (1 Overt.) 229 (1807).

81. *See* Larkin, *supra* note 3, at 72-78 (providing background).

82. Originally, the Bill of Rights consisted of twelve amendments with the first two preceding what would become the First and Second Amendments.

83. *See* Larkin, *supra* note 3, at 76 (citing SOURCES, *supra* note 73, at 423).

84. The Court applied the Sixth Amendment's Confrontation Clause to the states on the same day in 1965 in *Pointer v. Texas*, 380 U.S. 400 (1965) and *Douglas v. Alabama*, 380 U.S. 415 (1965). Nothing in the decisions suggests that analysis under the Confrontation Clause changed as a result of its application to the states. Thus, this Article does not differentiate between federal cases analyzing the clause and state cases analyzing the clause via the Fourteenth Amendment.

A. Case Types

1. Extrajudicial Statements

A large number of the Supreme Court's Confrontation Clause cases have involved the introduction at trial of extrajudicial statements. The phrase "extrajudicial statement" is used in this Article to refer to all out-of-court statements made by a declarant and offered in court. Throughout the Article, "declarant" will be used as it is used in the Federal Rules of Evidence to refer to the maker of a statement sought to be introduced at trial.[85]

Extrajudicial statements include statements that are hearsay,[86] statements that are not hearsay,[87] statements that satisfy exceptions to the hearsay rule,[88] and statements that are defined by modern rules of evidence as nonhearsay.[89]

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85. "Declarant" is defined under the federal rules as "a person who makes a statement." FED. R. EVID. 801(b).

86. The Federal Rules of Evidence define "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

87. Statements that are "not hearsay" refer to those extrajudicial statements that do not fall within the hearsay definition. Common examples of extrajudicial statements that are not hearsay are statements that are offered to prove something other than the truth of the statement, such as the effect on the listener, notice, or knowledge.

88. Under the Federal Rules of Evidence, exceptions may apply in the event of the unavailability of the declarant, FED. R. EVID. 804, regardless of the availability of the declarant, FED. R. EVID. 803, or in either situation, FED. R. EVID. 807. Exceptions that exist only upon a showing of the unavailability of the hearsay declarant are: former testimony, statements under belief of impending death, statements against interest, statements of personal or family history, and forfeiture by wrongdoing. FED. R. EVID. 804(b)(1)-(6). Exceptions that apply regardless of the availability of the declarant are: present sense impression; excited utterance; then-existing mental, emotional, or physical condition; statements for purposes of medical diagnosis or treatment; recorded recollection; records of regularly conducted activity or absence of such a record; public records and reports or absence of such a record or report; records of vital statistics; records of religious organizations; marriage, baptismal, and similar certificates; family records; records of documents affecting an interest in property; statements in documents affecting an interest in property; statements in ancient documents; market reports and commercial publications; learned treatises; reputation concerning personal or family history; reputation concerning boundaries or general history; reputation as to character; judgment of previous conviction; and judgment as to personal, family, or general history or boundaries. FED. R. EVID. 803 (1)-(23). Rule 807 provides for a general exception to the hearsay rule, known as the residual exception, in unique circumstances. *See* FED. R. EVID. 807.

89. Under the federal rules, four kinds of statements are defined as nonhearsay. They are prior inconsistent statements under oath (offered when the declarant is present, testifying, and subject to cross-examination); prior consistent statements (when offered to rebut a claim of recent fabrication, improper influence, or motive); prior statements of identification (made by one after perceiving the person identified); and statements of a party opponent offered against the party in either an individual, adopted, representative, agency, or co-conspirator capacity. *See* FED. R. EVID. 801(d).

An extrajudicial statement impacts an accused's Confrontation Clause rights only when it is offered by the government in a criminal case to prove an element of the government's case or to rebut an element of the defendant's case.[90] Throughout this Article, extrajudicial statement cases refer jointly to hearsay and *Bruton* cases described below.

a. Hearsay Cases

The category of cases referred to in this Article as hearsay cases are those cases in which the government has introduced extrajudicial statements in court to prove an element of the government's case or to rebut an element of the defendant's case. In hearsay cases, the government introduces the statement in its case in chief without producing the declarant, either arguing that the statement satisfies an exception to the hearsay rule, is not hearsay, or is nonhearsay as defined under rules of evidence.

b. Bruton *Cases*

One common type of hearsay case is one in which the declarant, the maker of the extrajudicial statement, is a criminal defendant tried jointly with another defendant. In these cases, referred to in this Article as *Bruton* cases, the government seeks to introduce the hearsay statement of the declarant (referred to in *Bruton* cases as the codefendant) in the joint trial. The hearsay statement may be admissible against its maker, the codefendant, either because it is nonhearsay or because it satisfies a hearsay exception, but it is generally not admissible against the defendant. The situation is complicated by the constitutional protections applicable to the codefendant declarant that are not present in other hearsay cases.[91] Because of these distinctions, the Court has handled *Bruton* cases differently, and they merit separate classification.

2. In-Court Statements

Confrontation Clause issues do not always arise as a result of an extrajudicial statement. In two kinds of cases, the issue is confrontation not of an out-of-court statement but of an in-court statement. These two kinds of confrontation cases are those involving protective devices and those in which cross-examination is in some way limited. They will be referred to collectively as in-court statements.

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90. For example, if the government relies upon an extrajudicial statement to impeach, or for some purpose other than the truth of the statement, the extrajudicial statement would not impact Confrontation Clause rights. *See* Tennessee v. Street, 471 U.S. 409, 414, 417 (1985).

91. *See* U.S. CONST. amend. V (asserting the foremost of these protections: the privilege against self-incrimination).

a. Protective Devices Cases

The third category of cases will be referred to as protective devices cases. This category includes cases in which the government places some protective barrier between the defendant and the testifying witness. In these cases, the government asserts some governmental interest which justifies isolating the witness, usually the victim, from the physical presence of the defendant during the trial testimony. Unlike the two varieties of extrajudicial statement cases, in these cases the witness actually testifies at trial. The most frequently used protective devices are closed-circuit televisions, screens, and videotaping.[92]

b. Cross-Examination Cases

The fourth category of cases will be referred to as cross-examination cases. In these cases, the defendant's ability to cross-examine a witness, who is testifying at trial, is limited in some manner. The declarant actually testifies as a witness at trial, unlike in the extrajudicial statement cases, and in the defendant's view, unlike in the protective devices cases. However, in the defendant's opinion the witness is not subject to full and fair cross-examination.

B. The Supreme Court's Chronology of Confrontation Clause Cases

1. Summary of Chronology

Reviewing the major Supreme Court confrontation cases in chronological order offers some insight into the Court's varied interpretations of the Clause. Beginning in 1895[93] and continuing until 1965, the Court's Confrontation Clause jurisprudence was limited to hearsay cases. In 1965, the Court considered a series of cross-examination cases arising out of unusual, and

92. For commentary on protective device cases, see Jean Montoya, *On Truth and Shielding in Child Abuse Cases*, 43 HASTINGS L.J. 1259 (1992); Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 FAM. L.Q. 393 (2000); Kathleen A. Barry, Comment, *Witness Shield Laws and Child Sexual Abuse Prosecutions: A Presumption of Guilt*, 15 S. ILL. U. L.J. 99, 115-19 (1990); Katherine A. Frances, Note, *To Hide in Plain Sight: Child Abuse, Closed Circuit Television, and the Confrontation Clause*, 60 U. CIN. L. REV. 827 (1992).

93. In 1851, the Supreme Court decided a case that it considered a Confrontation Clause case. In *United States v. Reid*, 53 U.S. (12 How.) 361 (1851), the defendant was jointly indicted, but tried separately for murder. In his defense, defendant Reid proposed to call the codefendant, Clements, to testify. The trial court would not allow Reid to call Clements, deeming him incompetent as a witness because he was jointly indicted. Reid was convicted and appealed, asserting his right to call the witness. Chief Justice Taney, writing for the Court, upheld the trial court's denial of Reid's claimed right to call the witness. *Id.* at 361, 366-67. The language of the Court's decision would figure prominently in the Court's early Confrontation Clause jurisprudence, though the case itself would rarely be cited. *See* discussion *infra* Part III.

hopefully unlikely to be repeated, factual situations.[94] In 1968, the Court began what would be a difficult foray into *Bruton* cases, beginning with the *Bruton* decision itself. With the exception of five cross-examination cases issued in 1974 and from 1985-87, the Court focused exclusively on the development of its hearsay and confrontation jurisprudence for the twenty years after *Bruton*. Then, in 1987, the Court returned to the *Bruton* cases before tackling a new category of cases—the protective devices cases. These cases arose as a result of defense challenges to state statutes passed largely to protect child witnesses. In the last decade, the Court has again focused on hearsay cases, with the exception of one *Bruton* case decided in 1998.

a. The First Seventy Years - Hearsay Cases, Part I

The first seventy years of the Supreme Court's Confrontation Clause decisions involved hearsay cases. Beginning with *Mattox v. United States*[95] and continuing until *Pointer v. Texas*,[96] the Court analyzed whether the admission of hearsay statements at trial violated the Constitution. For example, *Mattox* was a case involving a retrial. At the first trial, two witnesses testified and were subject to full cross-examination. The accused challenged his conviction, which had been partially based on the court reporter's notes of testimony. Two of the prosecution's witnesses, who were said to be "the strongest proof against the accused," died between the first prosecution and conviction of the defendant and the retrial following the defendant's successful appeal.[97] At the second trial, the reporter's stenographic notes of the dead witnesses testimony were admitted over defense objection, but evidence that one of the witness's recanted his incriminating testimony was disallowed.[98]

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94. *See infra* notes 135-44 and accompanying text.

95. 156 U.S. 237 (1895). See *supra* note 93 for discussion of *United States v. Reid* which predated *Mattox*.

96. 380 U.S. 400 (1965).

97. *Mattox*, 156 U.S. at 240.

98. The Court excluded the testimony of two witnesses who claimed that one of the deceased declarants recanted his testimony incriminating Maddox and confessed that he was forced to testify falsely. The Court affirmed on grounds that because the deceased witness could not be confronted with the inconsistent statement, a proper foundation could not be laid for its admission. *See id.* at 250. Three Justices dissented from the decision on this aspect of the case. *Id.* at 250, 260-61 (Shiras, Gray, & White, J.J., dissenting). The dissenting Justices stated:

> According to the rulings of the court below, the death of the witness deprived the accused of the opportunity of cross-examining him as to his conflicting statements, and the loss of this opportunity of cross-examination deprived the accused of the right to impeach the witness by independent proof of those statements; and thus, while the death of the witness did not deprive the government of the benefit of his testimony against the accused, it did deprive the latter of the right to prove that the testimony of the witness was untrustworthy.

Id. Today this problem would be avoided by Federal Rules of Evidence 806 and 613. *See infra* note 104.

The Supreme Court upheld the trial judge's ruling allowing the prosecution's introduction of the deceased witnesses' former testimony. Court's analysis and rationale, not its conclusion, are what is most instructive. According to the Court, the only authority for the defense's proposition that the testimony should be excluded derived from a misstatement in a work on evidence. That treatise specifically stated that "the testimony of a deceased witness could not be used in a criminal prosecution."[99] The Court quickly pointed out that the case on which the treatise relied,[100] as well as the rule in England[101] and in the states,[102] clearly allowed prior testimony of a deceased witness. Notwithstanding the constitutional right to confrontation, the Court concluded that rules of law, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."[103] The *Mattox* decision constituted the initial, unfortunate misjoinder of evidence principles with the constitutional right to confrontation. More than one-half of the relevant portions of the Court's opinion reviewed rules of evidence in England and the states,[104] finding that the overwhelming majority allowed the admission of testimony "where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case . . . ."[105] However, the Court did not add that even the strictest reading of the Confrontation Clause allowed the introduction of this testimony—testimony given under oath and subject to cross-examination in a prior proceeding by a

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99. *Mattox*, 156 U.S. at 240.

100. The English case relied upon by Peake was reported to be *case of Sir John Fenwick*, 13 How. St. Tr. 537, 579 (1696), a treason case in which the absent witness testified against someone other than the defendant in a previous trial, but who was not deceased and had never testified against, nor been subject to cross-examination by, John Fenwick. *Mattox*, 156 U.S. at 240.

101. The Court matter-of-factly stated that "[t]he rule in England . . . is clearly the other way." *Id.*

102. The Court cited cases from Virginia, Tennessee, California, Massachusetts, Ohio, Pennsylvania, Missouri, Mississippi, Illinois, Kansas, Nevada, Alabama, Texas, Vermont, Washington, Georgia, and Louisiana. *Id.* at 241-42 (citations omitted).

103. *Id.* at 243. In the most unfortunate phrase in the *Mattox* decision, the Court continued: "The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an *incidental benefit* may be preserved to the accused." *Id.* (emphasis added). It is noteworthy that what had been "essential to the correct administration of justice" in 1807, and among the "safeguards . . . which were so oppressive and odious" in 1851, had become "an incidental benefit" by 1895.

104. *See id.* at 240-50. In addition to the confrontation issue, the defendant challenged the trial court's refusal to allow him to impeach one of the deceased witnesses with testimony. The Court upheld the trial court's ruling based upon the common-law requirement that a witness must be asked whether an inconsistent statement was made before the inconsistent statement could be introduced. *See id.* at 245-50. This portion of the holding has been repudiated in most state and federal courts by the inclusion of Rule 806 that allows the impeachment of hearsay declarants, and by Rule 613 that removes the need to first confront the witness with the prior inconsistent statement. *See* FED. R. EVID. 806, 613.

105. *Mattox*, 156 U.S. at 241.

witness who was now unequivocally unavailable. Instead, the Court gratuitously added that prior testimony given before a committing magistrate, where the accused was not present, would be admissible at trial if the witness was unavailable.[106] This dicta was unnecessary and confusing.

The Court's dicta and its joinder of constitutional rights with evidence principles were most unfortunate. After its observations, the Court contrasted the English practice of trial based upon ex parte depositions or affidavits with the American practice of in-court confrontation. Ex parte affidavits could not be used

> in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[107]

This was the United States Supreme Court's first complete formulation of the purposes of the rights secured under the Sixth Amendment Confrontation Clause.[108]

The *Mattox* dicta previewed an interpretive device that the Court would employ when faced with future Confrontation Clause challenges. The Court noted that "technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary . . . ."[109] Thus, a test that balances the benefits against the burdens would be used to determine if strict adherence to evidence principles were required by the constitutional right to confrontation.

Illustrating appropriate balance, the Court suggested that "no one" could question the admissibility of a dying declaration,[110] although its admission directly conflicted with the right of confrontation.

> They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood

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106. *Id.*

107. *Id.* at 242-43.

108. This formulation by the Court was not attributed to any source. Yet, earlier state court decisions had identified and discussed many of these purposes.

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

110. *Id.* at 243-44. Notably, *Mattox* was not a case involving dying declarations, although some future cases would refer to it as such.

> at this day to question their admissibility. They are admitted . . . simply from the necessities of the case, and to prevent a manifest failure of justice [and because of their inherent reliability].[111]

This dicta would be the predecessor of the Court's "firmly rooted hearsay exception" and "indicia of reliability" approaches which appeared in the next century.[112]

The remainder of the Court's first thorough interpretation of the Confrontation Clause was equally disconcerting. Without any citation, the Court connected the Clause with the desire to avoid trial by deposition or by ex parte affidavit, as was common in civil cases in England.[113] While the *Mattox* Court supplemented this limiting approach by reciting multiple reasons for confrontation, the Court would frequently use this connection between confrontation and unacceptable English practices to limit the right to confrontation.

The second aspect of the *Mattox* decision that would be revived repeatedly to limit confrontation rights was its use of a benefits-burden analysis. Although the Court acknowledged that the literal language of the Confrontation Clause supported an absolute right to confrontation, it quickly added that "[t]he law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."[114] Clearly, in *Mattox*, the benefit was incidental, because the accused in the previous trial had confronted the witnesses who were now silenced by death. Unfortunately, the Court did not later confine the benefit-burden analysis to cases in which the benefit was so incidental.

Had the Court in later decisions latched on to other parts of the *Mattox* opinion, the appreciation for confrontation rights might have been different. At least four times the Court asserted that Mattox had enjoyed the full opportunity to confront the now-deceased witnesses at the former trial. That, the Court

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111. *Mattox*, 156 U.S. at 243-44. The paraphrased portion of the quote replaces the Court's reference to its prior opinion in which the Chief Justice had commented that impending death "is presumed to remove all temptation to falsehood." *Id.* at 244 (citation omitted).

112. *See infra* notes 206-242 and accompanying text.

113. The Court stated:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox, 156 U.S. at 242-43.

114. *Id.* at 243.

asserted, was a right that the accused "shall under no circumstances be deprived of . . . ."[115]

The *Mattox* decision made the Court's resolution of the confrontation issue in *Kirby v. United States*[116] four years later quite simple. Kirby had not confronted the "witness" against him. The "witness against" Kirby was the judgment of conviction in another case used to prove that property Kirby possessed was stolen.[117] The *Kirby* Court captured the significance of confrontation in its analysis:

> [A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.[118]

While the *Kirby* Court followed the *Mattox* Court's lead in utilizing rules of evidence to analyze the case before it,[119] it took care to point out the supremacy of constitutional principles. Thus, the *Kirby* decision emphasized the nexus between the Confrontation Clause, the adversary system, the presumption of innocence, and due process.[120] The legislature could not generate evidence rules that would "impair the very substance of a right long deemed so essential for the due protection of life and liberty that it [was guarded by state and federal constitutions]."[121]

It would be more than six decades before the Court again addressed a significant Confrontation Clause issue.[122] In *Douglas v. Alabama*,[123] *Pointer v.*

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115. *Id.* at 244. So confident was the Court of the absolute right to confront at some time that it painstakingly set forth the requirement that the actual transcript of the prior testimony be proven by oath of the stenographer. *Id.*

116. 174 U.S. 47 (1899).

117. *Id.* at 49-50.

118. *Id.* at 55. Though not quoted or cited, this is substantially the language used by the *Mattox* Court. *See supra* notes 95-115 and accompanying text.

119. *See Kirby*, 174 U.S. at 56-61 (citing numerous cases and evidence treatises that discussed the method of proving that goods were stolen for purposes of convicting the person for possession of the goods). *Kirby* is most likely the reason that *Mattox* is frequently miscited as a dying declaration case. *See id.* at 61.

120. *See id.* at 55-56 (reasoning a "vital fact which the Government was bound to establish affirmatively [was put into evidence] by reason alone of what appeared to have been *said* in another criminal prosecution with which [Kirby] was not connected and at which he was not entitled to be represented").

121. *Id.* at 56.

122. Between 1899 and 1965, the Court decided four cases which referred to the Confrontation Clause. In *Motes v. United States*, 178 U.S. 458 (1900), the Court disallowed the use of a witness statement when it was found that the witness's absence was due to the negligence of the government's agents. In *West v. Louisiana*, 194 U.S. 258 (1904), *overruled by*

Texas;[124] and *Barber v. Page*[125] the Court found Confrontation Clause violations based upon the State's introduction of hearsay to prove elements of its cases.[126]

The Court used the *Pointer* case to make the Sixth Amendment's confrontation guarantees applicable to the states. At Pointer's trial, the State offered the transcript of his preliminary hearing at which he was not represented by counsel. At the preliminary hearing, the victim testified that he was robbed by Pointer and a codefendant. Since then, the State claimed, the victim had left Texas.[127] From the opening paragraphs, it was clear that the Supreme Court considered the right of confrontation to have fundamental underpinnings. The Court noted that:

> It cannot be seriously doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.[128]

In *Douglas,* the Court reversed an Alabama trial court's ruling that allowed the state to cross-examine a witness based on the witness's alleged confession that implicated the defendant. The witness had been convicted of the offense, but refused to testify when called to the witness stand. While attempting to cross-examine the witness, the prosecution read each line of the witness's confession prefaced with questions such as, "[did] you say . . . ?" and "[d]id

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Pointer v. Texas, 380 U.S. 400 (1965), the Court upheld the judgment of a Louisiana trial court that allowed the use of former testimony taken at the preliminary examination when the witness was unable to be produced for trial. In *Dowdell v. United States*, 221 U.S. 325 (1911), the Court allowed the use of documentary evidence to prove a collateral fact in a criminal case. In *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934), the Court emphasized the right of the accused "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge."

123. 380 U.S. 415 (1965) (decided April 5, 1965).

124. 380 U.S. 400 (1965) (decided April 5, 1965).

125. 390 U.S. 719 (1968).

126. The history of the Confrontation Clause might have been better served if the Court had decided these cases on different grounds. For example, *Douglas* could easily have been disposed of under a sufficiency of the evidence analysis. *Pointer* was largely a right to counsel case. *Barber* was a case about the State's failure to produce its witnesses.

127. *Pointer*, 380 U.S. at 401.

128. *Id.* at 404 (citations omitted).

you make your further statement . . . ?"[129] Although the trial judge instructed the jury that the questions were not evidence, the Supreme Court held that "[i]n the circumstances of this case, [Douglas'] inability to cross-examine [the witness] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause."[130]

The testimony offered in *Barber* was that of a codefendant who had testified at the preliminary hearing, but was, by the time of trial, incarcerated in a federal prison some 225 miles away from the site of the trial. The Court began its analysis of the Confrontation Clause issue by acknowledging that the "State made absolutely no effort to obtain the presence of [the witness] at trial . . . ."[131]

The Court then demonstrated the importance of the right by noting that it could not be dishonored simply out of need or for convenience sake. Only when the prosecution made a good-faith effort to obtain a witness's presence at trial and failed could the absent witness's former testimony be introduced.[132] In light of the State's failure to do so, the Court added that even had counsel cross-examined the witness at the preliminary hearing, the introduction of the former preliminary hearing testimony at trial would have violated the Confrontation Clause.[133]

> The right to confrontation is basically a trial right. It *includes both the opportunity to cross-examine and 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 . . . . While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be *actually unavailable*, this is not . . . such a case.[134]

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129. *Douglas*, 380 U.S. at 416-18 & n.3.

130. *Id.* at 419.

131. *Barber*, 390 U.S. at 720, 723.

132. *Id.* at 724-25. The Court corrected that "various courts and commentators have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that . . . the trial Court [could not compel the witness's attendance.]" *Id.* at 723 (citations omitted). This "theory" had little "continuing validity in the criminal law" as a result of federal statues and uniform laws that provide means for procuring the attendance of out-of-jurisdiction witnesses. *Id.*

133. *Id.* at 725.

134. *Id.* at 725-26 (emphasis added).

b. *Cross-Examination Cases (1965, 1966, 1968)*

In four aberrational cases,[135] arising shortly after the Court began its modern Confrontation Clause analysis in hearsay cases, the Court applied the Clause in a second kind of case, which dealt with limitations on cross-examination. The hearsay cases noted the connection between the right of cross-examination and the right to confrontation. But no case up to this time had suggested that cross-examination was the *sole* right protected by the Sixth Amendment's Confrontation Clause. Perhaps that was because all of the prior cases in which a confrontation violation was found involved absent witnesses. None of the previous cases involved a witness who was present, yet not required to undergo cross-examination. The four cross-examination cases allowed the Court to consider whether confrontation was violated by the introduction of testimony not subject to cross-examination and, eventually, whether limits on cross-examination violated confrontation.[136]

The first cross-examination cases, like the first three modern-day hearsay cases, could have easily been decided on grounds other than confrontation. Yet in each of them, the Court addressed confrontation in ways that became part of the Court's Confrontation Clause jurisprudence. In *Turner* and *Parker*, law enforcement officers, whose sworn duty it was to keep the jury from inappropriate outside influences, arguably exerted such influences themselves by making statements, outside the courtroom, that implied the defendant's guilt.[137] In both cases, the Court reversed convictions because evidence against an accused must "come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."[138]

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135. *See* Turner v. Louisiana, 379 U.S. 466 (1965); Parker v. Gladden, 385 U.S. 363 (1966) (per curiam); Brookhart v. Janis, 384 U.S. 1 (1966); Smith v. Illinois, 390 U.S. 129 (1968). Three other cases might be added here, but are not considered fully because of the other bases for the decisions. *Chambers v. Mississippi*, 410 U.S. 284 (1973), dealt with the right of a defendant to impeach his or her own witness in a criminal case, related to, but not explicitly a Confrontation Clause issue. Both *McCray v. Illinois*, 386 U.S. 300 (1967), and *Rovario v. United States*, 353 U.S. 53 (1957), dealt with the defendant's desire to discover the name of a criminal informant prior to or during the trial. While both decisions referred to the right to discover the information as related to confrontation, the cases turned on the proposition that confrontation is a trial right.

136. *See* Davis v. Alaska, 415 U.S. 308 (1974); Delaware v. Fensterer, 474 U.S. 15 (1985); Delaware v. Van Arsdall, 475 U.S. 673 (1986); Pennsylvania v. Ritchie, 480 U.S. 39 (1987). The case of *Kentucky v. Stincer*, 482 U.S. 730 (1987), is also properly categorized as a cross-examination case, though it has some of the elements of the protective devices cases.

137. *See Turner*, 379 U.S. at 467-68. *Turner* involved two deputy sheriffs who were both prime witnesses against the accused and the guardians of the jury. Allowing them to guard the jury was error because evidence against the accused was required to "come from the witness stand." *Id.* at 473. *Parker* involved a court bailiff assigned to guard the sequestered jury who commented on the defendant's guilt to a juror "in the presence of" other jurors. 385 U.S. at 363 ("Oh that wicked fellow . . ., he is guilty . . . .").

138. *Parker*, 385 U.S at 364 (quoting *Turner*, 379 U.S. at 472-73).

In the third case, *Brookhart v. Janis*,[139] the defendant claimed a complete denial of the right to confront any witnesses, including a codefendant who had allegedly confessed.[140] The Court noted: "If there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."[141]

Smith v. Illinois[142] was an equally simple case reversing a trial court's refusal to allow defense counsel to ask the "real name" of the falsely-identified witness.[143] The Court relied on an earlier decision to bolster its commentary on the essential right to cross-examine:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.[144]

This view of the fundamental nature of cross-examination would suffer a set-back in the Court's next cross-examination cases.

c. Bruton *Cases (1968-1969)*

Fresh from asserting the importance of cross-examination to confrontation, the Court again emphasized that aspect of the right in a series of cases involving the introduction of a codefendant's confession at a joint trial. A slight foreshadowing of this unique problem had occurred in *Brookhart*.[145] It is of

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139. 384 U.S. 1 (1966).

140. *Brookhart* was, in reality, a waiver case. Counsel for the accused, but not the accused, had agreed to an Ohio procedure known as a prima facie case in which the defendant, in effect, requires the State to prove guilt but does not challenge the State's evidence. *Id.* at 6-7.

141. *Id.* at 3.

142. 390 U.S. 129 (1968).

143. *Id.* at 130.

144. *Id.* at 132 (quoting Alford v. United States, 282 U.S. 687, 692 (1931)).

145. The Court said in *Brookhart* that unless waiver of the right to cross-examine was established, the defendant was denied his constitutional rights in two ways. 384 U.S. at 4. The first was by virtue of having been denied the right to cross-examine any witness. *Id.* The second was by virtue of the state having introduced "as evidence against him an alleged confession, made out of court by one of his codefendants, Mitchell, who did not testify in court, and petitioner was therefore denied any opportunity whatever to confront and cross-examine the

particular interest that the Court split the confrontation issues in *Brookhart* in two, separating the denial of the right to confront and cross-examine any witness from the same rights with regard to a confessing codefendant.

In *Bruton v. United States*[146] and the many cases in which the Court refined the *Bruton* rule, the Court identified the codefendant's right to remain silent as the constitutional basis for this delineation. This delineation was the likely beginning of the Court's tendency in later decisions to greatly reduce confrontation rights in hearsay cases, while preserving them in *Bruton* cases.[147]

The constitutional requirement that justified strict control over the admission, in joint trials, of codefendants' statements was the Fifth Amendment privilege against self-incrimination. The Court in *Bruton* adopted the explanation given by the Advisory Committee on the Federal Rules of Criminal Procedure: "'A defendant may be prejudiced by the admission in evidence against a codefendant of a statement or confession made by that codefendant. This prejudice cannot be dispelled by cross-examination if the codefendant does not take the stand. . . .'"[148]

Very little was said in *Bruton* about the Confrontation Clause, but what was said furthered the Court's joinder of the right of confrontation with cross-examination. Before beginning the main thrust of the opinion, which justified overruling prior precedent,[149] the Court acknowledged *Pointer* and *Douglas*, the first two modern hearsay cases, and the nexus between confrontation and cross-examination. However, the Court did not equate the two, noting that cross-examination was "included in the right of an accused in a criminal case to confront the witnesses against him" and that "'a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him.'"[150] Bruton was denied his confrontation rights because the government introduced evidence that "added substantial, perhaps even critical, weight to [its] case in a form not subject to cross-examination."[151] In its sole reference to evidence rules, so detailed in earlier decisions, the *Bruton* Court noted in a footnote that the

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witness who made this very damaging statement." *Id.*

146. 391 U.S. 123 (1968).

147. *See infra* notes 161-278 and accompanying text.

148. 391 U.S. at 132 (quoting 34 F.R.D. 411, 419 (1964)).

149. In *Delli Paoli v. United States*, 352 U.S. 232, 233 (1957), *overruled by* Bruton v. United States, 391 U.S. 123 (1968), the Court had upheld the introduction of a codefendant's inculpating confession at a joint trial at which the jury was instructed as to the limited use of the codefendant's confession. In *Bruton*, the Court held that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [the codefendant] Evans's confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. at 126.

150. *Bruton*, 391 U.S. at 126 (quoting Pointer v. Texas, 380 U.S. 400, 404, 406-07).

151. *Id.* at 127-28.

codefendant's confession was "clearly inadmissible" against Bruton under evidence rules.[152]

Two aspects of the *Bruton* analysis are relevant to this historical discussion. First, the Court stressed the critical nature of the evidence which had been allowed—the codefendant's confession. The evidence was referred to as "devastating to the defendant" and considered critical to the prosecution's case.[153] This reference would provide a new dimension for the Confrontation Clause inquiry, evidenced in one of the Court's next hearsay cases, *Dutton v. Evans*.[154]

Second was *Bruton's* implicit, albeit somewhat ambiguous, focus on what this Article will refer to as the "functional view" of the Confrontation Clause. A codefendant's confession was "inevitably suspect" as to the defendant (though, as the Court would later advise, inherently reliable as to the codefendant).[155] The confession was unreliable because the codefendant was obviously motivated to blame the defendant. This "unreliability" was "intolerably compounded" when the codefendant was not subject to cross-examination, thus resulting in an unfair trial.[156] The antithesis of this proposition was that if the evidence was not unreliable, or if it was "inherently reliable," confrontation could be dispensed with without affecting the fairness of the trial. This antithesis, only implicit at the time of *Bruton*, would be explicitly stated when the Court returned to hearsay cases in the ensuing years.

The critical nature of the unconfronted evidence and the functional purpose of confrontation would serve as the basis for Justice Stewart's succinct, yet historically significant, concurring opinion in *Bruton*. In his view,

> A basic premise of the Confrontation Clause . . . is that certain kinds of hearsay are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth.[157]

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152. *Id.* at 128 n.3.

153. *Id.* at 136.

154. 400 U.S. 74 (1970).

155. *Bruton*, 391 U.S. at 136.

156. *Id.*

157. *Id.* at 137 (Stewart, J., concurring) (citations omitted). As examples of these "certain kinds of hearsay," Justice Stewart cited *Pointer* and *Douglas*. This is significant because it demonstrates that, in his view, hearsay other than codefendant's statements would fall under the Confrontation Clause's absolute inadmissibility rule. The extrajudicial statement in *Pointer* was the statement of the victim-eyewitness.

The early cases that applied *Bruton* added much to the *Bruton* doctrine but little to the Court's Confrontation Clause jurisprudence.[158] An exception is *Nelson v. O'Neil*.[159] However, *Nelson* followed a third era in the Court's Confrontation Clause chronology, beginning with the 1970 decision in *California v. Green*,[160] in which the Court all but denounced assertions made in the earlier hearsay cases.

d. Hearsay Cases (1970 - 1972), Part II

After the Court gave notification that the Confrontation Clause had its parameters in *Pointer*, it was soon given the opportunity to define those parameters. In *California v. Green*[161] a prosecution witness had testified at a preliminary hearing identifying defendant Green as a drug supplier. By trial time, the witness's memory had "lapsed" and the prosecution offered instead the sworn preliminary hearing testimony.[162] Relying on *Pointer*, *Mattox*, and dicta in *Barber*, the Court upheld the introduction of the former testimony. The Court reasoned that the preliminary hearing testimony had been given "under circumstances closely approximating those that surround the typical trial."[163] Ignoring its previous recognition—that a preliminary hearing is "ordinarily a much less searching exploration into the merits of a case than a trial . . . because its function is the more limited one of determining whether

158. *Roberts v. Russell*, 392 U.S. 293, 294 (1968) (per curiam) (quoting Stovall v. Denno, 388 U.S. 293, 298 (1967)), held that *Bruton* was to be applied retroactively because it was a rule of criminal procedure "fashioned to correct serious flaws in the fact-finding process at trial." *Harrington v. California*, 395 U.S. 250, 251-54 (1969), subjected the *Bruton* doctrine, in appropriate cases, to a harmless error analysis under *Chapman v. California*, 386 U.S. 18 (1967). *Schneble v. Florida*, 405 U.S. 427 (1972), and *Brown v. United States*, 411 U.S. 223 (1973), involved applications of the harmless error doctrine. The propriety of a harmless error analysis to *Bruton* cases is beyond the scope of this Article.

159. 402 U.S. 622 (1971).

160. 399 U.S. 149 (1970). A discussion of *Nelson* will follow the discussion of the Court's hearsay cases, Part II. *See infra* notes 198-205 and accompanying text.

161. 399 U.S. 149 (1970).

162. *Id.* at 152. The witness's prior testimony was admitted pursuant to a California statute that allowed the introduction of prior inconsistent statements as substantive evidence. *Id.* Admission was under a minority view that admitted all prior inconsistent statements, not under a former testimony exception as in *Pointer* and *Barber*. This minority view is recognized in some states, after the passage of rules of evidence, *see* MONT. R. EVID. 801(d)(1); UTAH R. EVID. 801(d)(1), but is not recognized by the Federal Rules of Evidence. *See* FED. R. EVID. 801(d)(1) (providing that prior inconsistent statements under oath are admissible as nonhearsay when the declarant is present and testifying). Interestingly, the Court based its rationale in *Green* on the former testimony exception, reasoning that because the witness's testimony would have been admitted under the former testimony rule had the witness been unavailable at trial, the same result should occur when the witness was not unavailable, but simply forgetful. *See id.* at 159.

163. *Green*, 399 U.S. at 165. Those circumstances, according to the Court, were that the witness was under oath, before a judicial tribunal equipped to produce a record, the defendant was represented by counsel, and counsel had "every opportunity to cross-examine." *Id.*

probable cause exists . . ."[164]—the Court concluded that "substantial compliance with the purposes behind the confrontation requirement"[165] had been accomplished.

In allowing "substantial compliance with the purposes" of confrontation to satisfy confrontation, the Court focused on three functions of confrontation. First, a witness must testify under oath to impress upon the witness the solemnity of the matter. Second, a witness must be subject to cross-examination, the function of which was to find the truth. Third, the witness must be observed by the factfinder in order to aid the factfinder in assessing the witness's credibility.[166]

Had the Court adhered to its often-stated principle that the Confrontation Clause protects trial rights, the result in *Green* might have been different. But instead of focusing on whether the defendant had the right to confront at trial, the Court focused only on one facet of confrontation—availability at trial for cross-examination. Because the witness was present at trial and subject to cross-examination about his prior testimony, the Court concluded that the "out-of-court statement for all practical purposes regains most of the lost protections."[167]

The decision in *Green* was problematic for many reasons. One problem, recognized years earlier in *Barber*, was the dramatic differences between a preliminary hearing and a trial. While most states allow the defense the opportunity to cross-examine at a preliminary hearing, the limited purpose of the hearing dictates that defense counsel cross-examine in an altogether different manner and for an altogether different purpose than at trial.[168]

Justice Brennan, in his dissenting opinion in *Green,* was displeased with the Court's return to and resolution of the issue:

> I thought that our decision in *Barber v. Page* resolved this issue. In *Barber* we stated that confrontation at a preliminary hearing cannot compensate for the absence of confrontation at trial, because the nature and objectives of the two proceedings differ significantly. . . . [W]e stated . . . "[t]he right to confrontation is basically a trial right. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is

164. Barber v. Page, 390 U.S. 719, 726 (1968).

165. *Green*, 399 U.S. at 166.

166. *Id.* at 158.

167. *Id.*

168. Counsel will rarely find it helpful to reveal trial strategy or defenses in the preliminary hearing. Until the State's evidence is heard at the preliminary hearing, defense strategy may be uncertain; defenses may be evolving. Furthermore, if the defense *is* well-established by the time of the preliminary hearing, little can be gained by previewing the defense for the court, because dismissal at a preliminary hearing does not affect the state's right to seek an indictment against the defendant and to pursue the charges further.

> the more limited one of determining whether probable cause exists to hold the accused for trial."[169]

A second problem with the *Green* decision was the Court's suggestion that presenting the witness at trial removed any confrontation issues that the admission of out-of-court, unconfronted testimony presented.[170] This suggestion, while theoretically palatable, is impractical.

When the prosecution seeks to introduce an out-of-court statement, it is presumably doing so because the statement is necessary to prove some part of the case. What is relevant to the jury, whose duty it is to assess the reliability of the statement and the credibility of the witnesses, are the circumstances surrounding the statement and the giving of the statement. Do the circumstances suggest, for example, that the witness was distracted during the event, or was the witness completely focused on the event? What had the witness done immediately before the event, and what did the witness do thereafter? How quickly and certainly did the witness respond when questioned about the event? What were the witness's demeanor, facial expressions, and attitude? These and countless other inquiries, often brought out through cross-examination, give the jury a view of the total situation enabling the jury to determine the reliability of the statement. Thus, when a witness takes the stand and testifies to a fact or series of facts, the jury is able to evaluate credibility and reliability because it observes the witness and hears both the statement and the circumstances surrounding the statement.

On the other hand, when the jury is presented only with the statement via a written transcript, it receives only a portion of what it needs to perform its function in the case. The jury neither hears nor observes the witness while the witness is describing the event. Instead, it hears questions and answers read without the benefit of pauses, inflections, or intonations. To suggest that the defense is able to provide the jury with the remaining tools it needs to assess the evidence by allowing the defendant to cross-examine the witness is unrealistic. In addition, to place that responsibility on the defense shifts the burden of proof, usurps the presumption of innocence, and makes the right of confrontation an option which the defense may waive or precariously risk exercising.[171]

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169. 399 U.S. at 195 (Brennan, J., dissenting) (citations omitted). Justice Brennan also reminded the Court that they had retroactively applied the *Barber* principle a year earlier in another California case, Berger v. California, 393 U.S. 314 (1969), in which the defense had conducted a cross-examination at the preliminary hearing. *See Green*, 399 U.S. at 196.

170. *See Green*, 399 U.S. at 198-99 (Brennan, J., dissenting).

171. Ordinarily, the cross-examination at a preliminary hearing will be limited. The direct examination is also more limited than it would be at trial, because the state has only to establish probable cause. When the State is allowed to introduce the preliminary hearing transcript at trial, the defense must decide whether to rest on the meager transcript, which may be an uncompelling version of the facts, but a version with no cross-examination, or to cross-examine the witness whose memory may become selectively improved during cross-examination.

Dutton v. Evans,[172] which was originally argued before *Green*,[173] presented a question similar to that raised in *Green*. Like *Green*, *Dutton* involved a state rule of evidence that differed from the federal and many state rules. Unlike *Green*, the evidence rule at issue in *Dutton* would be one the Court would revisit frequently over the next two decades. *Dutton* would also provide the catalyst for the Court's shift to a functional view of confrontation based primarily on the reliability of the hearsay statement.

Dutton involved a Georgia evidence statute providing that once a conspiracy is proved, "the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."[174] However, Georgia common law differed by providing that all statements would be admissible so long as the conspirators continued to conceal their identity.[175]

Dutton was accused of murdering three Georgia police officers. The chief witness against Dutton in his trial was an alleged accomplice who had been granted immunity in exchange for his testimony. In addition, a witness testified to comments that a codefendant made after returning from court. The evidence was admissible under Georgia law as a co-conspirator's exception to the hearsay rule.[176]

The plurality readily conceded that whether the Confrontation Clause was violated was not as easily resolved as whether a hearsay rule was violated. While the two "are generally designed to protect similar values,"[177] they are not congruent. Evidence that was admissible under a hearsay rule might or might not, in the Court's view, be admissible under the Confrontation Clause.[178]

The plurality opinion in *Dutton* used terms not previously utilized in Confrontation Clause cases. The Court began by concluding that the evidence in the case was not "crucial" or "devastating" as was the evidence in previous Confrontation Clause cases.[179] Additionally, the evidence did not involve the use or misuse of a coerced confession, prosecutorial misconduct, or negligence.[180] No joint trial or paper evidence was at issue, nor was the denial of cross-examination.[181]

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172. 400 U.S. 74 (1970).

173. *Dutton* was first argued on October 15, 1969; *Green* was argued on April 20, 1970 and decided on June 23 that same year; *Dutton* was reargued on October 15, 1970 and finally decided on December 15, 1970.

174. 400 U.S. at 78 (citing GA. CODE ANN. § 38-306 (1954)).

175. See *Dutton*, 400 U.S. at 78 (citing Evans v. State, 150 S.E.2d 240, 248 (Ga. 1966)).

176. *Dutton*, 400 U.S. at 78.

177. 400 U.S. at 81 (quoting California v. Green, 399 U.S. 149 (1970)).

178. *See id.* at 82.

179. *Id.* at 87.

180. *Id.* (citations omitted).

181. *Id.* This facile attempt to distinguish prior cases, or to refuse a disciplined analysis of this case, is arguably incredulous.

The plurality[182] opinion took great pains to reassert that evidence rules and the Confrontation Clause were not identical. However, this time the assertion was for the purpose of establishing that the limitations placed on the introduction of co-conspirator's statements by federal evidence rules were not constitutionally mandated, but were rather a product of federal conspiracy law. Thus, Georgia's choice to provide expanded admissibility of co-conspirator's statements was not an issue of constitutional law.[183]

The Court concluded that its prior hearsay cases did not support the defendant's Confrontation Clause claim.[184] Likewise, the *Bruton* cases were distinguishable. Here, the Court stated both the obvious—that this case did not involve a joint trial of codefendants—and the not-so-obvious—that no recognized hearsay exception was applicable in *Bruton*.[185] This recognition was profound. In effect, the Court was suggesting that statements admissible under recognized hearsay exceptions might not raise confrontation issues at all. As if it realized the significance of the implication, the Court immediately added:

> It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now. We confine ourselves, instead, to deciding the case before us.
>
> This case does not involve evidence in any sense "crucial" or "devastating," as did all the cases just discussed. It does not involve the use, or misuse, of a confession made in the coercive atmosphere of official interrogation . . . . It does not involve any suggestion of prosecutorial misconduct or even negligence . . . . It does not involve the use by the prosecution of a paper transcript . . . . It does not involve a joint trial . . . . And it certainly does not involve the wholesale denial of cross-examination . . . .[186]

What followed was, in effect, a harmless error analysis (and Confrontation Clause jurisprudence would have benefited had the Court chosen that approach) in Confrontation Clause clothing. But two points made, but unnecessary to the decision, would cause problems in future cases. The first was the Court's indefensible assertion that "[f]rom the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not

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182. Justice Harlan concurred with the result in *Dutton*, casting doubt on some of his earlier viewpoints expressed in *Green*. *See* 400 U.S. at 93-100 (Harlan, J., concurring).

183. *Id.* at 87-88.

184. 400 U.S. at 83-85.

185. *Id.* at 86-87.

186. *Id.* at 86-87 (citations omitted).

only as to what he has seen but also as to what he has heard."[187] In other words, if the government calls any witness to the stand who is subject to cross-examination, the Constitution allows that witness to testify as to other witnesses' statements, though those other witnesses are not subject to cross-examination or confrontation. Obviously, this assertion creates a hollow confrontation right controlled, and easily abused, by the government.

The second problem was *Dutton*'s contribution to the functional view of the Confrontation Clause. After explaining that confrontation of the actual declarant would have been of little consequence to the defendant,[188] the Court observed that the declarant's statements were "spontaneous, and . . . against his penal interest . . . . These 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."[189] Notably absent in the opinion are citations to *any* cases or commentary expressing these wide views.

Two years after the Court's 1970 decisions in *Green* and *Dutton*, the Court analyzed a confrontation claim in another hearsay case, *Mancusi v. Stubbs*.[190] The victim-eyewitness in *Stubbs* had testified and was cross-examined at a trial resulting in Stubbs's conviction.[191] Following a reversal, and the witness's relocation to Sweden, the witness's previous testimony was admitted, over objection, at defendant's second trial.[192] The Court upheld the admission of the evidence based on a test gleaned from *Barber*, *Green*, and *Dutton*. As to the *Barber* portion of the test, the Court concluded that the "predicate of unavailability was sufficiently stronger here than in *Barber* . . . ."[193] However, satisfying the predicate was not enough; the Court must also consider the "adequacy of [the] examination at the first trial . . . ."[194]

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187. *Id.* at 88.

188. The Court reasoned (1) that since the statement was not an express assertion of past fact, it carried an implicit warning that it should be given little weight; (2) that other evidence established the likelihood that the declarant was knowledgeable about the subject matter of the statement, thus making it implausible that cross-examination as to knowledge would be fruitful; (3) that it was unlikely that the declarant had a faulty memory; and (4) that the circumstances indicated reliability. *See id.* at 88-89. The Court added this conclusion: "[T]he possibility that cross-examination of [the declarant] could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal." *Id.* at 89. The Court ignores several obvious cross-examination points illustrated by both Justice Blackmun in his concurring opinion and Justice Marshall in his dissenting opinion. *See Dutton*, 400 U.S. at 90 (Blackmun, J., concurring); *id.* at 100-01 (Marshall, J. dissenting).

189. *Id.* at 89.

190. 408 U.S. 204 (1972).

191. *Id.* at 208. Some disagreement in the Court's decision centered around the fact that Stubbs' case arose on habeas and alleged, among other things, ineffective assistance of counsel based on the fact that counsel was appointed only four days before trial of his murder case. *See id.* at 209.

192. *Id.* at 209.

193. *Id.* at 212. The Court's reference to unavailability as a "predicate" is significant.

194. *Id.* at 213.

The second inquiry focused on *Dutton*'s "indicia of reliability" requirement and whether the trier of fact had a "satisfactory basis for evaluating the truth of the prior statement" under *Green*.[195] The Court summarily dispensed with this analysis, crediting the statements per se because of their nature as prior recorded testimony. The Court easily concluded that the defendant's Confrontation Clause rights were not violated because the witness had testified and was subject to cross-examination at the first trial. Absent was any discussion of the part of the test attributed to *Green*—whether the factfinder had a sufficient basis for evaluating the truth of the prior statement.[196]

After *Stubbs*, the Court would not consider another hearsay case until 1980, when it would apply the reliability-based functional approach used in *Green*. As is often the case, *Green's* import was not totally understood until that application ten years later in *Ohio v. Roberts*.[197]

e. Bruton *Cases Revisited . . . and Revised (1971 - 1979)*

After dealing with the normal byproducts of establishing a new criminal procedure rule, the Court in the 1970s limited the application of the *Bruton* principle in several cases, as illustrated by its 1971 decision in *Nelson v. O'Neil*.[198] These cases were largely decided based on the functional view of confrontation expressed in *Bruton*.

Unlike *Bruton*, the codefendant in *Nelson* whose statement was introduced in the joint trial testified, denied making the statement, and was available for cross-examination, though defense counsel did not cross-examine. As a matter of evidence law, the codefendant's statement was not admissible against the defendant. Therefore, the trial judge instructed the jury that the statement could only be considered against the codefendant, not the defendant.[199]

The Supreme Court in *Nelson* declared the limits of *Bruton* in terms revealed in *Green*. *Bruton* applied only when the codefendant whose statement was introduced was "unavailable at the trial for 'full and effective' cross-

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195. *Stubbs*, 408 U.S. at 213 (quoting California v. Green, 399 U.S. 149, 161 (1970)) ("It is clear . . . that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability' referred to in *Dutton*.").

196. A review of the portion of the *Green* decision, to which *Stubbs* attributed this part of the test, suggests that the Court was merely giving lip service to the idea that more than cross-examination was required to satisfy confrontation. *See Green*, 399 U.S. at 161. The Court in *Green* implied that the trier of fact was given an adequate opportunity to judge the reliability of the evidence when the evidence was former testimony. Of course, a trier of fact presented with prior testimony has only one arrow in its quiver with which to assess credibility—the testimony. Absent are the witness's demeanor, composure, hesitancy or lack of hesitancy, voice inflection, facial expressions, and a whole host of other factors that cannot be evaluated based on a transcript of the previous testimony.

197. 448 U.S. 56 (1980); *see infra* notes 206-14 and accompanying text.

198. 402 U.S. 622 (1971).

199. *Id.* at 624.

examination."[200] The fact that the codefendant disaffirmed the extrajudicial statement did not deprive the defendant of the right to full and effective cross-examination. The Court acknowledged that *Bruton* and *Douglas* explicitly stated that a witness could not be effectively confronted unless the witness affirmed the prior statement, but concluded that these statements were dicta because the witnesses in those cases did not testify.[201]

Utilizing the functional view of confrontation introduced in *Bruton* and reiterated in *Green*, the Court explained why no violation occurred. Had the codefendant affirmed the statement, the defendant's cross-examination task would have been difficult. The defendant would have to show that the codefendant's confession was false and, thus, that the codefendant was lying or that the confession was at least partially false in its references to the defendant. In the latter situation, the defendant would then have to explain why he and the codefendant were found together in a stolen car. Had the witness affirmed the statement, but claimed it to be unreliable because it was coerced, cross-examination would not be beneficial because the defendant would then want the jury to believe, as the codefendant was now testifying, that the confession was untrue as to both of them.[202] Given this, the actual testimony at trial was "more favorable to the respondent than any that cross-examination by counsel could possibly have produced . . . . It would be unrealistic in the extreme . . . to hold that the respondent was denied either the opportunity or the benefit of full and effective cross-examination . . . ."[203]

The Court used the functional view of confrontation again eight years after *Nelson*. In *Parker v. Randolph*,[204] a plurality declined to apply *Bruton* to a case in which the defendant's own confession corroborated that of the codefendant. Focusing on function, the plurality observed that the "right protected by *Bruton*—the 'constitutional right of cross-examination'- has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence."[205]

f. Hearsay Cases (1980-1992), Part III

In the 1980s, the Court expanded the test applied in 1972 in *Stubbs* and quickly retreated from any suggestion that confrontation was a bundle of rights essential to a fair trial. The new restricted view of the confrontation right in hearsay cases continued until 1994 and spread into the cross-examination cases in which the Court also retreated from its earlier holdings that suggested an absolute right to cross-examine.

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200. *Id.* at 626-27.
201. *Id.* at 627-28.
202. *Id.* at 628-29.
203. *Id.* at 629.
204. 442 U.S. 62 (1979).
205. *Id.* at 73 (citations omitted).

The Court had not considered a hearsay case for almost a decade since its decisions in *Stubbs* and, more importantly, *Green*. Now the Court returned to the reliability-based functional approach used in *Green*. As is often the case, *Green's* import became apparent only after it was applied to different facts ten years later in *Ohio v. Roberts*.[206] While much of the language in *Green* suggested that confrontation was satisfied by virtue of the witness's presence at trial, which gave the defense an opportunity to cross-examine in the jury's presence, the *Roberts* Court clarified that even without the subsequent opportunity to cross-examine, the witness's prior testimony would have been admissible.[207]

Unlike the fact situation in *Green,* the witness who testified at the preliminary hearing and incriminated the defendant in *Roberts* did not appear at trial.[208] Thus, the Court's *Green* rationale, that somehow the presence at trial caused the out-of-court statement to regain "most of the lost protections,"[209] could not be used to affirm the lower court's allowance of the prior testimony.

Had the Supreme Court strictly adhered to the reasoning set forth in *Green*, the Court would have been required to reverse the Ohio court's ruling that allowed the preliminary hearing testimony to be introduced at trial. Unlike the witness in *Green*, the witness in *Roberts* was not available for cross-examination. Yet, the Court noted that counsel had asked "[n]o less than 17 plainly leading questions,"[210] challenging the witness's story at the preliminary hearing and thereby affording "'substantial compliance with the purposes behind the confrontation requirement.'"[211] Thus, the presence of the witness at trial for cross-examination was not required. Rather, the opportunity to cross-examine anytime, even if that opportunity was not fully exercised, satisfied the constitutional right to confrontation.[212]

What is perhaps most disingenuous about the stretching of *Green* to fit the facts in *Roberts* is that the issue before the Court in *Roberts* was not at issue in *Green* and thus not briefed, argued, or analyzed. Nonetheless, when the issue reached the Court in *Roberts,* the Court did not analyze the application of the principle espoused in *Green*, but rather applied the principle to the distinguishable facts as if it were established law. The Court's reasoning was this: *Green* recognized that it was senseless to allow the introduction at trial of an unavailable witness's former testimony while disallowing the introduction at trial of the former testimony of a witness who appeared, but had a faulty memory.[213] The *Roberts* Court accepted this proposition as established law, although, in reality, former testimony had been allowed only in cases of

206. 448 U.S. 56 (1980).
207. *See id.* at 69-70 n.10.
208. *Id.* at 59.
209. California v. Green, 399 U.S. 149, 158 (1970).
210. *Roberts*, 448 U.S. at 70 n.11.
211. *Id.* at 71 (quoting *Green*, 399 U.S. at 166).
212. *Id.* at 73 & n.12.
213. *See Green*, 399 U.S. at 161.

absolute necessity, as when the witness had died, and when a previous cross-examination had occurred. Now that the Court was faced with the situation, the majority relied on the *ipse dixit* language from *Green* and did not analyze whether the admission of former testimony comported with the constitutional confrontation requirement.[214]

The facts in *Roberts* make the Court's decision even more troubling. In *Roberts,* the State was not relying upon former testimony to prove an element of the case. The witness's former testimony was offered in rebuttal after the defendant had testified to his innocence. Furthermore, the witness whose former testimony the State offered had been called to testify by the defendant during the preliminary hearing.[215] The Court did not mention these facts, although arguably both provide a basis for distinguishing the case from the other hearsay cases the Court had decided.

Although the majority stretched the *Green* decision to cover the *Roberts* facts, it did not do so with total comfort. A comfortable fit would have allowed the majority to apply *Green* without supplementation. Instead, the *Roberts* Court supplemented the *Green* opinion regarding the admissibility of prior testimony with a new prerequisite: the need for the testimony.

Four points should be noted from *Roberts*. The first is the recognition that an absence of confrontation may affect the very integrity of the fact-finding mission. Second, the Sixth Amendment establishes a rule of necessity as a prerequisite to the admission of out-of-court statements. Third, only reliable hearsay is admissible, even after constitutional necessity is established. Finally, all hearsay that is not inherently reliable is presumptively inadmissible, unless the state establishes adequate particularized guarantees of trustworthiness.[216]

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214. *See Roberts*, 448 U.S. at 73.

215. *Id.* at 58-59. At the preliminary hearing, the State introduced the testimony of a property owner, Mr. Isaacs, and several other witnesses. After the State rested its case, the defense counsel called Anita Isaacs, Mr. Isaacs' daughter, as a witness and unsuccessfully tried to establish that she had authorized the defendant to use credit cards and checks belonging to Mr. Isaac. When defendant took the witness stand at trial and claimed that Anita had authorized his use of the cards, the State was allowed to introduce Anita's prior preliminary hearing testimony in rebuttal. *Id.* The Court could have viewed the evidence as nonhearsay impeachment evidence not raising confrontation concerns, as it would later do in *Tennessee v. Street*, 471 U.S. 409 (1985). In *Street,* a codefendant's statement to the police was allowed into evidence for the "legitimate, nonhearsay purpose of rebutting [defendant's] testimony . . . ." 471 U.S. at 417. "The *nonhearsay* aspect of [the codefendant's statement] . . . raises no Confrontation Clause concerns." *Id.* at 414. Alternatively, the Court could have upheld the admission based on the unfairness that would occur if the defense were allowed to open the door on the issue and then protest when the State sought to rebut the evidence. *See* Tome v. United States, 513 U.S. 150, 167 (1995).

216. The majority used this language:

> [C]ertain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." . . .
>
> . . . Reliability can be *inferred* without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the

One of the four *Roberts'* principles was soon discarded. In a federal drug conspiracy case, *United States v. Inadi*,[217] the Court revisited the constitutional necessity requirement set forth in *Roberts*. The government offered, as substantive evidence, tape recordings of conversations between unindicted co-conspirators.[218] Over objection, the trial court admitted the out-of-court statements under Rule 801(d)(2)(E) of the Federal Rules of Evidence.[219] On appeal, the Third Circuit Court of Appeals, relying on the principles set forth in *Roberts*, reversed the conviction because the government had not established the unavailability of the declarants.[220]

The Supreme Court reversed, undoing the constitutional necessity prong of *Roberts*:

> There are good reasons why the unavailability rule, developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements. Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. . . . When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. But if the declarant is unavailable, no "better" version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point.
>
> Those same principles do not apply to co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court.[221]

Utilizing a benefit-burden analysis, the majority held that requiring an unavailability analysis every time the government wanted to introduce a co-

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> evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Roberts, 448 U.S. at 66 (emphasis added) (citations omitted). An inference of reliability is notably not the same as a presumption of reliability.

217. 475 U.S. 387 (1986).

218. *Inadi*, 475 U.S at 390.

219. The rule provides that a statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E).

220. United States v. Inadi, 748 F.2d 812, 819-20 (3d Cir. 1984).

221. *Inadi*, 475 U.S. at 394-95 (citations omitted).

conspirator's out-of-court statement would substantially burden an already burdened criminal justice system.[222] Thus, the Court concluded that the Constitution did not require a showing of unavailability prior to the admission of a co-conspirator's statements against an accused criminal.[223]

Startled at this new focus on prosecutorial convenience, the dissent asserted what most courts had assumed following *Roberts*—that the unavailability requirement was a rule of constitutional necessity, a condition precedent to infringement upon the constitutional guarantee of confrontation.[224] The dissent argued that the compromise of a constitutional right justified requiring proof of necessity and should not be displaced with a benefit-burden analysis.[225] The dissent also questioned the majority's assertion that *Roberts* had cited only former testimony cases.[226] Instead, *Roberts* had relied upon

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222. *Id.* at 399. Among the burdens perceived by the majority were added appellate review; the difficulty that would be placed on the prosecution in ascertaining the identify and location of declarants; and making declarants available at trial, particularly if the declarants were not incarcerated. *Id.* at 398-99.

223. *Id.* at 399-400. Because the unavailability issue was the sole issue addressed by the Third Circuit, it was likewise the only issue reached by the Court. *Id.* at 391 n.3. Nevertheless, the Court gave a thumbs-up to the reliability of co-conspirator's statements, adding in closing that in accord with the plurality decision in *Dutton v. Evans*, 400 U.S. 74 (1970), "we continue to affirm the validity of the use of co-conspirator statements . . . ." *Inadi*, 475 U.S. at 400. This led the dissent to characterize it as a "small step" for the specific case, but a "giant leap" with regard to constitutional ramifications. *Id.* at 400-01 (Marshall, J., dissenting). The majority would further its affirmation of the reliability of co-conspirators' statements in *Bourjaily v. United States*, 483 U.S. 171, 183 (1987), the next term.

224. *Inadi*, 475 U.S. at 402-03 (Marshall, J., dissenting). In addition to the Third Circuit, most of the other courts faced with the issue pre-*Inadi* had applied *Roberts* literally and recognized a "Sixth Amendment . . . rule of necessity." *See* Ohio v. Roberts, 448 U.S. 56, 65 (1979). The Sixth Circuit had so ruled in *Haggins v. Warden*, 715 F.2d 1050, 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984). Likewise, the Eighth Circuit had so held in *United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984). A year after its *Inadi* decision, the Third Circuit had followed its reasoning in *Inadi*. *See* United States v. Caputo, 758 F.2d 944, 951 (3d Cir. 1985); *see also* Hutchins v. Wainwright, 715 F.2d 512, 516 (11th Cir. 1983) (applying *Roberts*), *cert. denied*, 465 U.S. 1071 (1984); United States v. Washington, 688 F.2d 953, 959 (5th Cir. 1982) (same).

225. *See Inadi*, 475 U.S. at 408 (Marshall, J., dissenting).

226. *See id.* at 402-03.

Douglas v. Alabama[227] and *Dutton v. Evans*,[228] involving an accomplice's confession and a conspirator's statement, respectively.

Although the Court did not require unavailability as a constitutional prerequisite in *Inadi*, the Court declined to clarify whether *Inadi* or *Roberts* applied to hearsay cases not involving either former testimony or co-conspirators' statements. Rather, in *Idaho v. Wright*,[229] the case that followed *Inadi* chronologically, the Court noted that the issue of unavailability was not raised and assumed "without deciding that, to the extent the unavailability requirement applies in this case, the [witness] was an unavailable witness within the meaning of the Confrontation Clause."[230] After *Wright*, arguably, unavailability was still a constitutional prerequisite for some types of hearsay, especially since the hearsay in *Wright* had been admitted under a hearsay exception that did not require the unavailability of the declarant.

The statements introduced in *Wright* were those of a two-and-one-half year-old child, testified to by an examining pediatrician. The state court admitted the statements under the Idaho residual hearsay exception that allowed the introduction of hearsay statements not covered by other hearsay exceptions that had "equivalent circumstantial guarantees of trustworthiness."[231]

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227. 380 U.S. 415 (1965). *Douglas*, decided the same day as *Pointer*, was the Court's first application of the Confrontation Clause in a state case not involving former testimony. The case is curious, at best. A prosecutor repeatedly questioned a witness who had asserted his privilege to remain silent as to whether he had made certain statements to the police that incriminated both the witness and the defendant who was on trial. The witness refused to acknowledge the statements or to testify at all except as to his name. The trial judge also allowed the prosecutor to call law enforcement officers who testified that the document from which he had read was a "confession" made by the witness. *See Douglas*, 380 U.S. at 416-17. The Supreme Court noted that the questioning and refusals to answer were not "technically testimony," but asserted that the statement "constituted the only direct evidence" that the defendant had committed the offense. *Id.* at 418; *see supra* notes 129-30 and accompanying text. A better disposition would have been a dismissal, based on insufficient evidence (or more correctly, no evidence, since the asking of questions to which there is no response does not constitute testimony). Nonetheless, the Court continues to cite *Douglas* for the proposition that the inability of the defendant to cross-examine the witness was a denial of "the right of cross-examination secured by the Confrontation Clause." Lilly v. Virginia, 527 U.S. 116, 131 (1999) (quoting *Douglas*, 380 U.S. at 419).

228. 400 U.S. 74 (1970). *Dutton* involved the introduction of co-conspirator statements under a Georgia statute that allowed the admission of co-conspirator statements made after the termination of the conspiracy, but while the conspiracy was still being concealed. While the *Dutton* Court allowed the evidence, it did so by concluding that confrontation at trial would be of little consequence. While it is true that the witness which the prosecutor failed to produce was likely available, the *Dutton* Court did not address the unavailability issue. *See supra* notes 172-89 and accompanying text.

229. 497 U.S. 805 (1990).

230. *Id.* at 816. Rather than assert that *Inadi* had resolved the issue of constitutional necessity, the Court stated that *Inadi* had held that the "general requirement of unavailability did not apply to incriminating out-of-court statements made by a non-testifying co-conspirator...." *Id.* at 815. This statement justifies a conclusion that the Court was still contemplating the applicability of unavailability to other contexts.

231. Idaho Rule of Evidence 803(24) is identical in content to former Federal Rule of

In *Wright*, the Court, for the first time, candidly stated the interrelationship between hearsay and confrontation: "The Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule."[232] Now the task was to explain when the bar applied. The evidence in *Wright* was presumptively inadmissible under hearsay rules and the Confrontation Clause and would be admitted only if it bore sufficient indicia of reliability, which can be inferred without more where the evidence falls within a firmly rooted hearsay exception.[233] In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[234] After analyzing the exception[235] and then the statements,[236] the Court concluded that the introduction of these hearsay statements under the state's residual hearsay exception violated confrontation.

A mere two years later, the Court dealt decisively with the issue left at bay in *Wright*. In *White v. Illinois*[237] a child-victim's statements were admitted at trial through adults, namely a babysitter, a parent, a police officer, a nurse, and a physician. Relying upon two hearsay exceptions—spontaneous declaration[238] and statements for purpose of medical diagnosis or treatment[239]—the trial court admitted the statements over the defendant's objection, based upon the federal Confrontation Clause.[240]

The Court removed any uncertainty as to whether the Constitution required the State to establish necessity, or unavailability, in order to introduce hearsay as a substitute for in-court testimony. "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry

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Evidence 803(24). The former rule and its unavailability counterpart, Federal Rule of Evidence 804(b)(5), have been combined and transferred to Federal Rule of Evidence 807.

232. *Wright*, 497 U.S. at 814.

233. *Id.* at 816.

234. *Id.* at 816 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

235. "Hearsay statements admitted under the residual exception, almost by definition, therefore do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception." *Id.* at 817.

236. "Because evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability." *Id.* at 821. "Viewing the totality of the circumstances surrounding the younger daughter's responses to Dr. Jambura's questions, we find no special reason for supposing that the incriminating statements were particularly trustworthy." *Id.* at 826. Much of the Court's decision focused on what circumstances could be considered in assessing particular trustworthiness. The Court concluded that the "relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 819.

237. 502 U.S. 346 (1992). Justice Brennan had left the Court after the *Wright* but before the *White* decision.

238. This exception is the equivalent of what most rules of evidence, including the Federal Rules of Evidence, refer to as an excited utterance. *See* FED. R. EVID. 803(2).

239. *See* FED. R. EVID. 803(4).

240. *See White*, 502 U.S. at 349-51.

only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."[241]

Thus, only when the prior statements have been the "substantial equivalent" of in-court testimony and have been given under oath (impressing upon the witness the solemnity of the occasion and subjecting the witness to perjury charges in the event of lying), in the presence of the defendant, and subjected to cross-examination (or the opportunity to cross-examine) does the Constitution require the State to demonstrate a need for the testimony. When the statement is unconfronted (not given under oath, before a jury, or subject to cross-examination), the State does not have to "need" the testimony in order to introduce it. The State can choose in those situations whether to use the prior statement or present the witness. If the prior statement is admissible under the rules of evidence, no confrontation issue exists.[242]

g. Cross-Examination Cases (1984, 1986-1987)

Following its assertion of a test in the hearsay cases in the 1980s, the Supreme Court considered four cross-examination cases. In the most straightforward case of the four decided, the Court held that a total denial of the right to cross-examine a witness about potential bias violated the Confrontation Clause. In *Delaware v. Van Arsdall*,[243] the Court reversed a trial court ruling that precluded the defense from questioning a key witness about matters relevant to bias or motivation. In holding that the denial of cross-examination violated the right to confrontation, the Court linked the right to one of its elements, cross-examination.[244] In the other three decisions, the Court would make it clear that even if cross-examination was the heart of confrontation, even the heart was not indispensable.

In the first of these cases, *Delaware v. Fensterer*,[245] the Court summarily disposed of a case in which the defendant alleged a confrontation violation as a result of the denial of "effective" cross-examination. In *Fensterer* the prosecution's expert witness testified to a conclusion, based upon a scientific examination, but could not recollect the foundation for his expert opinion.[246] The defense expert had spoken to the expert before trial, learned the foundation of the expert's opinion, and was of the opinion that the foundation lacked scientific support. Since the expert could not recall the foundation, he did not testify to it. As a result, fertile, effective defense cross-examination of the expert was foiled. The Court found no restriction on the right to cross-examine

241. *Id.* at 354 (citation omitted).

242. *See id.* at 354-55.

243. 475 U.S. 673 (1986) (precluding cross-examination at trial about the state's dismissal of a criminal charge against a key witness).

244. *Id.* at 684.

245. 474 U.S. 15 (1985) (per curiam).

246. *Id.* at 16.

because "the trial court did not limit the scope or nature of defense counsel's cross-examination in any way."[247]

While this statement about the *Fensterer* case was undoubtedly accurate, the Court, in defending its affirmation, went far beyond what was necessary. This is illustrated by the Court's reliance on *Davis v. Alaska*,[248] a cross-examination case decided two years earlier. In *Davis* the Court invalidated a state statute that denied an accused the right to cross-examine a crucial witness about a juvenile conviction. The statute violated the Confrontation Clause because "[c]onfrontation means more than being allowed to confront the witness physically."[249] The Clause was violated in some situations because "restrictions on the scope of cross-examination . . . 'effectively . . . emasculate[d] the right of cross-examination itself.'"[250]

The *Fensterer* Court supplemented the *Davis* holding with some unrelated language from *Roberts* and held that the Confrontation Clause "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[251] This is an excellent example of the Court's careless amalgamation of reasoning from one kind of a case to a different kind of case with no analysis as to whether the reasoning applied. The opportunity to cross-examine in *Roberts* was an actual opportunity to cross-examine the witness at a previous proceeding in the same case. Now the Court extracted that language and asserted it in a much different setting, arguably one in which it was not appropriate.

The Court used the opportunity theory in two cross-examination cases decided in 1987, two years after *Fensterer*. In the first, *Pennsylvania v. Ritchie*,[252] a plurality of the Court reemphasized that confrontation was a "trial right," but added that it was "designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."[253] Thus, the *Ritchie* Court reasoned, *Davis* had not held that the Alaska statute making certain juvenile records confidential violated the Confrontation Clause; rather the Constitution was violated in that case because cross-examination about those juvenile records was precluded.[254] By making this oblique distinction, the plurality in *Ritchie* concluded that the Constitution was not violated when a victim's mental health records were withheld from defense

247. *Id.* at 19.

248. 415 U.S. 308 (1974).

249. *Id.* at 315.

250. *Fensterer*, 474 U.S. at 19 (citing *Davis* and quoting Smith v. Illinois, 390 U.S. 129, 131 (1968)).

251. *Id.* at 20 (citing Ohio v. Roberts, 448 U.S. 56, 73 n.12 (1980)). This language is referred to in this Article as the Court's "opportunity theory."

252. 480 U.S. 39 (1987) (plurality opinion).

253. *Id.* at 52 (citations omitted).

254. *Id.*

counsel.[255] Because counsel was allowed to cross-examine the witness, the Confrontation Clause was not implicated.[256]

Justice Blackmun, the fifth vote to affirm in *Ritchie*, explicitly rejected this portion of the plurality opinion. He wrote:

> [The plurality] believes that [the right of confrontation] is satisfied so long as defense counsel can *question* a witness on any proper subject of cross-examination. . . . [T]he plurality in effect dismisses—or, at best, downplays—any inquiry into the effectiveness of cross-examination. Thus, the plurality confidently can state that the Confrontation Clause creates nothing more than a trial right.
>
> If I were to accept the plurality's effort to divorce confrontation analysis from any examination into the effectiveness of cross-examination, I believe that in some situations the confrontation right would become an empty formality. . . . The opportunity the Confrontation Clause gives a defendant's attorney to pursue any proper avenue of questioning a witness makes little sense set apart from the goals of cross-examination. . . .
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> . . . .
>
> . . . I do not believe . . . that a State can avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination . . . at the pretrial, rather than at the trial, stage.[257]

Justice Blackmun elaborated on his interpretation of the interplay between confrontation and cross-examination in *Kentucky v. Stincer*,[258] decided only four months after *Ritchie*. The case involved whether the defendant had the right to be present at a hearing conducted during the trial to determine the witnesses' competency to testify.[259] As such, it would have lent itself to many analyses. That chosen by the clear majority, and set forth by Justice Blackmun, focused not on the timing of confrontation or cross-examination,[260] but upon its

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255. *Id.* at 54.

256. *Id.*

257. *Id.* at 62, 65.

258. 482 U.S. 730 (1987).

259. *Id.* at 732.

260. *See id.* at 740. The State urged the Court to adopt a "critical stage" analysis in order to find the absence of a Confrontation Clause violation. The Court declined, emphatically, on two occasions: "Instead of attempting to characterize a competency hearing as a trial or pretrial proceeding, it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination." *Id.* "[T]he question whether a particular proceeding is critical to the outcome of a trial is not the proper inquiry in determining whether the Confrontation Clause has been violated. The appropriate question is whether there has been any interference with the defendant's opportunity for effective cross-examination." *Id.*

function: "The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial."[261] Therefore, the exclusion of a criminal accused from a hearing held to determine a witness's competency does not violate confrontation rights when the witnesses are subject to cross-examination during the trial.[262]

h. Bruton, *Again (1986 - 1987)*

After almost a decade of silence on *Bruton* issues, the Court returned to the issue of Confrontation Clause rights in joint trials involving the introduction of confessions of a codefendant. In the first case, in a most bizarre set of circumstances, the Court upheld the basic tenets of *Bruton*, notwithstanding the fact that the trial was conducted by a judge rather than a jury. In *Lee v. Illinois*,[263] despite assurances that the evidence at a joint trial would be considered "separately for each defendant," the trial judge relied upon portions of a codefendant's confession as substantive evidence against the defendant.[264]

The majority asserted, for the first time, a symbolic approach to the Confrontation Clause.[265] Perhaps of more lasting import would be the Court's use of tests established in recent hearsay cases to analyze the confrontation claim. The Court concluded that the codefendant's confessions were presumptively unreliable and that the confession before it did not bear sufficient independent indicia of reliability.[266]

The year after *Lee*, the Court decided, on the same day, two other *Bruton* cases, which gave Justice Scalia his first opportunity to enter the Court's

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at 744-45 n.17. This assertion equates confrontation and cross-examination. The inquiry for evaluating whether the "function" of confrontation has been satisfied is whether there has been an interference with cross-examination.

261. *Id.* at 737.

262. *See id.* at 744 ("Because respondent had the opportunity for full and effective cross-examination of the two witnesses during trial, and because of the nature of the competency hearing at issue in this case, we conclude that respondent's rights under the Confrontation Clause were not violated by his exclusion from the competency hearing . . . .").

263. 476 U.S. 530, 536 (1986) (quoting petitioner's lawyer as saying, "We would ask the Court to consider the evidence separately for each defendant.").

264. The State conceded reliance on the codefendant's confession to find premeditation, an essential element of the crime for which Lee was convicted. *Id.* at 538.

265. *See id.* at 540.

266. *See id.* at 443-47. The State argued that the presumed unreliability of the confession was rebutted by the circumstances surrounding the confession and the fact that the confession interlocked with the defendant's confession. As to the first contention, the Court noted that the codefendant had at first declined to be interviewed by the police and had agreed to talk only after being told that his girlfriend had urged him to share the blame for the crime with her. As to the second claim, the Court cautioned that "a confession is not necessarily rendered reliable simply because some of the facts it contains 'interlock' with the facts in the defendant's statement. The true danger inherent in this type of hearsay is, in fact, its selective reliability." *Id.* at 545 (citations omitted).

Confrontation Clause jurisprudence. In *Cruz v. New York*[267] and *Richardson v. Marsh*,[268] the Court, through opinions written by Justice Scalia, reiterated the *Bruton* principle and attached it to evidence underpinnings.

In *Cruz* the State introduced, over objection, a codefendant's videotaped confession implicating the defendant and the codefendant in their joint trial.[269] The codefendant did not testify. Because the defendant had confessed, the trial judge applied the rationale of the *Parker* plurality, overruled the defendant's objection, and instructed the jury as to the limited use of the codefendant's confession.[270] On appeal, the majority rejected the *Parker* plurality opinion and its narrow application of *Bruton* to cases in which the admission of a codefendant's confession was "devastating" to the defendant's case.[271] The *Cruz* majority adopted instead Justice Blackmun's position that a defendant's interlocking confession would not invalidate a confrontation challenge, but might render the violation harmless.[272] Thus, the Court concluded that the Confrontation Clause was violated by the admission at a joint trial of a nontestifying codefendant's confession incriminating the defendant if the confession was not directly admissible against the defendant.[273] This was true even if the jury was instructed not to consider the confession against the defendant.[274]

Having established the ruling and rationale for the decision, Justice Scalia did not conclude the opinion, but instead offered the following dicta:

> Of course, the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient "indicia of reliability" to be directly admissible against him (assuming the "unavailability" of the codefendant) despite the lack of opportunity for cross-examination, and may be considered on appeal in assessing whether any Confrontation Clause violation was harmless.[275]

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267. 481 U.S. 186 (1987).

268. 481 U.S. 200 (1987). In *Richardson* and *Gray v. Maryland*, 523 U.S. 185 (1998), the Court would functionalize *Bruton*, making it inapplicable when the codefendant's confession could be satisfactorily redacted so as not to refer to the defendant or to the defendant's existence. The redaction in *Richardson* was successful in that the confession incriminated the defendant only inferentially and after the introduction of evidence by the defense. *See* 481 U.S. at 211. However, in *Gray* the inferences that remained after redaction referred to someone directly, most likely the defendant. Thus, the *Bruton* principle applied. *See* 523 U.S. at 192.

269. 481 U.S. at 189.

270. *Id.*

271. *Id.* at 191.

272. *Id.*

273. *Id.* at 193.

274. *Id.*

275. 481 U.S. at 193-94 (citations omitted).

In *Lee* and *Cruz* the Court opined that presumptively unreliable and inadmissible evidence that met certain standards of reliability could nevertheless be admitted without violating the Confrontation Clause.[276] This approach, which fused the previously separate approaches used in hearsay and *Bruton* cases, would complete the substitution of confrontation rights with evidence rules.

Another important part of the *Cruz* opinion was Justice Scalia's definition of terms within the Clause. The phrase "witness against" as used in the Confrontation Clause was defined in a seemingly sensible way: "Ordinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt."[277] The Court would later abandon this definition in favor of a much more rigid (and arguably less sensible) one in the protective devices cases which the Court would next decide.[278]

i. Protective Devices Cases (1988-1990)

In two cases the Court decided whether a witness testifying at trial, subject to cross-examination by the defendant and observation by the jury, could, without violating the Confrontation Clause, be shielded from the defendant's view. These cases gave the Court, particularly Justice Scalia, yet another opportunity to revise its confrontation analysis.

In *Coy v. Iowa*,[279] the Court considered whether an Iowa statute,[280] which allowed child witnesses to testify without seeing or hearing the defendant, violated the federal Confrontation Clause. The trial court in *Coy* had placed a screen between the thirteen-year-old child witness and the defendant, adjusting the lighting so the defendant could see the witnesses dimly, but the witnesses could not see the defendant.[281] The defendant claimed that the Confrontation Clause gave him the right to face-to-face confrontation and that the Due

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276. This is the exact position taken by the dissenting Justices. "Here, the codefendant's confession carries numerous indicia of reliability; and I gather that the Court's disposition does not deny the state courts, on remand, the opportunity to deal with the admissibility of that confession against Cruz." *Id.* at 198-99 (White, J., dissenting).

277. *Id.* at 190. Justice Scalia would reconcile his two definitions by construing the word "testimony" as used in his definition to refer only to trial testimony.

278. *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (discussing the meaning of the word "confront").

279. 487 U.S. 1012 (1988).

280. The Iowa statute at issue in *Coy* provided that:

> [T]he court may require a party to be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.

IOWA CODE § 910A.14 (1988).

281. *Coy*, 487 U.S. at 1014-15.

Process Clause protected him from procedures that "would make him appear guilty."[282]

Writing for the Court, Justice Scalia asserted unequivocally that the "Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[283] The Clause's purpose is "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination."[284]

Since the very purpose of the screen used by the Iowa trial court was to allow the witnesses against the accused to avoid seeing the accused, the Court found it "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[285] The Court's precedents that allowed confrontation to be compromised involved rights that were "implicit" to confrontation, not the "right narrowly and explicitly set forth in the Clause."[286]

In response to the State's argument that confrontation rights should yield to important public interests in protecting the victims of sexual abuse, the Court suggested that whether exceptions to the "irreducible literal meaning of the Clause" were allowed depended on whether specific, individualized findings supported a deviation from the constitutional right.[287] Exceptions, if allowed at all, depended on some "showing of necessity"[288] not present in the current case.[289] The "necessity" language hailed from the *Roberts* decision; more proof that the Court's refinement of *Roberts* in *Inadi* and *White* was the product of revision, not restatement.

Perhaps it was this part of the opinion that prompted Justice O'Connor, in a concurring opinion, to detail what might justify a finding of necessity.[290]

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282. 487 U.S. at 1015.

283. *Id.* at 1016.

284. *Id.* at 1017 (quoting Dowdell v. United States, 221 U.S. 325, 330 (1911) (describing a provision of the Bill of Rights of the Philippines as "substantially the same as the Sixth Amendment")).

285. *Id.* at 1020.

286. *Id.*

287. *Id.* at 1021.

288. *See* White v. Illinois, 502 U.S. 346, 357-58 (1992) (describing a rule of necessity derived, in part, from *Coy*).

289. *Coy*, 487 U.S. at 1021.

290. Picking up on this opening left by the majority, Justice O'Connor explained the "appropriate case" in which the rights secured by the Confrontation Clause might yield to competing public interests:

> [N]othing in today's decision necessarily dooms such efforts by state legislators to protect child witnesses. Initially, many such procedures may raise no substantial Confrontation Clause problem since they involve testimony in the presence of the defendant. . . .
>
> Moreover, even if a particular state procedure runs afoul of the Confrontation Clause's general requirements, it may come within an

Justice O'Connor's opinion did not fall upon deaf ears. Within a year, the Court decided a case based on a Maryland statute that provided for the use of a different protective device to shield the child witness during testimony.[291] Based upon case-specific findings that "testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate," a trial court could order that the child testify outside the courtroom.[292] Under the statutory provisions, the child, the prosecutor, and the defense counsel would go into a separate room where the child would be examined and cross-examined. The examination and cross-examination would be broadcast into the courtroom where the defendant, the judge, and the jury would view it. The defendant would be allowed to communicate with defense counsel during the examination.[293]

In requesting the trial court to invoke the protective procedures in *Craig*, the State called an expert who testified to the trauma the children would suffer if they were required to testify in the courtroom in the defendant's presence.[294] This case-specific evidence satisfied the five-member Supreme Court majority that the State's compelling interest in protecting child witnesses in this case overrode the defendant's Confrontation Clause rights.[295]

Notably, the procedure utilized in *Craig* removed only one of the historic tenets of cross-examination. The child witness was required to take an oath to tell the truth; to testify in the presence of the factfinder, who could view the child's demeanor while testifying; and was subject to cross-examination.[296] The Court revived a phrase not recently used and concluded that the Maryland

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> exception that permits its use . . . .
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> Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. . . . The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. . . . [I]f a court makes a case-specific finding of necessity, as is required by a number of state statutes, our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.

Id. at 1023-26 (O'Connor, J., concurring) (citations omitted).

291. Maryland v. Craig, 497 U.S. 836 (1990). The Maryland statute allowed testimony by the child to be taken "outside the courtroom and showed in the courtroom by means of a closed circuit television" after the court made certain enumerated findings. MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1) (1989).

292. *Craig*, 497 U.S. at 841 (quoting § 9-102(a)(1)(ii)).

293. *Id.* at 841-42.

294. *Id.* at 842.

295. *See id.* at 855. The holding represents a deference to state's rights. The majority referenced the state's "traditional and 'transcendent interest in protecting the welfare of children,'" and the literature documenting trauma caused by in-court testimony, before concluding that "we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying." *Id.* (quoting Ginsberg v. New York, 390 U.S. 629, 640 (1968)).

296. *Craig*, 497 U.S. at 851.

procedure "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner *functionally equivalent* to that accorded live, in-person testimony."[297] The only element of confrontation absent in the Maryland procedure was the requirement that the child's testimony be given in the physical presence of the defendant.

Prior to the Court's final hearsay case, the prudent approach to confrontation claims seemed to be to admit evidence that satisfied traditional hearsay exceptions, but to exclude evidence that fell only under a residual exception, or perhaps a newly created exception. So long as the State could pigeon hole its hearsay evidence into a traditional exception, it could dispense with calling witnesses to testify even to crucial and devastating matters at the heart of the state's case. But, in 1999, the Court cast doubt on this overly simplistic approach in *Lilly v. Virginia.*[298]

j. Hearsay Cases (1999), Part IV

In *Lilly* the Virginia state court admitted an out-of-court statement that incriminated the defendant under the state's declaration against penal interest exception.[299] Finding that the declarant was unavailable based on his refusal to testify, the state trial court allowed the prosecution to introduce taped statements made by the declarant to law enforcement officers. The statements incriminated the declarant and the defendant, but attributed the actual murder in question to the defendant.[300] The defendant argued that the evidence violated his confrontation rights, but the Virginia courts allowed the evidence, finding that the declaration against penal interest exception was a firmly rooted hearsay exception, thus satisfying the indicia of reliability requirement.[301]

The Supreme Court did not resolve the issue so easily. A majority found a violation of the Confrontation Clause and remanded for a determination of harmfulness,[302] but the Court split 4-2-3 on the rationale. The plurality opinion attempted to announce black letter law in several ways. First, it stated that whether a hearsay statement fell under a firmly rooted hearsay exception for purposes of satisfying the Confrontation Clause was a federal question.[303]

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297. *Id.* (emphasis added).

298. 527 U.S. 116 (1999).

299. *Id.* at 122. The exception in Virginia was recognized by court decision. *See* Chandler v. Commonwealth, 455 S.E.2d 219, 224 (Va. 1995).

300. 527 U.S. at 121. Of crucial importance to the Commonwealth of Virginia was proof that the defendant, Benjamin Lilly, was the actual trigger man since Virginia law only allows execution of the actual trigger man.

301. *Id.* at 122.

302. *See id.* at 139-40.

303. *Id.* at 125. The plurality used language from *Mattox* to explain firmly rooted hearsay exceptions. An exception to the hearsay rule is a firmly rooted exception if it "rests on such a solid foundation that admission of virtually any evidence within it comports with the 'substance of the constitutional protection'.... [A] category of hearsay whose conditions have proved over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as

"[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule. . . ."[304] Furthermore, accomplice confessions "given under conditions that implicate the core concerns of the old *ex parte* affidavit practice—that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing"—would rarely rebut the presumption of unreliability.[305]

Second, the plurality addressed the appropriate standard for appellate review of the government's claim of trustworthiness. Because the factors for review were not those "uniquely suited to the province of trial courts . . . [appellate] courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause."[306]

Lilly prompted four additional opinions. The Chief Justice, joined by Justices O'Connor and Kennedy, disagreed with both of the plurality's conclusions.[307] Justices Scalia and Thomas each wrote separately. Justice Scalia reminds his colleagues that the confrontation issue in this case could easily be resolved by their prior formulations because the case involved a witness "who actually testifies at trial."[308] The fourth opinion, penned by Justice Breyer, may prove to be the most important.

Justice Breyer noted that the Court's "effort to tie the Clause so directly to the hearsay rule"[309] could be faulted for being both too broad and too narrow, excluding some hearsay "only tangentially related to the elements in dispute,"[310] because it did not fit under a hearsay exception, while allowing some hearsay into evidence that amounted to a "modern Lord Cobham[ ]" statement.[311] Most poignantly, Justice Breyer rhetorically questioned whether the Sixth Amendment should be read "principally [to] protect[] 'trustworthiness,'" rather than to require (or at least allow) confrontation.[312] Because Justice Breyer found the confrontation violation in *Lilly* to be obvious,

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would the obligation of an oath' and cross-examination at trial." *Lilly*, 527 U.S. at 126 (citations omitted).

304. *Id.* at 134. It was this part of the plurality opinion that most alarmed the Chief Justice who wrote in his concurrence that the plurality had completely banned "the government's use of accomplice confessions that inculpate a codefendant." *Id.* at 145 (Rehnquist, C.J., concurring). Of course, as the plurality noted, the Chief Justice's observation was incorrect since the statement would still be admissible if it satisfied the circumstantial guarantees of trustworthiness test. *See id.* at 134-35 n.5.

305. *Id.* at 137.

306. *Id.*

307. *Lilly*, 527 U.S. at 144 (Rehnquist, C.J., concurring).

308. *Id.* at 143 (Scalia, J., concurring) (describing the case as "a paradigmatic Confrontation Clause violation").

309. *Id.* at 140 (Breyer, J., concurring).

310. *Id.* at 142.

311. *Id.* at 141.

312. *Id.* at 142 (citations omitted).

he did not explore the dubious link between hearsay and confrontation. However, he did note "this case does not end the matter. It may leave the question open for another day."[313] That day has arrived.

IV. APPROACHES TO CONFRONTATION CLAUSE ANALYSIS

As has been seen in the previous section, the Court has approached confrontation claims differently depending on whether the claim involved hearsay evidence, *Bruton* testimony, limits on cross-examination, or the use of protective devices. However, at times the Court has interchanged rationales. Therefore, absolute delineation of approaches is impossible, but this section will describe and critique some of the approaches the Court has used to interpret the provisions of the Confrontation Clause.

A. Common-Law Rights Approach

The Supreme Court, and dozens of state courts, frequently have suggested that the Confrontation Clause was intended to bestow those rights enjoyed in England at the time of the passage of the Bill of Rights,[314] a claim often repeated by historians and scholars.[315] This so-called "modern Lord Cobham" interpretation has resulted in restricted views of the Confrontation Clause that suggest its sole purpose is to prohibit trials based upon ex parte affidavits or depositions.[316] That this interpretation is flawed is evident from the Supreme Court's first confrontation case. In *United States v. Reid*[317] Chief Justice Taney wrote that the "rules of evidence in criminal cases [] are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed."[318] While Chief Justice Taney noted Congress's ability to change those rules, so long as the changes did not conflict with the federal Constitution, he found no legislative change that applied to the facts in *Reid*.[319]

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313. *Lilly*, 527 U.S. at 142-43.

314. For example, in *Mattox v. United States*, 156 U.S. 237, 243 (1895), Mr. Justice Brown began on solid ground with the recognition that "[w]e are bound to interpret the Constitution in light of the law as it existed at the time it was adopted." However, he lost historical footing when he proclaimed that the law "secur[es] to every individual [rights] such as he had already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta." *Id.*

315. *See Lilly*, 527 U.S. at 141.

316. *See* Mattox v. United States, 156 U.S. 237, 242 (1895); Kirby v. United States, 174 U.S. 47, 61 (1899); Dowdell v. United States, 221 U.S. 325, 330 (1911).

317. 53 U.S. (12 How.) 361 (1851).

318. *Id.* at 366.

319. The defendant relied upon a Virginia statute passed in 1849 that declared witnesses who were not tried jointly with a defendant were competent to testify. *Id.* at 362. The Court's affirmance was based on two conclusions. First, the Court held that evidence issues in federal criminal trials were determined by the state criminal evidence law in effect at the time of the passage of the Judiciary Act of 1789. *Id.* at 363. Secondly, the Court concluded that "no law of a State made since 1789 [] can affect the mode of proceeding or the rules of evidence in criminal

The *Reid* decision repudiates any notion that the Confrontation Clause must be interpreted as coexistent with English common law. First, the decision was written and endorsed by those with the most direct knowledge of the country's formation, the adoption of constitutional principles, and the reaction to the abuses of English law. Chief Justice Taney carefully pointed out that while the colonists brought with them the cherished right of a trial by jury, they fortified that right in criminal cases in ways that differed greatly from the English practice.[320] The value of the right to trial by jury in criminal cases in England, in Chief Justice Taney's words, "was much impaired by the mode of proceeding."[321] This reference was to the absence of counsel, compulsory process, and presentation of witnesses.[322]

Second, *Reid* expressly noted that the federal Confrontation Clause was intended to embrace the practices that the states had adopted under their own constitutions and for their court systems.[323] Neither the formation of the federal judiciary nor the passage of early federal criminal laws affected the state procedures. In fact, the Judiciary Act of 1789, in some provisions, specifically provided that federal courts were to be governed by state procedures.[324]

Thus, the rights in the Bill of Rights, including the right to confrontation, should be interpreted consistent with state constitutions and the state court procedures in effect prior to the adoption of the Bill of Rights, rather than in accord with English common law or practice. The Court elaborated:

> This oppressive mode of proceeding [in England] had been abolished in England and the Colonies also by different statutes before the declaration of independence. But the memory of the abuses which had been practised under it had not passed away. And the thirteen Colonies who united in the declaration of independence, as soon as they became States, placed in their respective constitutions or fundamental laws, safeguards against the restoration of proceedings which were

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cases. . . ." *Id.* at 366.

320. *Reid*, 53 U.S. (12 How.) at 363-64.

321. *Id.* at 364.

322. *Id.*

323. *Reid*, 53 U.S. (12 How.) at 365. In referring to the Judiciary Act of 1789 and the Crimes Act of 1790, Chief Justice Taney noted that "neither of these acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined." *Id.*

324. The Court stated:

> And as the courts of the United States were in these respects to be governed by the laws of the several States, it would seem necessarily to follow that the same principles were to prevail throughout the trial: and that they were to be governed in like manner, in the ulterior proceedings after the jury was sworn, where there was no law of Congress to the contrary.

Id. at 366.

> so oppressive and odious while they remained in force. It was the people of these thirteen states which formed the Constitution of the United States, and ingrafted on it the provision which secures the trial by jury . . . . And the provisions in the Constitution . . . are substantially the same with those which had been previously adopted in the several States. They were overlooked . . . as originally framed. But as soon as the public attention was called to the fact, that the securities for a fair and impartial trial by jury in criminal cases had not been inserted among the cardinal principles of the new government, they hastened to amend it, and to secure to a party accused of an offense against the United States, the same mode of trial, and the same mode of proceeding, that had been previously established and practised in the courts of the several States.
>
> It was for this purpose that the 5th and 6th amendments were added to the Constitution.[325]

At first glance, it may seem atypical to think about a federal constitutional right defined by state courts. But that is in fact the required approach, albeit an approach that would become largely ignored by the Supreme Court.

The clear language of *Reid* was soon misused in an opinion that would be frequently cited by the Supreme Court in its Confrontation Clause jurisprudence.[326] The Court's rationale in *Mattox v. United States*,[327] rather than the outcome of the case, offers some explanation for the Court's misapplication of existing English common law principles to narrow confrontation rights.

The *Mattox* decision contains several erroneous statements that have hampered Confrontation Clause analysis. The first significant blunder was the Court's discussion of the historical basis for the right of confrontation. In discussing the Court's duty to interpret the Constitution generally, the Court opined:

> We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are

325. *Id.* at 364.
326. *See* Mattox v. United States, 156 U.S. 237 (1895).
327. *Id.*

> subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit.[328]

The inapplicability of this passage to an analysis of American confrontation rights, which were largely nonexistent in England and were intentionally largely expanded in the states, was as obvious as it was harmful. By suggesting that the interpretation of the Confrontation Clause was restricted to the rights colonists possessed as British Subjects, the Court not only misread history, but also severely limited future interpretations of the right of confrontation. Implicit in this restricted view was the notion that the colonists, in forming a new country, could (or at least did) guarantee only those rights formerly guaranteed them or their ancestors in England under the provisions of the Magna Charta.

Such a suggestion was in fact preposterous. The Bill of Rights had been specifically penned in order to assert clearly many rights that were not honored in England.[329] The new country had been formed in large part in reaction to the absence of those rights. And most assuredly, the new country had been formed out of a fear of government, not a desire to create a stronger, more powerful one. The Court's choice of language, suggesting that rights were given to citizens, rather than taken from government,[330] directly contradicted much of the Constitution and history as well.

This idea of a constitutional right that could absorb no more than what American citizens had enjoyed as British subjects was unfortunately one that the Court would draw upon often in justifying governmental action in contradiction of the literal terms of the Confrontation Clause. The *Mattox* decision is cited frequently as authority for restrictions on confrontation.[331]

The second error that crept into interpretations of the Confrontation Clause as a result of misstatements in *Mattox* was as unfortunate as the first. The Court incorrectly assumed and stated that the "primary object" of the Clause was to disallow "depositions or ex parte affidavits, such as were sometimes admitted in civil cases, [from] being used against the prisoner."[332] Undoubtedly this statement by the Court in 1895, repeated almost routinely through the next century, is the basis of the common misjoinder of Sir Walter Raleigh and the American Confrontation Clause.

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328. *Id.* at 243.

329. ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1776-1791, at 3, 12 (1983); *see also* Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEXAS TECH L. REV. 67, 73-74 (1969).

330. *See Mattox*, 156 U.S. at 243-45.

331. *See, e.g.*, California v. Green, 399 U.S. 149, 158 (1970) (citing *Mattox*); Ohio v. Roberts, 448 U.S. 56, 63 (1980) (same); White v. Illinois, 502 U.S. 346, 352 (1992) (same).

332. *Mattox*, 156 U.S. at 242.

B. Language-Based Approach

Most interpretations of the Confrontation Clause assume that the literal language of the Clause is so indefinite as to be undecipherable. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[333] Presumably, the most indefinite term in the short clause is the verb "confront." Based on this asserted indefiniteness, courts have rushed to interpret the term, but have rarely looked at legislative history, perhaps because of its sparseness.

The wholesale acceptance of "confront" as an undecipherable term should not go unchallenged. Most dictionaries define the term simply as "to face; stand or meet face to face."[334] In some, the definition is even simpler: "to bring (a person) face to face (*with*)."[335] In reality, the term is not ambiguous in the least. Perhaps the reason that judges have insisted that it is indefinite is the implication of giving it so simple a meaning. To do so would permit that which no Supreme Court has fathomed possible—if an accused were literally given the right to stand face-to-face with the witnesses against him, hearsay evidence would be excluded in criminal trials.

The Sixth Amendment that James Madison originally submitted to the states in 1789 read as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; and to be informed of the nature and cause of the accusation; to be confronted *with his accusers and with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.[336]

With no real explanation in the historical record, the Committee of Eleven who considered the proposal deleted the language "with his accusers" and left the remaining language "with the witnesses against him."[337] At least three suggested explanations are given.

That the deletion was accidental is unlikely given the amount of time that passed between the submission and passage.[338] If the deletion were intentional,

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333. U.S. CONST. amend. VI.

334. WEBSTER'S NEW WORLD DICTIONARY 308 (College ed. 1960).

335. *Id.*

336. Jeremy A. Blumenthal, *Reading the Text of the Confrontation Clause: "To Be" or "Not to Be?"*, U. PA. J. CONST. L. 722, 738 (2001) (citing 1 ANNALS OF CONG. 452 (Joseph Gales ed., 1789)).

337. *Id.* at 738-39.

338. More than two and one-half years passed between submission on June 8, 1789 and adoption on December 15,1791 (describing practices leading up to passage of confrontation

perhaps it was to simplify the language based on a belief that the phrases were redundant. Alternatively, an intentional deletion might have been prompted by just the opposite concern, specifically, a desire to allow confrontation of witnesses, but not of accusers. This is unlikely since in England, accusers, because of the essential nature of their information, had to be sworn before testifying, but witnesses did not.[339] If this were the intended distinction, then the right of confrontation would apply only to witnesses, with less crucial information, but not to accusers with the essential, incriminating information.

If one considers the deleted language in light of the language of state constitutions in existence when the Bill of Rights was proposed, the simplification explanation seems the most likely. Virginia, Delaware, and North Carolina used the terms "witnesses" and "accusers," while New Hampshire, Massachusetts, Vermont, Maryland, and Pennsylvania used the simpler version.[340] No case law suggests that the right to confront was different, for example, in Virginia than it was in Pennsylvania. The drafters most likely decided that the shorter, simpler version conveyed exactly the same rights as the longer, more cumbersome one.

Some states vested their citizens with a more literal confrontation right based on more precise language in their state constitutions. For example, in Montana the state supreme court analyzed Montana's confrontation clause to provide broader rights than those interpreted to exist by virtue of the federal provision.[341] Other courts, despite identical language in the state constitutions, have made more subtle differentiations.[342]

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clauses in the Federal and state Constitutions).

339. *See generally* Larkin, *supra* note 3, at 72-78.

340. *See* Larkin, *supra* note 3, at 75-76.

341. For example, Article II, Section 24 of the Montana Constitution provides that:

> In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

MONT. CONST. art. II, § 24. Based on the different language, the Montana Supreme Court has consistently held that:

> Unlike its federal counterpart, the text of Montana's Confrontation Clause specifically guarantees the accused's right "to meet the witnesses against him face to face." As we [have] noted the 1972 Montana Constitution and subsequent cases analyzing the Confrontation Clause have made it abundantly clear that full cross-examination is a critical aspect of the right of confrontation." Moreover, we have recognized that the rights contained in the Declaration of Rights, which include the rights guaranteed to an accused person in a criminal prosecution, are fundamental rights.

State v. Clark, 964 P.2d 766, 771 (Mont. 1998) (quoting State v. Young, 815 P.2d 590, 592 (Mont. 1991)).

342. The Tennessee Constitution provides:

Another language-based interpretation is Justice Scalia's, which is more fully discussed in Part IV. To Justice Scalia, a "witness," for purposes of the Sixth Amendment, is one who gives testimony at trial.[343] Thus, the right to confront the witnesses means only that the accused has the right to confront those whom the state chooses to call to testify at the trial of the case.

Justice Scalia's approach depends on a rigid interpretation of the clause "witnesses against him."[344] This approach selectively chooses a definition of the term "witness," which is neither favored nor sensible. The interpretation of the Confrontation Clause that results from this limited definition of the word "witness" is practically indefensible. The interpretation empowers the State to void the right entirely by proving its case through hearsay exceptions. The interpretation must be coupled with an historic approach, the exclusion of depositions and ex parte affidavits as proof, to have any validity. While this approach asserts a language-based foundation, its supporters concede the Clause must also exclude proof that otherwise would not be forbidden under the literal language of the Clause.

The need to supplement the literal language approach was exemplified by the government in the Court's protective devices cases. After the Court declined the government's offer to construe the Clause as only prohibiting ex parte affidavits, the government suggested a supplemented approach in its brief in *White v. Illinois*.[345] The brief suggested that the Court adopt Justice Scalia's language approach, with his definition of witness, but that the Court supplement that approach with the prohibition of ex parte affidavits.[346] Thus, the federal government, as amicus curiae in the *White* case, suggested that the Clause "apply only to those persons who provide in-court testimony or the functional equivalent, such as affidavits, depositions, or confessions that are made in contemplation of legal proceedings."[347]

The rationale behind this approach is obscure. Certainly, this rationale is not based upon history or precedent. It is not supported by the language of the clause. Perhaps, it is best explained as an advocate's attempt to find the most

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> That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

TENN. CONST. art. 1, § 9. The Tennessee Supreme Court has held that "[t]he 'face-to-face' language found in the Tennessee Constitution . . . impose[s] a higher right than that found in the federal constitution." State v. Deuter, 839 S.W.2d 391, 395 (Tenn. 1992).

343. *See* Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

344. U.S. CONST. amend. VI.

345. *See* White v. Illinois, 502 U.S. 346, 352 (1992) (describing the position taken in the government's brief).

346. *Id.* at 352-53; *see* Brief for Respondent, *White*, 1991 WL 527595.

347. *White*, 502 U.S. at 364 (Thomas, J., concurring).

restrictive approach that would garner the requisite five votes from the Court. The government had little hope of getting the Court to back away from the notion that the Clause prohibited ex parte affidavits. History and precedent support an interpretation of the Clause that excludes ex parte affidavits. Of the remaining alternatives, the most palatable to the government—the one that allows the most unconfronted evidence at trial—was Justice Scalia's approach, particularly in light of *Craig*. In effect, had the government been successful in persuading the Court to adopt the approach it suggested in *White,* only ex parte affidavits would actually be excluded under the Confrontation Clause. Witnesses could avoid becoming witnesses subject to actual confrontation, under Justice Scalia's definition of "witness," by asserting the traumatic effect of being forced to give testimony in the presence of the defendant.

C. Fundamental, Interdependent Rights Approach

In the very first case in which the Supreme Court interpreted the Confrontation Clause, the Court viewed confrontation rights as a bundle of interdependent rights necessary for accomplishing a fair criminal trial. In the 1851 *Reid* decision, the Supreme Court recognized the connection between the right to a trial by jury and other constitutional rights, including the right to confrontation. A right to a jury trial absent those other guarantees was an "oppressive mode of proceeding."[348] Thus, the rights bundled in the Fifth and Sixth Amendments, including the right to trial by jury, counsel, confrontation, and compulsory process were viewed, at least temporarily, as interdependent; restricting or interfering with one compromised all of the others.

Similarly, in *Kirby v. United States,*[349] the Court celebrated the importance of the confrontation provision, deeming it "[o]ne of the fundamental guarantees of life and liberty."[350] Seemingly important to the *Kirby* Court was the interplay between the "fundamental" confrontation right and the adversarial nature of the American criminal justice system.[351] Because Kirby was denied his right to confrontation, the presumption of innocence, which "has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt" was of "no consequence."[352]

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348. United States v. Reid, 53 U.S. (12 How.) 361, 364 (1851).

349. 174 U.S. 47 (1899).

350. *Id.* at 55.

> [A] fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offence, . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."

Id.

351. *See id.*

352. *Id.*

This interdependent rights approach was not the creation of Chief Justice Taney, who authored the *Reid* decision, nor of the *Reid* or *Kirby* Court. Four decades earlier, another Chief Justice had interpreted confrontation, counsel, compulsory process, and jury trial as a bundle of interdependent rights. Fulfilling his responsibilities as a circuit justice,[353] Chief Justice John Marshall presided over the trial of Aaron Burr in the Virginia district court in the early 1800s.[354] At trial, the prosecution asked a man named Neale about conversations he had with Herman Blannerhasset that implicated Burr.[355] The prosecution argued that the evidence was admissible since Blannerhasset and Burr were co-conspirators, thereby making Blannerhasset's declarations admissible evidence against Burr.[356]

Chief Justice Marshall, sitting as trial judge, began his ruling on the evidence with the following pronouncement:

> The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice. . . . I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty, and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.[357]

In the end, Marshall denied the use of the hearsay evidence stating repeatedly that "the declarations of third persons not forming a part of the transaction, and not made in the presence of the accused, cannot be received in evidence in this case."[358]

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353. When the federal judiciary was created by the Judiciary Act of 1789, six justices were named to serve as Justices of the Supreme Court, but also to travel the country and sit as trial and appellate judges as well. Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 754 (2001) (citations omitted). Because of the hardships of the tasks, Congress passed the Judiciary Act of 1801 which ended the circuit-riding responsibilities of the Justices and created circuit judge positions. *Id.* A lame-duck Congress filled the circuit judge positions with federalist judges, which displeased newly elected president Thomas Jefferson. *Id.* at 754-55. When Jefferson questioned the appointment of sixteen new judges, members of Congress introduced legislation in 1802 to repeal the Judiciary Act of 1801. *Id.* at 755. Despite a vigorous debate over the constitutionality of the repealing legislation, it passed, restoring the Justices to their circuit-riding responsibilities and eliminating the sixteen new federal judgeships. *Id.*

354. United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807).

355. *Id.* at 193.

356. *Id.*

357. *Id.* at 193.

358. *Id.* at 198, 201.

As was true forty-four years later when Chief Justice Taney first wrote for the Supreme Court on the topic of the Confrontation Clause, what was important about Chief Justice Marshall's decision in *Burr* was not the outcome but the rationale. Marshall, writing less than two decades after the adoption of the Bill of Rights, recognized that confrontation was essential to the administration of justice and that undermining the right endangered the very core values that the Framers had intended to protect, namely, life, liberty, and property.[359]

The modern Supreme Court embraced an interdependent rights interpretation in a case in which it applied the Sixth Amendment's Confrontation Clause to the states.[360] In *Pointer v. Texas*[361] the Court reiterated that confrontation was a "fundamental right essential to a fair trial in a criminal prosecution."[362] In a preview of what later became the more favored approach, a functional analysis of the Confrontation Clause, the Court added that the "the right of cross examination is *included* in [that] right."[363]

359. *Id.* at 193.

360. Pointer v. Texas, 380 U.S. 400 (1965) (holding that the Fourteenth Amendment's Due Process Clause incorporated the rights of the Sixth Amendment as applicable against the states). Only two years before *Pointer,* in *Gideon v. Wainwright,* 372 U.S. 335, 342 (1963), the Court held that "a provision of the Bill of Rights, which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment."

361. 380 U.S. 400 (1965).

362. *Id.* at 404.

363. *Id.* (emphasis added).

The Court in *Pointer* relied on five previous decisions[364] to connect the "right of confrontation and cross-examination" and to characterize them as "essential and fundamental requirement[s] for the kind of fair trial, which is this country's constitutional goal."[365] The Court linked confrontation and cross-examination rights to the right to a trial by jury as had the *Reid* Court. In support of the linkage, the Court cited *Turner v. Louisiana,*[366] a cross-

364. Kirby v. United States, 174 U.S. 47 (1899); Alford v. United States, 282 U.S. 687, 691 (1931); *In re* Oliver, 333 U.S. 257 (1948); Greene v. McElroy, 360 U.S. 474 (1959); Turner v. Louisiana, 379 U.S. 466 (1965).

In *Alford* defense counsel was denied the opportunity to cross-examine a government witness as to his present address on the grounds of relevance. 282 U.S. at 689-90. Counsel asserted his belief that the witness was in federal custody and that this information was relevant to bias or prejudice. In overturning the decision, the Court stated bluntly that "[c]ross-examination of a witness is a matter of right." 282 U.S. at 691. The Supreme Court discounted the trial judge's rationale that he had a duty to protect the witness. "[N]o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked." *Id.* at 694.

Oliver was a federal habeas case arising out of a state court's order finding Oliver in contempt and sentencing him to jail as a result of his testimony at a "One-Man Grand Jury" proceeding allowed by Michigan law. 333 U.S. at 260. The judge, based upon Oliver's testimony and the testimony of other witnesses given in secret to the judge, concluded that Oliver had been untruthful. The Supreme Court found that this procedure violated due process. *Id.* at 273.

In *Greene* petitioner challenged on due process grounds a governmental policy that kept classified information confidential. 379 U.S. at 475-76. In this non-criminal setting, the Court uttered some of its most firm comments about the importance of cross-examination.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show what is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice . . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . .

Greene, 360 U.S. at 496 (citing Mattox v. United States, 156 U.S. 237 (1895); Kirby v. United States, 174 U.S. 47 (1899); Motes v. United States, 178 U.S. 458 (1900) (finding Confrontation Clause violation when preliminary hearing testimony of codefendant used by government although the codefendant was in government custody and could have been brought to trial to testify)); and *In re* Oliver, 333 U.S. 257 (1948). The "ancient roots" to which the Court referred were those of Paul and Festus told in *Acts* 25:16. *Greene*, 360 U.S. at 496 n.25.

365. 380 U.S. at 405 (citing *In re* Oliver, 333 U.S. 257 (1948)). In *Oliver*, the Court described the rights as "basic in our system of jurisprudence." 333 U.S. at 273.

366. 379 U.S. 466 (1965). The *Turner* case involved a claim that due process was violated by sequestering a jury under the command of two deputies, the key witnesses against the defendant who was on trial for a capital offense. *Id.* at 467-68. The Court noted that "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution." *Id.* at 473.

examination case of the same term.[367] *Turner* held that "trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."[368]

In the confrontation case that followed *Pointer*, the Court adhered to the interdependent rights approach. In *Barber v. Page*,[369] decided just three years after *Pointer*, the Court again recognized the significance of confrontation and, arguably, disposed of the earlier idea that the purpose of the Confrontation Clause was only to protect against convictions based on ex parte affidavits. Justice Marshall, writing for an unanimous court, quoted from *Pointer*:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is[370] an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.[371]

Despite this interdependent rights approach used in *Barber* and *Pointer*, the Court laid the groundwork for what emerged as a more favored view of the Confrontation Clause, the functional approach.[372] In *Pointer*, the Court reminded the parties that the Confrontation Clause had exceptions, but that those exceptions were limited to situations in which a witness was not available to testify.[373]

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367. 380 U.S. at 405.

368. *Pointer*, 380 U.S. at 405 (quoting *Turner*, 379 U.S. at 472-73).

369. 390 U.S. 719 (1968).

370. Even the use of the verb "is" suggests an inextricable linkage between confrontation and cross-examination.

371. *Barber*, 390 U.S. at 721 (quoting *Pointer*, 380 U.S. at 406).

372. *See supra* text accompanying notes 202-42.

373. 380 U.S. at 407. The Court cited *Mattox* as a case that allowed the admission of dying declarations and previous testimony of a deceased witness. *Id. Mattox*, of course, only involved the latter. *See supra* notes 95-115 and accompanying text. However, what is more telling is the Court's attachment to the signal *compare* to the citation from *Motes v. United States*, 178 U.S. 458 (1900). *Id.* The *Motes* Court found a Confrontation Clause violation when former testimony of a witness and codefendant was admitted notwithstanding that his "absence was manifestly due to the negligence of the officers of the Government." 178 U.S. at 471. The discussion focused upon the various reasons for a witness's absence. *Id.* at 473-74. When the *Motes* citation is compared, as directed, with the statement in *Pointer* that precedes it ("The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." 380 U.S. at 407), the obvious conclusion is that "situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses," 380 U.S. at 407, depend upon whether cross-examination had occurred and the reason for the witness's absence.

D. *Functional Approach*

1. *The Clause's Function*

Just as *Pointer* had intimated, the Court began to analyze the Confrontation Clause in terms of whether the function of the right had been satisfied. This analysis necessarily depended upon the chosen view of the Clause's history. The more restricted alternative views the clause's function as it was misstated in *Mattox*—to prohibit convictions based upon ex parte affidavits and depositions. Under this functional approach, confrontation rights are violated only when evidence is offered via depositions or ex parte affidavits. Recently, in *Lilly*, a plurality suggested that even under a restrictive functional approach, accomplice confessions (which are notably neither ex parte affidavits or depositions) should ordinarily not be admissible.[374]

A more generous functional approach views the Clause as essential to the right to a trial by jury, the presumption of innocence, and the burden of proof. Under this approach, the function of confrontation is to assure that witnesses testify in the presence of the accused, face-to-face with the jury, subject to cross-examination.[375] This view of confrontation is based on several premises. One is that witnesses who must testify under oath in the presence of the accused and the jury in a formal setting are more likely to be truthful, because they are subject to the penalties of perjury and are made aware of the importance of their testimony. A second premise is that the defense, through cross-examination, has the opportunity to reveal inconsistencies and implausibilities in the testimony and can demonstrate bias or motive of the witnesses. The jury, whose ultimate job is to determine the facts of the case, may see the witnesses during testimony and cross-examination and observe their demeanor and attitude, all of which aids the jury in determining credibility. Under this functional approach, confrontation entitles the accused to cross-examine the witness in the presence of the jury.

Juxtaposed between these two approaches is a third approach that asserts the Confrontation Clause is intended to assure the right to cross-examination. If the defense cross-examined, or had an opportunity to cross-examine, the witness at any time, presumably in a formal setting, confrontation has been satisfied. Cross-examination need not occur in the presence of the jury, and it need not have the ability to be. Opportunity to cross-examine is the key. This has become a favored approach in the Supreme Court's modern Confrontation Clause analysis.

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374. They may be admitted if they can satisfy the circumstantial guarantees of trustworthiness test. *See supra* notes 296-306 and accompanying text.

375. *See generally* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 613 (1992) ("[T]he failure to hold statements elicited by the prosecution to a higher standard of admissibility defeats the objective of protecting the individual against the power of the government and interferes with the jury's historical function of guarding our civil liberties.").

To accept the proposition that a previous cross-examination somehow satisfies confrontation at trial ignores the realities of trial practice. When a jury is read a previous witness examination, the entire context of the examination is absent. Factors such as the witness's tone of voice, quickness of response, and nonverbal cues are replaced with the often monotonous recitation of counsel. In addition, the jury is deprived of observing the witness under cross-examination. Does the witness maintain eye contact with the cross-examiner? Does the witness fidget, sweat, or breathe irregularly? The entire exchange between cross-examiner and witness is supplanted with a cold, dry transcript.

2. *Refinement of the Functional Approach - Function Once Removed, Reliability Plus Constitutional Unavailability*

Once the Court accepted that the function of the Confrontation Clause was to assure the right of cross-examination, the functional approach lent itself to further refinement. If the function of the Clause is to assure the right of cross-examination, then confrontation is satisfied if the function of cross-examination is satisfied. The function of cross-examination is to test the reliability of the evidence.[376] From almost the beginning of its use of this new functional approach, the Court ignored all but the verbal aspects of cross-examination. Thus, the Court concluded that any cross-examination, or any opportunity for cross-examination, satisfied the Confrontation Clause. Under this approach, the Court is not concerned about the timing or nature of cross-examination. Any cross-examination is sufficient, regardless of whether it occurred in the presence of the jury or at a preliminary hearing far in advance of trial. In the Court's view, only a complete denial of cross-examination violates the Confrontation Clause.

The adoption of this approach led the Court down a slippery slope that it had previously avoided. For decades the Court had refused to equate the Confrontation Clause with the rules of evidence. Thus, a confrontation challenge and a hearsay challenge required different analyses. A determination that evidence was admissible under hearsay rules did not necessarily mean that the evidence satisfied the Confrontation Clause. Separate inquiries were required.

Once the Court shifted from a functional approach that focused on confrontation to a functional approach that focused on cross-examination, this often-repeated observation began to erode. The Court reasoned that both cross-examination and the exclusion of hearsay evidence served the same purpose: to assure reliable evidence. Yet, the hearsay rule yielded many exceptions based on the inherent reliability of certain hearsay. If evidence was inherently reliable, the need to test its reliability by cross-examination was reduced, if not

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376. Cross-examination has been referred to, even by the United States Supreme Court, as the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970) (citation omitted).

totally removed. Similarly, if evidence was inherently reliable, an inquiry into whether a denial of cross-examination resulted in the admission of unreliable evidence was superfluous.

The Court's frequent admonishment that satisfaction of the hearsay rule did not necessarily satisfy the Confrontation Clause was no longer accurate. Instead, in the vast majority of cases, a court that utilized the equation "Hearsay Exception = Confrontation Satisfaction" would rule correctly.

However, some of the Court's prior decisions had seemingly barred a pure reliability-based functional approach. The bar was provided by the Court's discussion of the witness's unavailability. In *Barber* and in *Mancusi v. Stubbs* the Court required that the hearsay evidence be necessary before it could substitute for in-court testimony. In both of those cases, the prior testimony was subjected to cross-examination in the presence of the jury at a prior trial.[377] Similarly, in both, the use of prior testimony was necessitated by the current unavailability of the witness. In *Barber*, because the State had not made a good-faith effort to procure the witness, the prior, cross-examined testimony was not allowed.[378] But in *Mancusi* the witness was living abroad and the State could not compel the witness's return to the United States.[379] Under those circumstances, the presumptively reliable former testimony was admitted.[380]

An objective reading of *Roberts*, the case following *Barber* and *Mancusi*, suggests that the Court had devised a two-prong test for evaluating whether otherwise admissible hearsay evidence was admissible in the face of a confrontation challenge.[381] The first prong excluded hearsay evidence that was not countenanced with trustworthiness. Even trustworthy hearsay would be excluded if the use of the evidence was not necessary.[382] The second prong, necessity, was as an equally mandatory prerequisite for admission. "[T]he Sixth Amendment establishes 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."[383]

The majority's assertion that necessity, referred to as unavailability, was a *constitutional requirement* was not ambiguous. It was direct. Furthermore, it was the basis of the dissent.[384] Before out-of-court statements could be

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377. *See* Barber v. Page, 390 U.S. 719, 720 (1986); Mancusi v. Stubbs, 408 U.S. 204, 213-14 (1972).

378. *See* 390 U.S. at 725.

379. 408 U.S at 209.

380. *Id.* at 216.

381. *See* 448 U.S. 56, 65 (1980).

382. *Id.*

383. *Id.* (citations omitted).

384. *See id.* at 77-82. Justice Brennan wrote the dissenting opinion with which Justices Stevens and Marshall joined. The relatively short opinion is based on the dissenter's disagreement with the factual conclusions reached by the majority on the issue of unavailability. "As the Court recognizes, however, the Constitution imposes the threshold requirement that the prosecution must demonstrate the unavailability of the witness whose prerecorded testimony it wishes to use against the defendant. Because I cannot agree that the State has met its burden of

introduced against a defendant at trial, the State was required to satisfy both the constitutional necessity requirement, by establishing unavailability, and the trustworthiness requirement, by establishing the inherent reliability of the out-of-court statement.[385] While there remained cohesive arguments about whether this test satisfied the purposes of confrontation, the two-prong test guaranteed that the exceptional case would be one in which a defendant was convicted based upon out-of-court testimony. For that to occur, the prosecution had to satisfy a threshold requirement of necessity.

3. *Further Refinement of the Functional Approach—Reliability Alone*

The functional approach based on reliability and necessity was quickly replaced with an approach based ostensibly on reliability alone. In *United States v. Inadi*[386] the majority of the Court asserted that "*Roberts* . . . does not stand for such a wholesale revision of the law of evidence [that would require the government to establish the unavailability of the witness], nor does it support such a broad interpretation of the Confrontation Clause."[387] Reasoning that the Court only decided the case before it and did not offer answers to questions not posed by the case, the Court concluded that the necessity rule discussed in *Roberts* applied only to prior testimony cases and did not 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."[388] Thus, the Constitution did not require a showing of unavailability prior to the admission of a co-conspirator's statements against an accused criminal.

While the *Inadi* majority took care to confine its decision to the facts before it, that is, whether unavailability was a prerequisite to the introduction of co-conspirator's statements, the Court eventually asserted a more universal rule dispensing with unavailability. In *White v. Illinois*[389] the Supreme Court analyzed both aspects of the Confrontation Clause that it had addressed in *Roberts*. As to the first, constitutional necessity, the Court said what it could have said in *Inadi*—the Constitution requires the State to establish unavailability only when the out-of-court statements were made in the course of a judicial proceeding.[390]

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establishing this predicate, I dissent." *Id.* at 77 (Brennan, J., dissenting). Justice Brennan went on to make it clear that because he disagreed with the majority's factual finding on the *threshold* issue, he was not reaching the issue of whether the testimony met the reliability requirement. *Id.* at 77 n.1.

385. *See id.* at 65.

386. 475 U.S. 387 (1986).

387. *Id.* at 392.

388. *Id.* at 394.

389. 502 U.S. 346 (1992).

390. *Id.* at 354 (citation omitted).

After *White* the test for determining whether hearsay statements are admissible notwithstanding a Confrontation Clause challenge is, in essence, a functional test based exclusively on reliability. Reliability can, in turn, be established in either of two ways. If the out-of-court statement fits under a firmly rooted hearsay exception, it satisfies the indicia of reliability requirement, by definition, and is admissible notwithstanding a Confrontation Clause challenge.[391] This is because of the "weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."[392] The firmly rooted hearsay standard is a strict one. Statements "whose conditions have proved over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath' and cross-examination at a trial" are firmly rooted.[393]

If the statement does not fall under a firmly rooted hearsay exception, then the statement is admissible, despite confrontation objections, only if it bears "particularized guarantees of trustworthiness."[394] Again, the test for compliance is strict:

> When a court can be confident—as in the context of hearsay falling within a firmly rooted exception—that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility," the Sixth Amendment's residual "trustworthiness" test allows the admission of the declarant's statements.[395]

Only when the statement is prior testimony from a judicial proceeding is the State required to establish constitutional necessity.[396] Constitutional necessity is established by demonstrating the unavailability of the declarant.[397] Based on undisturbed prior rulings, that test seemingly turns on the good-faith efforts of the state to produce the declarant at trial. Unavailability had been discussed in the context of lost witnesses, dead witnesses, Fifth-Amendment asserting witnesses, forgetful witnesses, witnesses outside the court's jurisdiction, screened witnesses, and uncalled witnesses.[398] Some dicta suggests

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391. *Id.* at 356.

392. Idaho v. Wright, 497 U.S. 805, 817 (1990).

393. Lilly v. Virginia, 527 U.S. 116, 126 (1999) (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

394. *Id.* at 125 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

395. *Id.* at 136 (quoting *Wright*, 497 U.S. at 820).

396. White v. Illinois, 502 U.S. 346, 354 (1992).

397. *See id.*

398. *See id.* at 350 (uncalled witnesses); Coy v. Iowa, 487 U.S. 1012 (1988) (screened witnesses); Delaware v. Fensterer, 474 U.S. 15 (1985) (forgetful witnesses); Ohio v. Roberts, 448 U.S. 56 (1980) (lost witnesses); Mancusi v. Stubbs, 408 U.S. 204 (1972) (witnesses outside the court's jurisdiction); Douglas v. Alabama, 380 U.S. 415 (1965) (Fifth Amendment-claiming witnesses); Mattox v. United States, 156 U.S. 237 (1895) (dead witnesses).

that constitutional necessity may yield to a benefits-burden or utility test, but it seems at least certain that the State must make a good-faith attempt to make the witness available.[399] Although the Court has flirted with the definition of unavailability set forth in widely-accepted evidence rules, the Court has never specifically equated constitutional necessity and unavailability with unavailability as defined in Rule 804 of the Federal Rules of Evidence and its state counterparts.[400] However, there is little reason to suspect that the same definitions would not apply, especially since the Court has in effect equated the constitutional right with the rule of evidence.

When the State claims that the evidence is admissible because of particularized guarantees of trustworthiness, the judge, in effect, determines what the jury would determine were the witness present to testify. The judge decides, in essence, whether cross-examination would do any good. The problem with this approach is obvious. Judges are trained neutrals, not trained advocates. Although they may have tried cases before taking the bench, they have been encouraged, indeed required, to set aside those skills for the more applicable ones of neutral decision making. The evidentiary ruling they must make requires not only an advocate's viewpoint, but also a viewpoint from the advocate who has prepared the case and knows the potential areas for cross-examination of the particular witness. It also requires an understanding of the trial strategy in the particular case.

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399. *See* United States v. Inadi, 475 U.S. 387, 396 (1986) (benefits-burden analysis); Ohio v. Roberts, 448 U.S. 56, 76-77 (1980) (good-faith showing of unavailability).

400. Federal Rule 804 sets forth the following definition of unavailability:

> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

FED. R. EVID. 804.

E. Particular Justices' Approaches

Most of the Justices who have written about confrontation rights weave together pieces of the Court's prior opinions, sometimes haphazardly, in order to justify their decisions. There are three noteworthy exceptions: Justice Harlan, Justice Scalia, and to a lesser extent, Justice Thomas.

1. The Two Approaches of Justice Harlan

Justice Harlan, who was a member of the Court when the Court was deciding mostly hearsay cases, expressed two approaches to the Confrontation Clause. His first view was expressed in his concurring opinion in *California v. Green*.[401] Justice Harlan later repudiated this view in his concurring opinion in *Dutton v. Evans*.[402]

In *Green* Justice Harlan reached two conclusions that are significant to Confrontation Clause jurisprudence. First, based on a void historical record, Justice Harlan concluded that the "Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial."[403] Second, even if the Sixth Amendment were not broad enough to support that conclusion, the Fourteenth Amendment would be.[404]

Justice Harlan's view was prompted by a combination of language, history, unsupported theories expounded by evidence scholars, and fairness. For example, he noted that the language of the Clause must be read to confer not only the right to question witnesses who appear and give evidence at trial, but also the right to question "extrajudicial" declarants since they are "no less" witnesses.[405] Thus, Justice Harlan concluded that:

> From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses. . . . [H]aving established a broad principle, it is . . . likely that the Framers anticipated it would be supplemented, as a matter of judge-made common law, by prevailing rules of evidence.[406]

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401. California v. Green, 399 U.S. 149, 172 (1970) (Harlan, J., concurring).

402. 400 U.S. 74, 94 (1970) (Harlan, J., concurring).

403. *Green*, 399 U.S. at 174 (Harlan, J., concurring).

404. *See id.* This portion of Justice Harlan's concurring opinion would be the portion selected by Justice Scalia in *Coy* two decades later to form the basis of his Confrontation Clause approach. However, a close look at Justice Harlan's concurring opinion in *Green* discloses that Justice Scalia was selective in choosing and applying Justice Harlan's thoughts.

405. *Id.* at 175.

406. *Id.* at 179. Justice Harlan offers as support for his conclusion a short debate that took place during 1789-90 in Congress on the compulsory process portion of the Sixth Amendment.

Justice Harlan challenged what he believed to be the mistaken, restrictive reading of the Confrontation Clause to prohibit only the use of ex parte affidavits and depositions.[407] Introduction of ex parte affidavits and depositions was no more, and perhaps less, problematic for the accused than was the introduction of hearsay.[408] Thus, Justice Harlan concluded that the Confrontation Clause could best be reconciled with history, language, and precedent by confining the confrontation guarantee to "an availability rule, one that requires the production of a witness when he is available to testify."[409]

> What I would hold binding on the States as a matter of due process is what I also deem the correct meaning of the Sixth Amendment's Confrontation Clause—that a State may not in a criminal case use hearsay when the declarant is available. There is no reason in fairness why a State should not, as long as it retains a traditional adversarial trial, produce a witness and afford the accused an opportunity to cross-examine him when he can be made available. That this principle is an essential element of fairness is attested to not only by precedent, but also by the traditional and present exceptions to the hearsay rule . . . . Furthermore it accommodates the interest of the State in making a case, yet recognizes the obligation to accord the accused the fullest opportunity to present his best defense. For those rare cases where a conviction occurs after a trial where no credible evidence could be said to justify the result, there remains the broader due process requirement that a conviction cannot be founded on no evidence.[410]

Justice Harlan candidly changed his position on the Confrontation Clause less than a year later in *Dutton v. Evans*.[411] Justice Harlan began his concurring opinion by recognizing the difference between confrontation rights and hearsay rules.[412] He continued to adhere to his view, set forth in *Green*, that they must

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Id. at 177. During the debate, the movant was asked how far the State must go in providing compulsory process, as, for example, when a defendant requests a continuance until a witness could be produced. The reported answer was that "in securing him the right of compulsory process, *the Government did all it could; the remainder must lie in the discretion of the court.*" *Id.* (quoting 1 ANNALS OF CONG. 756). Another member of Congress answered that the judicial system would be required to supervise the rule. *Id.*

407. 399 U.S. at 182 (Harlan, J., concurring).

408. *Id.*

409. *Id.*

410. *Id.* at 186-87 (citations omitted). Justice Harlan also utilized the due process/unnecessary suggestiveness line of cases to support his conclusion. *Id.* at n.20 (citing Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968)).

411. 400 U.S. 74, 94 (1970) (Harlan, J., concurring).

412. *Id.* at 94 (Harlan, J., concurring).

be treated distinctly. Nonetheless, he accepted Wigmore's view of confrontation as the "correct view":[413]

> "The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—*i.e.*, a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially."
>
> The conversion of a clause intended to regulate trial procedure into a threat to much of the existing law of evidence and to future developments in that field is not an unnatural shift, for the paradigmatic evil the Confrontation Clause was aimed at—trial by affidavit—can be viewed almost equally well as a gross violation of the rule against hearsay and as the giving of evidence by the affiant out of the presence of the accused and not subject to cross-examination by him. But however natural the shift may be, once made it carries the seeds of great mischief for enlightened development in the law of evidence.[414]

In essence, Justice Harlan accepted a benefits-burden approach, arguably expressing greater concern for the continued development of evidence law than for protecting a constitutional guarantee. Justice Harlan accepted these limitations, in part, because he could find no "compelling linguistic or historical evidence" to suggest otherwise.[415] To his credit, Justice Harlan did not pretend that his new approach, nor the approach of the Court, was consistent with the Court's precedent. However, he was satisfied that his approach was not "necessarily inconsistent with the results that have been reached."[416]

2. *Justice Scalia's Approach, Parts I and II*

Justice Scalia previewed his unique interpretation of the Confrontation Clause in the Court's first protective devices case. To Justice Scalia, *Coy v. Iowa*[417] presented the pure confrontation issue that arose when an accused was deprived of rights with respect to witnesses actually testifying at trial. The

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413. *Id.*

414. *Id.* at 94 (quoting 5 J. WIGMORE, EVIDENCE § 1397, at 131 (3d ed. 1940)).

415. *Id.* at 95.

416. *Id.* at 97. Justice Harlan undertook to demonstrate consistency in the Court's prior confrontation decisions. When he reached the *Kirby* decision, unable to argue consistency in result, he concluded simply that while correctly decided, the legal theory used by the *Kirby* Court had simply been "wrong." 400 U.S. at 99.

417. 487 U.S. 1012 (1988).

explicit guarantee of the Confrontation Clause was the right of the defendant to "a face-to-face meeting with witnesses appearing before the trier of fact."[418] Relying on one of the Court's earliest Confrontation Clause decisions, Justice Scalia explained:

> [A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.[419]

The State had as much as conceded the significance of face-to-face confrontation, the majority held, by relying upon its traumatic effect as a reason for dispensing with it in the case at bar.[420] Since the very purpose of the screen used by the Iowa trial court was to allow the witnesses against the accused to avoid seeing the accused, Justice Scalia, writing for the Court, found it "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[421]

Justice Scalia distinguished the Court's prior decision by delineating "explicit" and "implicit" confrontation rights. The case before the Court involved the explicit right to confrontation—it derived from the "irreducible literal meaning of the Clause" and was an absolute right.[422] The other cases involved rights that flowed from the explicit right to confrontation. These were implicit rights such as cross-examination. They were not absolute rights but could be compromised in the event of necessity.[423]

Within a year, Justice Scalia's implicit-explicit rights test would itself be tested in *Maryland v. Craig*.[424] The protective device in *Craig*, like the one in *Coy*, interfered specifically with the "explicit" right that Justice Scalia had found in the "irreducible literal meaning" of the Confrontation Clause.[425] Dissenting vigorously from the majority's finding of a state interest sufficient to dispense with physical confrontation, Justice Scalia scolded the majority for

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418. *Id.* at 1016.

419. *Id.* at 1017 (quoting Kirby v. United States, 174 U.S. 47, 55 (1899)).

420. *See id.* at 1020.

421. *Coy*, 487 U.S. at 1020.

422. *Id.* at 1021.

423. *Id.* at 1020-21. When the opinion addresses whether an exception might exist, it suggests that exceptions would depend upon the "showing of necessity," which was not present in the current case in which the Iowa legislature had imposed a "presumption of trauma." *Id.* at 1021. The "necessity" language hails from the *Roberts* decision, more proof that the Court's refinement of *Roberts* in *Inadi* and *White* was the product of revision, not restatement.

424. 497 U.S. 836 (1990).

425. *See Coy*, 487 U.S. at 1021; *Craig*, 497 U.S. at 840.

compromising a right that was "unqualifiedly guaranteed."[426] Justice Scalia stated:

> Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. . . .
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> . . . .
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> . . . Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the "'right to meet face to face all those who appear and give evidence at trial.'"[427]

Justice Scalia's majority opinion in *Coy* and his dissenting opinion in *Craig* clearly establish a viewpoint of the Confrontation Clause neither suggested nor dictated by the Court's previous decisions. For Justice Scalia, the Confrontation Clause grants one explicit, absolute right—the right to confront face-to-face the witnesses that actually appear and testify at the trial. He bases his opinion on the "literal, unavoidable text"[428] of the Sixth Amendment, selective historical anecdotes,[429] a Latin translation,[430] and Supreme Court precedent: "[this Court has] never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[431]

Justice Scalia relies repeatedly on two Supreme Court cases: *Kentucky v. Stincer*[432] and *Kirby v. United States*.[433] Both the decisions and the historical

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426. *Craig*, 497 U.S. at 863 (Scalia, J., dissenting).

427. *Id.* at 860-62 (Scalia, J., dissenting) (citations omitted).

428. *Id.* at 863 (Scalia, J., dissenting).

429. Justice Scalia in *Coy* illustrates his reading of the clause with the words of Roman Governor Festus in regard to his prisoner, Paul: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges;" and William Shakespeare: "Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ." 487 U.S. at 1015-16 (quoting *Acts* 25:16; WILLIAM SHAKESPEARE, RICHARD II, act 1, sc.1).

430. According to Justice Scalia, the Latin prefix "con" comes from "contra" meaning "against" or "opposed;" the root "frons" means "forehead." *Id.* at 1016.

431. *Id.* (citations omitted).

432. 482 U.S. 730 (1987). Justice Scalia actually cites the dissenting opinion in *Stincer*,

anecdotes utilized by Justice Scalia go further than the Justice would ultimately go, as evidenced by his dissenting opinion in *Craig*.[434]

In *Coy*, his initial writing on the Confrontation Clause, Justice Scalia stated that the Confrontation Clause provides the right to the accused (1) to confront face-to-face those witnesses who appear and testify at trial and (2) to have facts introduced that are provable or primarily established by witnesses, only if given the opportunity to confront those witnesses face-to-face at trial.[435] He explained his conclusion by reference to the underlying purpose of confrontation—assuring fair trials. While confrontation's purpose is to secure fairness, it must also secure the perception of fairness. Thus, Justice Scalia sprinkled his *Coy* opinion with cliches, "look me in the eye and say that," "it is always more difficult to lie about a person 'to his face' than 'behind his back'" and "[i]n this country if someone dislikes you, or accuses you, he must come up in front."[436]

Since the text of the Sixth Amendment is clear, exceptions cannot exist. Faced with explaining the exceptions that were plentiful in the Court's previous decisions, Justice Scalia advised that in previous cases the Court was dealing not with the explicit right of confrontation set forth in the Sixth Amendment, but rather with implications of that right, including the right to cross-examination, the right to confrontation outside the trial setting, and the right to exclude certain out-of-court statements from the trial. In those areas, to which the Confrontation Clause might not even apply, it is appropriate to consider and perhaps accommodate other interests. But even when only rights that are implicit to confrontation are implicated, more than a generalized assertion is required to interfere. However, when the right interfered with was the "right narrowly and explicitly set forth," no other interests were relevant and no accommodations allowed.[437]

It was Justice Scalia's dicta about compromising rights implicit to confrontation that prompted the concurring opinion in *Coy*, the state's reactions to *Coy*,[438] the *Craig* majority opinion,[439] and the retractions Scalia made in *Craig*.[440] When the *Craig* majority grasped Justice Scalia's dicta in *Coy* and utilized it to frame an exception to what Justice Scalia considered the essence

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authored by Justice Marshall. *See id.* at 748-50 (Marshall, J., dissenting).

433. 174 U.S. 47 (1899).

434. *See* Maryland v. Craig, 497 U.S. 836, 860-70 (1990) (Scalia, J., dissenting).

435. 487 U.S. at 1017.

436. *Coy*, 487 U.S. at 1018, 1019 (citations omitted).

437. *See id.* at 1020-21.

438. *See generally* Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After* Maryland v. Craig, 27 ST. MARY'S L.J. 389 (1996) (examining the harmful effects that alternative testimonial procedures have on the defendant's presumption of innocence); Karen L. Tomlinson, Note, Maryland v. Craig: *Televised Testimony and an Evolving Concept of Confrontation*, 36 VILL. L. REV. 1569 (1991) (proposing that the purpose and rationale of the Clause are served by the *Craig* holding).

439. *See* Maryland v. Craig, 497 U.S. 836 (1990).

440. *See id.* at 860-70 (Scalia, J., dissenting).

of the Confrontation Clause, Justice Scalia refined his earlier viewpoint. He began his chiding opinion with a hypothetical undoubtedly intended to show the majority the potential negative outcome of its decision.[441] In the hypothetical, a parent is accused by a child (under circumstances suggesting motive to fabricate) and is convicted without ever having the benefit of looking at the child at trial and inquiring as to the allegation.[442] Justice Scalia's hypothetical applied with equal force to hearsay and *Bruton* cases.

In his *Craig* dissent, Justice Scalia exposed, as he saw it, the error of the majority's thinking. What the majority had done was merge the two aspects of confrontation—the absolute, determinant textual right to face-to-face confrontation and the implications of that right.[443] In doing this, the majority recharacterized the explicit right (to face-to-face confrontation) as a "preference" and subjected it to a benefit-burden analysis more appropriately applied to the lesser implicit rights.[444]

To make his viewpoint more palatable, Justice Scalia sought to demonstrate that his absolute determinant text theory was consistent with the Court's hearsay and *Bruton* decisions.[445] Otherwise he would have been faced with an unattractive proposition—asserting that the Confrontation Clause was absolute in its requirement that prosecutions be based on live witnesses testifying under oath at trial in the presence of the factfinder.

Thus, Justice Scalia opined that while the text of the Confrontation Clause is absolute and not subject to exceptions, implications that arise from confrontation have always yielded to the necessities of the trial process.[446] Implications arising from constitutional rights are, by definition, a matter of judicial interpretation subject to a test of reason, allowing compromise when necessity arises. On the other hand, no amount of necessity can alter the determinant text of a constitutional right. To the contrary, the text is determinant to *assure* that policy, politics, and convenience do not interfere with its absolute requirements.[447]

Having divided his confrontation issues into two kinds—those that raise issues under the definitive text and those that involve only implied rights, Justice Scalia endorsed the Court's hearsay cases, albeit with a new explanation. The Confrontation Clause does not prohibit, by its explicit terms, hearsay evidence.[448] While the text of the Clause might imply that hearsay evidence would violate confrontation, since that principle flows only by

441. *See id.* at 861.
442. *Id.*
443. *See id.* at 862.
444. *See id.* at 863, 870.
445. *Craig*, 497 U.S. at 863-64 (Scalia, J., dissenting).
446. *Id.* at 865.
447. *See id.*
448. *Id.* at 864-65.

implication and is not explicitly expressed in the text, it may be limited as necessity and policy require.[449]

To further cement his theory, Justice Scalia wrote that a "witness," as that word is used in the text of the Confrontation Clause, is one who gives testimony in a judicial proceeding.[450] It does not include one who knows or sees, but only one who appears and gives testimony. Given this limited definition of "witness," Justice Scalia's Confrontation Clause analysis is theoretically defensible. It depends, however, on ignoring the practicalities of trial process.

Justice Scalia's approach gives the prosecutor the keys to the defendant's constitutional right. By choosing who to make a "witness," the prosecution controls who the defense has a right to confront. Justice Scalia would undoubtedly respond that the defense has a right to call any witness to the stand. But that response is no consolation at all. In the realities of criminal practice, those knowledgeable about the case who are aligned with the prosecution will decline the defense's attempts to interview them before trial. Criminal procedure rules and statutes provide the defense with copies of the witness's statements only after they testify on a direct examination.[451] Calling a person to the stand who has not been interviewed and whose statement has not been viewed for the opportunity to "confront" them is a risk that few skilled criminal defense lawyers would take.

3. *Justice Thomas, Joined by Justice Scalia, Part II*

In a case that turned on Justice Scalia's definition of "witness," Justice Thomas expressed his Confrontation Clause rationale. In the Court's decision in *White v. Illinois*,[452] Justice Thomas considered whether the Court had unnecessarily confused the relationship between hearsay and confrontation in its cases. The "critical phrase" of the Clause, Justice Thomas wrote, was "witnesses against him."[453] The Court had wrongly concluded that hearsay declarants are "witnesses against" an accused, thus inappropriately intertwining the two doctrines.[454]

White was the exact outcome feared by Justice Harlan in *Green* before he altered his view in his concurring opinion in *Dutton v. Evans*.[455] In *White* no

449. *Id.*

450. *Id.* at 864-65. Justice Scalia chose this definition because the other definition given ("one who knows or sees any thing; one personally present") "is excluded in the Sixth Amendment by the words following the noun: 'witnesses *against him*.' The phrase obviously refers to those who give testimony against the defendant at trial." *Craig*, 497 U.S. at 864-65 (Scalia, J., dissenting).

451. *See* 18 U.S.C. § 3500 (2000); FED. R. CRIM. P. 26.2.

452. 502 U.S. 346 (1992).

453. *Id.* at 359.

454. *Id.*

455. *See Dutton*, 400 U.S. 74, 93-100 (1970) (Harlan, J., concurring).

finding had been made that the witnesses would be traumatized by testifying or that they would be unable to communicate in the courtroom. Rather, the State, for whatever reasons, chose to prove its case without the declarants.[456]

Justice Thomas proposed his own remedy[457] for the jumbled jurisprudence that surrounds the Confrontation Clause. In Justice Thomas's view, a possible "formulation" 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.[458]

Justice Scalia concurred in the Thomas conclusion.

V. FAIRNESS AND CONFRONTATION

A. Need for a Universal Approach

One of the reasons that the Supreme Court grants certiorari in state criminal cases is to assist state court trial judges in applying federal constitutional law.[459] When the Court's decisions are confusing and inconsistent, state courts are deprived of that guidance. Furthermore, the quality of justice suffers, and the promise of equal justice under law disappears.

A scholar of the Confrontation Clause can, in most instances, decipher which of the Court's approaches apply to a confrontation issue. State trial judges have neither the motivation nor the time to review some fifty Supreme Court Confrontation Clause cases to determine how to rule on an evidentiary objection raised during trial. Most certainly, they can generally avoid reversal by finding that evidence fits within a firmly rooted hearsay exception, but many desire to try cases fairly and not merely to avoid reversal. A more easily understood and universal approach is needed to assist trial judges, who must rule on confrontation clause issues at the first juncture, and appellate judges, who must determine the validity of those rulings.

Similarly, a more consistent approach will assist lawyers on both sides of the criminal justice system. The present state of confrontation jurisprudence invites advocates to base arguments on numerous approaches and, in effect,

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456. *See White*, 502 U.S. at 349-51, 358.

457. Justice Thomas relies upon what he calls the Wigmore-Harlan view of confrontation for his interpretation. He defines their view this way: the Confrontation Clause confers on a "defendant the right to confront and cross-examine only those witnesses who actually appear and testify at trial." *White*, 502 U.S. at 359 (Thomas, J., concurring).

458. *Id.* at 365.

459. *See* SUP. CT. R. 10(c)

requires a case-by-case determination. This ad hoc approach not only complicates the job of trial judges and trial lawyers, but also complicates and increases the work of appellate courts.

The Court's Confrontation Clause cases seemingly present an open invitation to prosecutors to try their cases without live witnesses. While any effective trial strategist might question the approach, veteran criminal defense lawyers know that the State's case is often improved when certain witness statements are repeated by police officers, cloaked in authority, or by medical or mental health professionals, cloaked in trust. By utilizing others to tell the witness's story, the government can avoid having the witness observed by and tested in front of the jury. If a witness's statement fits within a hearsay exception, the informed prosecutor will evaluate whether to call that witness to the stand based not upon fairness, but upon whether the witness's demeanor or responses to cross-examination might negatively impact the jury.

The Court's current solution to the Confrontation Clause puzzle is complicated by emerging state hearsay exceptions. Many states have supplemented the hearsay exceptions set forth in the Federal Rules of Evidence with additional, policy-driven exceptions.[460] For example, several states have child hearsay exceptions making virtually any statement of a child, offered in a proceeding involving abuse of the child, admissible as an exception to the hearsay rule.[461] There can be little doubt that these exceptions do not fit within the "firmly rooted" rubric.[462] In each case, then, the trial court must undergo an evaluation of the specific facts and circumstances to determine whether circumstantial guarantees of trustworthiness exist. That analysis is subject to an independent review by the appellate courts under the Court's *Lilly* decision. State-by-state, case-by-case, analyses can lead only to varying results and varying degrees of fairness. While state prerogative must be honored in many aspects of law, application of a fundamental, explicit federal constitutional right should not be an area of state prerogative.

A uniform, understandable approach to the Confrontation Clause is necessary to assist judges and lawyers in light of emerging state-law hearsay exceptions, prosecutorial temptations, and case-by-case determinations. More importantly, a uniform approach is necessary to assure fairness and integrity in the trial process.

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460. *See* Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 696-702.

461. *See id.* at 698 n.20 (listing statutes).

462. Most of these statutes address trustworthiness as a function of the time, content, and circumstances of the child's statement and admit the statement if these "provide sufficient indicia of reliability." *Id.* at 698. This is in sharp contrast to the United States Supreme Court's pronouncement that a firmly rooted hearsay exception is one that "over time [has proven] to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath." Mattox v. United States, 156 U.S. 237, 244 (1895).

B. *A New Approach*

1. *Reasons Supporting a New Approach*

The Supreme Court's Confrontation Clause jurisprudence has reduced a fundamental constitutional right to a rule of evidence. The Court has justified this restructuring by equating reliability with confrontation. Thus, the conclusion is that as long as reliable evidence is introduced, the purpose of the Clause is satisfied. This substitution of reliability for confrontation, however, begs the question.

The plurality decision in *Lilly* and other recent events have underscored the unfairness of the Court's present approach to the Confrontation Clause. Having accepted its formula that "hearsay exception = satisfaction of the confrontation clause" since *White,* at least a plurality of the Court has been awakened to the unfairness under the circumstances presented in *Lilly.* The plurality decision demonstrates both a recognition of the unfairness generated by the rule the Court created and a struggle to restore some meaning to the fundamental constitutional principle.

But the *Lilly* solution is not the only solution. Respectfully, neither is it the right solution. The *Lilly* plurality decision requires a case-by-case analysis at both the trial and appellate levels to determine whether the Confrontation Clause has been satisfied. It also requires a careful parsing of the introduced statement, line-by-line, word-by-word, to determine its admissibility. Such an approach is inefficient, at the least. More importantly, such a test will produce unfair, inconsistent results which will likely escape correction due to the harmless error doctrine on appeal and new, rigid standards of federal habeas review.

2. *Visual Demonstration of the Need for a New Approach*

Graphic portrayals of the Court's reconstruction of the Confrontation Clause, from the early decisions which focused on the nexus between confrontation, counsel, and the right to a jury trial, and in which the Court viewed the constitutional right as fundamental, to the recent decisions in which the Court has interchanged the concepts of reliability, as defined by hearsay exceptions and confrontation, are found in Charts A and B. Chart A identifies, in chronological order, the evolving requirements for confrontation in each of the four kinds of cases discussed in this Article. Chart B depicts, again chronologically, confrontation requirements in hearsay cases as they devolved. Both charts visually demonstrate a drastic regression from the early cases—in which the Court recognized that the government was required to introduce live witnesses, observed by the trier of fact and subjected to cross-examination—to modern cases—in which the government chooses whether to introduce evidence second-hand, and thereby avoid confrontation altogether. This regression demonstrates an increased concern with the inconvenience and

difficulty caused by a confrontation requirement. What that concern and the resulting diminution of the right ignores is that constitutional rights, by their nature, are, and probably should be, inconvenient for the government.

To prevent a reoccurrence of the discomfort caused by an application of the Court's jurisprudence, such as that present in *Lilly,* the Court must candidly recognize that the Sixth Amendment right to confrontation is more than a restatement of evidence rules. Its authors were not concerned about the potential inconvenience of the government; rather, they feared the consequences of trials without confrontation, trials at which accusations were not heard or tested, trials at which juries were deprived of observing a sworn witness testify and be cross-examined in their presence.

Adhering to the right of confrontation, just as adhering to all fundamental constitutional rights, will cause some criminal prosecutions to fail. Its application should not be viewed as a hurdle to efficient, successful prosecution, but rather as a barrier to unfair, unconfronted convictions. It is not a rule to be maneuvered around in order to assure more convictions; rather it is a rule to be demanded in order to guarantee ultimate fairness.

> A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights .... The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in "efficiency" that resulted.[463]

3. *A New Approach*

An interpretation of the Clause that would render more consistent and reliable results would require the Court to return to its early Confrontation Clause cases and face the error of its reconstruction. The Court must undoubtedly overrule precedent, but only precedent that was incorrect from the outset.

The Court should adopt an interpretation of the Confrontation Clause that assures what the right guarantees—the right to confront the witnesses against an accused. The interpretation should require the government to prove its case by witnesses who testify in open court, before the factfinder, subject to cross-examination. Statements that fit within hearsay exceptions should be admitted for evidentiary purposes, but should not be sufficient to satisfy the government's burden of proof on any element of the crime.

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463. Williams v. Florida, 399 U.S. 78, 113-14 (1970) (Black, J., concurring in part and dissenting in part).

At the end of the State's proof, the trial judge would determine, upon defendant's motion for judgment of acquittal, whether the State had offered evidence of each element of the crime sufficient to defeat the motion.[464] If the evidence consisted solely of statements introduced as hearsay exceptions, the government's case would fail. If the evidence consisted partially of witness testimony and partially of statements introduced as hearsay exceptions, the trial court would have to determine whether sufficient evidence of each element was presented through live witness testimony. This inquiry by the trial judge would not differ substantially from the inquiry trial judges make every time a motion for judgment of acquittal is made in a case involving circumstantial evidence, accomplice testimony, or confessions of the accused.

Following the defense case and the ruling on any renewed motion for judgment of acquittal, the court would instruct the jury as to the use of the evidence. The jury instruction could be formulated along these lines:

> Members of the jury, you must find that all the essential elements of the case have been proven by the government beyond a reasonable doubt. Furthermore, you must find that each element was established beyond a reasonable doubt by proof consisting of exhibits or of the testimony of witnesses who were called to testify before you. Any witness statement that was offered through another witness may be considered by you as corroboration, but it alone cannot support a finding of any element of the case.

The trial judge would already have dismissed those cases in which sufficient evidence was not presented. The jury instruction would advise jurors how to evaluate evidence when, despite sufficient evidence introduced, the jury chose to disregard some of the testimony due to inconsistencies or impeachment.[465]

Critics might argue that this proposed interpretation of the Confrontation Clause is judge-made and not textually required. That criticism is without merit. Read plainly and literally, and consistently with history, the Clause supports an interpretation that disallows all hearsay evidence in a criminal case. However, no court and perhaps no scholar, has urged such a restrictive reading,

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464. The standard a trial court uses to determine whether to grant a motion for judgment of acquittal made at the close of the government's proof is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991) (citations omitted).

465. Standard jury instructions advise jurors that they may disregard all or part of the testimony of a witness who has been impeached. For example, if the trial judge denied the motion for judgment of acquittal because the State had introduced some evidence by which a rational trier of fact might find the presence of an element, but the jury disregarded the testimony of that witness for credibility reasons, the instruction would assure that the jury did not convict if the only remaining evidence on a particular element was a statement introduced as a hearsay exception.

perhaps because although history does not defy such a reading, neither does it support it. If the Clause must then be read to allow hearsay evidence, it does not follow that admitting that evidence should result in a denial of the specific right provided by the Clause. An accommodation of the Clause's protection and the rules of evidence need not result in its destruction. It is far more defensible for such an accommodation to effect the rules more harshly than it does the constitutional right.

Furthermore, in other contexts the Court has recognized that there may be a hierarchy of evidence. For example, for a conviction in a criminal case to be based totally upon circumstantial evidence, the facts and circumstances must be "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone."[466] Similarly, accomplice testimony in many states is insufficient to sustain a conviction without corroboration.[467] Some fact, independent of the accomplice's testimony, which, if taken by itself, leads to an inference that the crime was committed and that the accused committed it, is required to convict.[468] A third example is provided by the evidence standards that apply to confessions of the accused. Like accomplice testimony, the confession of an accused cannot be the sole basis for a conviction. Some corroboration is required.[469] Confessions, without corroboration, similarly are insufficient to sustain a conviction. In each of these contexts, and even in some civil contexts, courts have realized that evidence must be viewed in a hierarchal manner. Some kinds of evidence carry more weight than others. Providing a similar rule in the Confrontation Clause context is no different. It accommodates government interest without sacrificing fundamental constitutional rights.

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466. *Black*, 815 S.W.2d at 175.

467. *See, e.g.*, State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994) (stating that corroborative evidence is sufficient "if it fairly and legitimately tends to connect the defendant with the commission of the crime").

468. *See id.*

469. FED. R. EVID. 804(b)(3); *see, e.g.*, United States v. Porter, 881 F.2d 878, 882 (10th Cir. 1989) ("In order to admit hearsay evidence offered to exculpate the accused under rule 804(b)(3), the proponent of the evidence must show . . . sufficient corroboration to indicate trustworthiness of the statement."); United States v. Rasmussen, 790 F.2d 55, 56 (8th Cir. 1986) ("[T]he corroboration requirement, has been read into Rule 804(b)(3) to satisfy the confrontation clause rights of an accused. . . ."); United States v. Ospina, 739 F.2d 448, 452 (9th Cir. 1984) ("[T]he showing of corroborating circumstances must do more than tend to indicate the trustworthiness of the statements; they must clearly indicate it.").

VI. CONCLUSION

> *"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."*[470]

The United States Supreme Court must abandon its approach to the Confrontation Clause which ties the clause to rules of evidence and restore the Clause to its rightful place as an important, interdependent fundamental right essential to the presumption of innocence, the right to counsel, and the right to a trial by jury. Until the Court does so, inconsistent and unfair applications will result in the conviction of those who never had the opportunity to confront their accusers. Such a result was never intended, and would not be sanctioned, by those who passed the Sixth Amendment.

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470. U.S. CONST. amend. VI.

Chart A

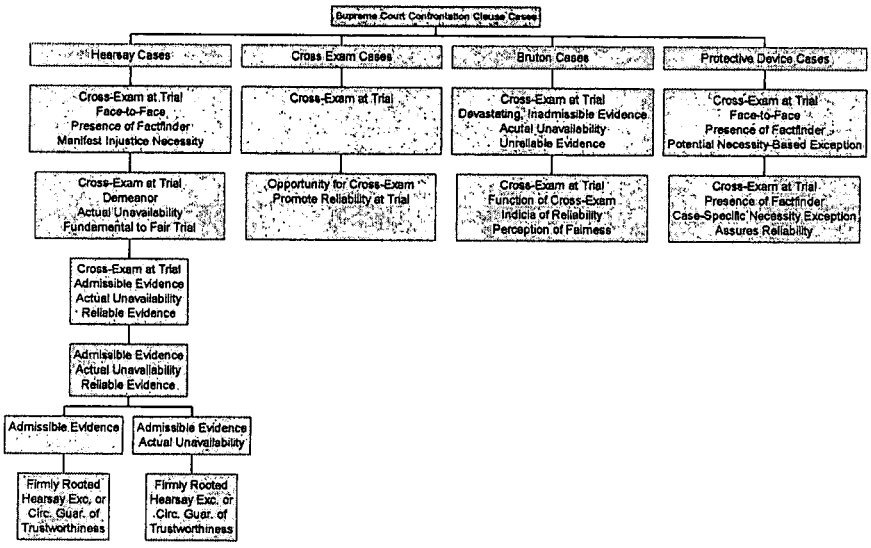
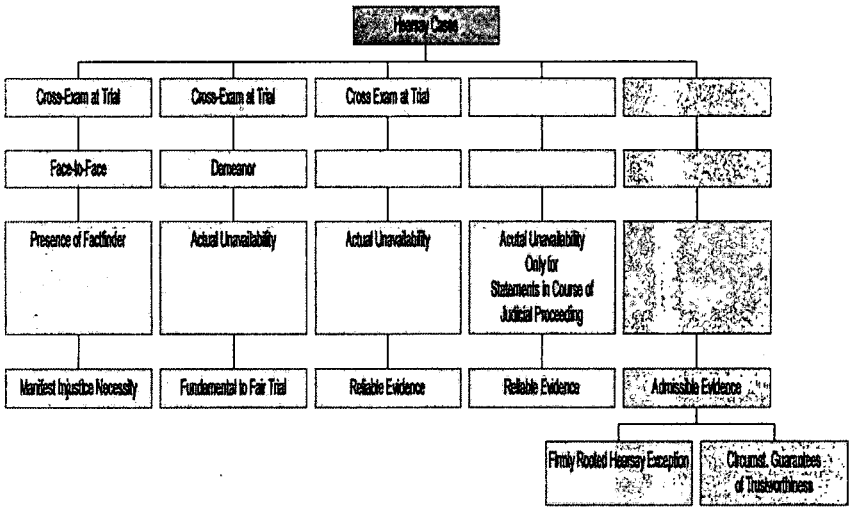

Supreme Court Confrontation Clause Cases
Hearsay Cases
Cross Exam Cases
Bruton Cases
Protective Device Cases
Cross-Exam at Trial
Face-to-Face
Presence of Factfinder
Manifest Injustice Necessity
Cross-Exam at Trial
Cross-Exam at Trial
Devastating, Inadmissible Evidence
Acutal Unavailability
Unreliable Evidence
Cross-Exam at Trial
Face-to-Face
Presence of Factfinder
Potential Necessity-Based Exception
Cross-Exam at Trial
Demeanor
Actual Unavailability
Fundamental to Fair Trial
Opportunity for Cross-Exam
Promote Reliability at Trial
Cross-Exam at Trial
Function of Cross-Exam
Indicia of Reliability
Perception of Fairness
Cross-Exam at Trial
Presence of Factfinder
Case-Specific Necessity Exception
Assures Reliability
Cross-Exam at Trial
Admissible Evidence
Actual Unavailability
Reliable Evidence
Admissible Evidence
Actual Unavailability
Reliable Evidence
Admissible Evidence
Admissible Evidence
Actual Unavailability
Firmly Rooted
Hearsay Exc. or
Circ. Guar. of
Trustworthiness
Firmly Rooted
Hearsay Exc. or
Circ. Guar. of
Trustworthiness

Chart B


Hearsay Cases
Cross-Exam at Trial
Face-to-Face
Presence of Factfinder
Manifest Injustice Necessity
Cross-Exam at Trial
Demeanor
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Fundamental to Fair Trial
Cross Exam at Trial
Actual Unavailability
Reliable Evidence
Actual Unavailability Only for Statements in Course of Judicial Proceeding
Reliable Evidence
Admissible Evidence
Firmly Rooted Hearsay Exception
Circumst. Guarantees of Trustworthiness