

---

Faculty Publications

---

1984

# Admissibility of Laboratory Reports

Paul C. Giannelli

Follow this and additional works at: [http://scholarlycommons.law.case.edu/faculty\\_publications](http://scholarlycommons.law.case.edu/faculty_publications)



Part of the [Evidence Commons](#), and the [Litigation Commons](#)

---

## Repository Citation

Giannelli, Paul C., "Admissibility of Laboratory Reports" (1984). *Faculty Publications*. Paper 460.  
[http://scholarlycommons.law.case.edu/faculty\\_publications/460](http://scholarlycommons.law.case.edu/faculty_publications/460)

This Article is brought to you for free and open access by Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholarly Commons.

# PUBLIC DEFENDER REPORTER

Vol. 7, No. 3

May-June 1984

## ADMISSIBILITY OF LABORATORY REPORTS

Paul C. Giannelli

Professor of Law

Case Western Reserve University

The admissibility of laboratory reports at a criminal trial raises a number of evidentiary issues. First, the report must be authenticated. See Fed. R. Evid. 901(a); *State v. Kraft*, 134 N.J. Super. 416, 341 A.2d 373 (1975) (laboratory report not authenticated). Since, however, most reports in criminal cases are prepared by government laboratories, they often qualify as self-authenticating documents, and thus may be admitted without extrinsic evidence. See Fed. R. Evid. 902. Second, under the original writing ("best evidence") rule, the admission of a written report requires that the original be accounted for or produced. See Fed. R. Evid. 1002. An exception, however, is typically recognized for public records. Under this exception certified copies of public records are admissible. See Fed. R. Evid. 1005.

The most serious obstacle to the admission of laboratory reports is the hearsay rule, an issue which typically involves the applicability of the public records, business records, and recorded recollection exceptions. In addition, the admission of laboratory reports raises confrontation issues. This article examines these issues.

### FEDERAL TRIALS

Prior to the adoption of the Federal Rules of Evidence, the federal courts generally admitted laboratory reports under the business or public records exceptions to the hearsay rule. *E.g.*, *U.S. v. Frattini*, 501 F.2d 1234, 1235-36 (2d Cir. 1974) (lab report identifying substance as cocaine); *U.S. v. Parker*, 491 F.2d 517, 520 (8th Cir. 1973) (lab report identifying substance as heroin), *cert. denied*, 416 U.S. 989 (1974); *Government of the Virgin Islands v. St. Ange*, 458 F.2d 981, 982 (3d Cir. 1972) (hospital lab report identifying sperm on vaginal smear); *Kay v. U.S.*, 255 F.2d 476, 480 (4th Cir.) (lab report of blood-alcohol test), *cert. denied*, 358 U.S. 825 (1958); *U.S. v. Ware*, 247 F.2d 698, 699 (7th Cir. 1957) (lab report identifying substance as heroin). See generally Imwinkelried, *The Constitutionality of*

*Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 Hastings L.J. 621 (1979). The enactment of the Federal Rules, however, has cast doubt on the admissibility of laboratory reports under these exceptions.

### Public Records Exception

Federal Rule 803(8) recognizes a hearsay exception for public records. It provides for the admissibility of:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Laboratory reports fall within subsection (C) of the rule. In *U.S. v. Oates*, 560 F.2d 45 (2d Cir. 1977), the Second Circuit wrote, "It seems indisputable to us that the chemist's official report and worksheet. . . can be characterized as reports of 'factual findings resulting from an investigation made pursuant to authority granted by law.'" *Id.* at 67. As the rule explicitly provides, investigative reports are not admissible in criminal cases when offered against the accused; they are, however, admissible if offered against the prosecution. *But see State v. Manke*, 328 N.W.2d 799 (N.D. 1982) (chemist's report admitted under N.D. Rule 803(8)(C)). See generally Annot., 47 A.L.R. Fed. 321 (1980) (collecting cases decided under Rule 803(8)(C)).

The court in *Oates* also concluded that laboratory reports came within subsection (B) of the rule, a conclusion which raises two issues. The first issue involved the meaning of the term "law enforcement personnel." The court held that chemists employed

Public Defender: Hyman Friedman  
Cuyahoga County Public Defender Office, 1200 Ontario Street, Cleveland, Ohio 44113  
Editor: Paul C. Giannelli, Professor of Law, Case Western Reserve University  
Associate Editor: Margaret Montgomery

Telephone: (216) 443-7223

*The views expressed herein are those of the author and do not necessarily reflect those of the Public Defender.*  
Copyright © 1984 Paul Giannelli

by the U.S. Customs Service were "law enforcement personnel" within the meaning of the rule. According to the court, "any officer or employee of a governmental agency which has law enforcement responsibilities" qualifies as law enforcement personnel. 560 F.2d at 68 ("Chemists at the laboratory are, without question, important participants in the prosecutorial effort."). See also *U.S. v. Orozco*, 590 F.2d 789, 793, (9th Cir. 1979) (customs inspector at border qualifies as "law enforcement personnel" under Rule 803(8)(B)), *cert. denied*, 439 U.S. 1049 (1978); *U.S. v. Ruffin*, 575 F.2d 346, 356 (2d Cir. 1978) (IRS personnel who gather data and information routinely used in criminal prosecutions perform a law enforcement function).

The second issue concerns the scope of the police records exclusion in Rule 803(8)(B). See generally *Annot.*, 37 A.L.R. Fed. 831 (1978) (collecting cases decided under Rule 803(8)(B)'s police records exclusion). According to the Senate Report, this exclusion was based on the belief that "observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases." S. Rep. No. 1277, 93d Cong., 2d Sess. 17, reprinted in 1974 U.S. Code Cong. and Ad. News 7051, 7064. In addition, the legislative history indicates that Congress was concerned with the confrontation problems raised by the use of police records in criminal trials. See *U.S. v. Oates*, 560 F.2d 45, 78 (2d Cir. 1977) ("[T]he pervasive fear of the draftsmen and of Congress that interference with an accused's right to confrontation would occur was the reason why in criminal cases evaluative reports of government agencies and law enforcement reports were expressly denied the benefit to which they might otherwise be entitled under FRE 803(8).").

In *Oates*, the court adopted a literal interpretation of the police records exclusion, under which all police reports are automatically excluded. Other courts, however, have held that the police records exclusion applies only to observations made during "adversarial confrontations." For example, the Ninth Circuit has held that "Congress did not intend to exclude [police] records of routine, nonadversarial matters. . . ." *U.S. v. Orozco*, 590 F.2d 789, 793 (9th Cir. 1979) (customs officer's recording of license plate numbers admissible), *cert. denied*, 439 U.S. 1049 (1978). See also *U.S. v. Coleman*, 631 F.2d 908, 910-12 (D.C. Cir. 1980) (chain of custody documents admissible); *U.S. v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir.) (Rule 803(8)(B) police records exclusion inapplicable to warrant of deportation), *cert. denied*, 449 U.S. 864 (1980); *U.S. v. Union Nacional de Trabajadores*, 576 F.2d 388, 391 (1st Cir. 1978) (marshall's return on service of injunction admissible); *U.S. v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976) (routine recording of serial numbers unrelated to commission of crime admissible).

In *Orozco*, the court focused on the Senate Report's language concerning the "adversarial nature of the confrontation" between the police and the defendant

"at the scene of the crime or the apprehension of the defendant." 590 F.2d at 793, quoting S. Rep. No. 1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7064. Under this view, it could be argued that laboratory analyses are far enough removed from such confrontations that they are not adversarial encounters and thus not inadmissible under the police records exclusion.

The police records exclusion raises one additional issue. On its face, Rule 803(8)(B) would appear to exclude all police records, whether offered by the prosecution or the defense. In this respect, subsection (B) differs from subsection (C) which excludes evaluative reports in criminal cases only when offered by the prosecution. In *U.S. v. Smith*, 521 F.2d 957 (D.C. Cir. 1975), the D.C. Circuit addressed this issue: "[T]he apparently absolute language of 803(8)(B) had its origin in congressional concern that use of reports against defendants would be unfair." *Id.* at 968 n.24. Accordingly, "803(8)(B) should be read, in accordance with the obvious intent of Congress and in harmony with 803(8)(C), to authorize the admission of the reports of police officers and other law enforcement personnel at the request of the defendant in a criminal case." *Id.* Ohio Rule 803(8)(B) expressly permits the introduction of police records when offered by the defendant.

#### **Relationship Between Public Records and Other Exceptions**

Another area of uncertainty concerns the relationship between the public records exception and other hearsay exceptions. See generally 4 D. Louisell & C. Mueller, *Federal Evidence* §§ 452 & 456 (1980); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(6)[07] (1981); *Annot.*, 56 A.L.R. Fed. 168 (1982).

Several courts have held that documents subject to exclusion under the public records exception are not admissible under any other hearsay exception. This interpretation may preclude the admissibility of laboratory reports as business records, Rule 803(6), or as recorded recollection, Rule 803(5). In *U.S. v. Oates*, 560 F.2d 45 (2d Cir. 1977), the prosecution argued that a laboratory report identifying a substance as heroin was admissible under the business records exception. Although the court recognized that as a general rule hearsay evidence failing to meet the requirements of one exception may nonetheless satisfy the standards of another exception, *id.* at 66, it found that the "clear legislative intent" of excluding police and investigative reports under Rule 803(8) precluded the admissibility of such reports under any other exception. *Id.* at 68, 72 & 77. *Accord* *U.S. v. Sims*, 617 F.2d 1371, 1377 (9th Cir. 1980) (FBI report); *U.S. v. Cain*, 615 F.2d 380, 382 (5th Cir. 1980) (prison escape report); *U.S. v. Ruffin*, 575 F.2d 346, 355-56 (2d Cir. 1978) (IRS computer printouts); *U.S. v. American Cyanamid Co.*, 427 F. Supp. 859, 867 (S.D.N.Y. 1977) (government internal memoranda and letters).

Other courts have disagreed with *Oates*, holding that Congress, by excluding police and investigative reports under Rule 803(8), intended to exclude such reports only when admitted in lieu of the testimony of the declarant. According to these courts, "[t]he ac-

companying testimony of the author minimizes the danger of unreliability by giving the trier of fact the opportunity to weigh his credibility and consider the circumstances surrounding preparation of the report." U.S. v. King, 613 F.2d 670, 673 (7th Cir. 1980) (Social Security forms admitted as business records where the preparers testified). *Accord* U.S. v. Sawyer, 607 F.2d 1190, 1193 (7th Cir. 1979) (recorded recollections of IRS agent who testified at trial admissible under recorded recollection exception notwithstanding their inadmissibility under Rule 803(8)(B)), *cert. denied*, 445 U.S. 943 (1980). See also *Abdel v. U.S.*, 670 F.2d 73, 75n. 3 (7th Cir. 1982).

Under this view, if a laboratory report qualifies as recorded recollection or as a business record and the declarant also testifies, the report is admissible. Thus, in *U.S. v. Coleman*, 631 F.2d 908, 915 (D.C. Cir. 1980), the D.C. Circuit upheld the admission of DEA analysis forms where the examining chemist testified, but reversed as to those counts where a supervising chemist testified in lieu of the examining chemist.

### Business Records Exception

If not precluded by the police records exclusion of Rule 803(8), laboratory reports may be admissible as business records under Rule 803(6). Fed. R. Evid. 803(6) provides for the admissibility of:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The rule expressly provides that "opinions" are admissible under this exception. In contrast, Ohio Rule 803(6) does not contain the term "opinions."

The principal issue involves the trustworthiness clause of the rule, under which business records are excludable if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." One factor affecting reliability is the motive of the person who prepares the record—whether the record was "prepared with an eye toward litigation." *U.S. v. Smith*, 521 F.2d 957, 966 (D.C. Cir. 1975). The "litigation records" rule is derived from *Palmer v. Hoffman*, 318 U.S. 109 (1943). In *U.S. v. Ware*, 247 F.2d 698 (7th Cir. 1957), the Seventh Circuit wrote:

[E]ven if memoranda . . . are regularly prepared by law enforcement officers, they lack the necessary earmarks of reliability and trustworthiness. Their source and the nature and manner of their compilation unavoidably dictate that they are inadmissible under [the Federal Business Records Act]. They are also subject to objection that such utility as they possess relates primarily to prosecution of suspected law breakers, and only inci-

dentally to the systematic conduct of the police business. *Id.* at 700.

*Accord* *U.S. v. Smith*, 521 F.2d 957, 966-67 (D.C. Cir. 1975); *U.S. v. Brown*, 451 F.2d 1231, 1233-34 (5th Cir. 1971); *Sanchez v. U.S.*, 293 F.2d 260, 269 (8th Cir. 1961).

The courts applying the litigation records rule, however, generally have not extended it to laboratory reports. See *U.S. v. Frattini*, 501 F.2d 1234, 1235 (2d Cir. 1974); *U.S. v. Ware*, 247 F.2d 698, 699 (7th Cir. 1957); *In re Nelson*, 83 Misc. 2d 1081, 1083-84, 374 N.Y.S.2d 982, 984-86 (Fam. Ct. 1975). For example, in *U.S. v. Evans*, 21 C.M.A. 579, 45 C.M.R. 353 (1972), the court stated: "We are not persuaded that a chemical examiner's report is made principally for the purpose of prosecution." *Id.* at 582, 45 C.M.R. at 356. In contrast, in *State v. Henderson*, 554 S.W.2d 117 (Tenn. 1977), the court stated that laboratory reports "realistically cannot be said to have been prepared for any reason other than their potential litigation value." *Id.* at 120. See also *U.S. v. Smith*, 521 F.2d 957, 967 (D.C. Cir. 1975) (police reports not admissible if offered by the prosecution).

### Recorded Recollection Exception

If not inadmissible due to the police records exclusion of Rule 803(8), laboratory reports may be admissible as recorded recollection under Rule 803(5). For example, in *U.S. v. Marshall*, 532 F.2d 1279 (9th Cir. 1976), the Ninth Circuit upheld the admissibility of a chemist's report identifying a substance as cocaine where the chemist testified that he had analyzed the substance and prepared the report but had no independent recollection of the tests. The chemist did testify, however, that the report was accurate and was prepared contemporaneously with the tests.

## STATE TRIALS

A minority of jurisdictions have excluded laboratory reports as a matter of evidence law. *E.g.*, *People v. Domin*, 71 Mich. App. 315, 248 N.W.2d 250 (1976) (lab report identifying substance as LSD is inadmissible hearsay); *State v. Russell*, 114 N.H. 222, 317 A.2d 781 (1974) (lab report identifying substance as marijuana does not qualify as a business record); *Bennett v. State*, 448 P.2d 253 (Okla. Crim. 1968) (psychiatric report inadmissible). In addition, several courts have excluded laboratory reports on constitutional grounds. See *infra*.

Most state courts that have considered the admissibility of laboratory reports have ruled that they are admissible. Some have used the business records exception. *E.g.*, *Henson v. State*, 332 A.2d 773, 775 (Del. 1975) (hospital record of rape victim examination); *State v. Rhone*, 555 S.W.2d 839, 841-42 (Mo. 1977) (lab report of clothing and debris); *State v. Taylor*, 486 S.W.2d 239, 242 (Mo. 1972) (lab report of debris); *People v. Porter*, 46 A.D. 2d 307, 311, 362 N.Y.S.2d 249, 255 (1974) (lab report of blood-alcohol test); *Burleson v. State*, 585 S.W.2d 711, 712-13 (Tex. Crim. 1979) (autopsy report); *State v. Kreck*, 86 Wash. 2d 112, 120-21, 542 P.2d 782, 787 (1975) (lab report of blood examination); *State v. Ecklund*, 30 Wash. App.

313, 319, 633 P.2d 933, 936-37 (1981) (lab report of serological examination).

Other courts have relied on the public records exception in upholding the admissibility of laboratory reports. *E.g.*, *Seals v. State*, 282 Ala. 586, 604, 213 So.2d 645, 662-63 (1968) (toxicologist report); *State v. Snider*, 168 Mont. 220, 229, 541 P.2d 1204, 1209 (1975) (lab report identifying substance as marijuana); *In re Kevin G.*, 80 Misc. 2d 517, 519, 363 N.Y.S.2d 999, 1002 (Fam. Ct. 1975) (lab report identifying substance as heroin). In addition, some jurisdictions have enacted statutes providing for the admissibility of certain types of reports, such as breathalyzer results. See *Wester v. State*, 528 P.2d 1179, 1189 (1974) (Alaska 1974); *State v. Laroche*, 112 N.H. 392, 394, 297 A.2d 223, 224 (1972). Most of these cases, however, predate the enactment of the Federal Rules of Evidence and their adoption by the states. The admissibility of laboratory reports in jurisdictions that have adopted the Federal Rules raises the same issues discussed above. The Military Rules, however, explicitly provide for the admissibility of "forensic laboratory reports" as business and public records. Mil. R. Evid. 803(6) and (8).

A number of jurisdictions have enacted statutes that provide for the admissibility of laboratory reports if the defendant does not request the presence of the examiner prior to trial. *E.g.*, Iowa Code Ann. § 691.2 (West 1979); Me. Rev. Stat. Ann. tit. 17-A § 1112(1) (1983). Some states, in addition to requiring a defense request for the presence of the analyst at trial, require the prosecution to notify the defense of its intention to use the laboratory report at trial. Md. Cts. & Jud. Proc. Code Ann. § 10-306 (1980) (intoxication tests); Ohio Rev. Code Ann. § 2925.51(C) (Baldwin 1982) (controlled substances). See *State v. Reese*, 56 Ohio App. 2d 278, 382 N.E.2d 1193 (1978) (failure to serve copy of lab report on defendant renders report inadmissible). A defendant's failure to request the presence of the examiner has been held to constitute a waiver of the right to confrontation. *State v. Davison*, 245 N.W.2d 321 (Iowa 1976), *cert. denied*, 430 U.S. 955 (1977); *State v. Kramer*, 231 N.W.2d 874 (Iowa 1975). See also *State v. Christianson*, 404 A.2d 999 (Me. 1979) (confrontation issue not raised).

## CONFRONTATION CLAUSE

Even if laboratory reports are admissible under a hearsay exception, the Confrontation Clause might require exclusion. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This clause was held binding upon the States. *Pointer v. Texas*, 380 U.S. 400 (1965). For discussions of the relationship between the hearsay rule and the Confrontation Clause, see 4 D. Louisell & C. Mueller, *Federal Evidence* § 418 (1980); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 800[04] (1981); Westen, *The Future of Confrontation*, 77 Mich. L. Rev. 1185 (1979); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978).

A hearsay declarant is, in effect, a "witness

against" the accused. Thus, a literal interpretation of the Confrontation Clause would preclude the prosecution from introducing any hearsay statement, notwithstanding the applicability of a recognized hearsay exception. However, the Supreme Court has rejected this interpretation. See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) ("[I]f thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.").

The Confrontation Clause also could be interpreted as requiring only the right to cross-examine in-court witnesses and not out-of-court declarants. See 5 J. Wigmore, *Evidence* § 1397 (Chadbourn Rev. 1974). Under this view, all recognized hearsay exceptions would satisfy constitutional requirements. The Supreme Court has also rejected this view:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . . The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. *California v. Green*, 399 U.S. 149, 155-56 (1970).

See also *Dutton v. Evans*, 400 U.S. 74, 86 (1970) ("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.").

The courts have disagreed over whether the admission of laboratory reports violates the Confrontation Clause. A number of courts have rejected the constitutional argument. *E.g.*, *Kay v. U.S.*, 255 F.2d 476, 480-81 (4th Cir.) (blood-alcohol report), *cert. denied*, 358 U.S. 825 (1958); *U.S. ex rel. Lurry v. Johnson*, 378 F. Supp. 818, 822 (E.D. Pa. 1974) (hospital record of rape victim examination); *Robertson v. Cox*, 320 F. Supp. 900 (W.D. Va. 1970) (lab report identifying seminal fluid); *Henson v. State*, 332 A.2d 773, 775 (Del. 1975) (hospital record of rape victim examination); *Grover v. State*, 41 Md. App. 705, 710-11, 398 A.2d 528, 531 (1979) (autopsy report); *Commonwealth v. Franks*, 359 Mass. 577, 580-81, 270 N.E.2d 837, 839-40 (1971) (hospital report identifying sperm); *Commonwealth v. Harvard*, 356 Mass. 452, 461-62, 253 N.E.2d 346, 351-52 (1969) (lab report identifying substance as marijuana); *State v. Laroche*, 112 N.H. 392, 396-97, 297 A.2d 223, 226 (1972) (breathalyzer results); *Burleson v. State*, 585 S.W.2d 711, 712-13 (Tex. Crim. 1979) (autopsy report); *Robertson v. Commonwealth*, 211 Va. 62, 65, 175 S.E.2d 260, 262-63 (1970) (lab report identifying seminal fluid); *State v. Kreck*, 86 Wash. 2d 112, 116-19, 542 P.2d 782, 785-86 (1975) (laboratory report of blood test).

Other courts have found a confrontation violation where laboratory reports have been admitted in evi-

dence. See *Steward v. Cowan*, 528 F.2d 79, 85 (6th Cir. 1976) (ballistics report); *Kienlen v. U.S.*, 437 F.2d 843, 848-49 (10th Cir. 1971) (psychiatric report); *Phillips v. Neil*, 452 F.2d 337, 348 (6th Cir. 1971) (psychiatric report); *cert. denied*, 409 U.S. 884 (1972); *People v. Johnson*, 11 Ill. App. 3d 395, 401-02, 296 N.E.2d 763, 768 (1973) (psychiatric report); *Gregory v. State*, 40 Md. App. 297, 325, 391 A.2d 437, 454 (1978) (psychiatric report); *State v. Russell*, 114 N.H. 223, 224-25, 317 A.2d 781, 782 (1974) (lab report identifying substance as marijuana); *Commonwealth v. McCloud*, 457 Pa. 310, 315-17, 322 A.2d 653, 657 (1974) (autopsy report); *State v. Henderson*, 554 S.W.2d 117, 122 (Tenn. 1977) (lab report identifying substances as LSD and marijuana).

These cases, however, were decided prior to the Supreme Court's latest confrontation decision. In *Roberts v. Ohio*, 448 U.S. 56 (1980), the Court set forth a two-step analysis for applying the Confrontation Clause. First, the Confrontation Clause "normally requires a showing that [the declarant] is unavailable." *Id.* at 66. Second, even if the declarant is unavailable, the hearsay statement must bear "adequate indicia of reliability." *Id.*

### Indicia of Reliability

Several passages in *Roberts* indicate that statements falling within the public records and business records exceptions will have no difficulty satisfying the reliability requirement. In one passage, the Court noted that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* The public and business records exceptions would seem to qualify as "firmly rooted." See 5 J. Wigmore, *Evidence* §§ 1517-61b (business records), §§ 1630-38a (public records) (Chadbourn rev. 1974). In another passage discussing reliability, the Court stated that "certain hearsay exceptions rest on such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" 448 U.S. at 66, quoting *Mattox v. U.S.*, 156 U.S. 237, 244 (1895). In an accompanying footnote, the Court cited the business and public records exceptions. *Id.* at 66 n.8.

Although it may be argued that business and public records generally bear adequate indicia of reliability, laboratory reports may not. The Laboratory Proficiency Testing Program, sponsored by the Law Enforcement Assistance Administration, documented a startlingly high incidence of errors in analyses performed by police laboratories. See J. Peterson, E. Fabricant & K. Field, *Crime Laboratory Proficiency Testing Research Program* (1978).

### Unavailability of the Declarant

The unavailability requirement presents greater difficulties. While establishing the unavailability of the declarant is not a prerequisite for the admissibility of business and public records, *Roberts* "normally" requires a showing of unavailability. In *Barber v. Page*, 390 U.S. 719 (1968), the Court wrote: "[A] witness is not 'unavailable' for purposes of the . . . confrontation requirement unless the prosecutorial

authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 724-25. In *Roberts*, the Court reaffirmed this test and added the following explanation:

The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." . . . The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate. 448 U.S. at 74-75.

Thus, in most cases a laboratory analyst would have to testify unless he is unavailable. See generally Note, *Confrontation and the Unavailable Witness: Searching for a Standard*, 18 Val. U.L. Rev. 193 (1983).

In *Roberts*, however, the Court recognized an exception to the unavailability requirement. In a footnote, the Court stated that a "demonstration of unavailability, however, is not always required." 448 U.S. at 65 n.7. The Court cited *Dutton v. Evans*, 400 U.S. 74 (1970), as an example of a case in which the Court "found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness." 448 U.S. at 65 n.7. Justice Harlan, in his *Dutton* concurrence, cited the business and public records exceptions, including a case admitting laboratory reports, *Kay v. U.S.*, 255 F.2d 476 (4th Cir.), *cert. denied* 358 U.S. 825 (1958), as examples of hearsay exceptions in which the production of the declarant would be "of small utility to a defendant." 400 U.S. at 96. Justice Harlan's view, however, seems questionable. The Second Circuit in *Oates* outlined a number of areas that would be grist for cross-examination, such as whether the analyst was qualified, whether proper procedures were followed, whether the procedures and analysis used were recognized in the profession as being reliable and, if instrumentation was employed, whether it was in good working order. 560 F.2d at 45 & 82. See also *Phillips v. Neil*, 452, F.2d 337, 348 (6th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972); *Commonwealth v. McCloud*, 457 Pa. 310, 313, 322 A.2d 653, 655 (1974) (cross-examination important because experts often give conflicting opinions); Advisory Committee's Note, Fed. R. Evid. 803(8) (Investigative reports "are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.").

In upholding the admissibility of laboratory reports in face of a constitutional challenge, a number of courts have cited the defendant's failure to subpoena the analyst. *E.g.*, *U.S. v. Miller*, 23 C.M.A. 247, 49 C.M.R. 380, 383 (1974); *Burleson v. State*, 585 S.W.2d 711, 713 (Tex. Crim. 1979). For example, in *State v. Spikes*, 67 Ohio St. 2d 405, 423 N.E.2d 1122

(1981), *appeal dismissed*, 454 U.S. 1131 (1982), the court wrote that defense counsel "could have subpoenaed [the preparers] to testify at trial." *Id.* at 411, 423 N.E.2d at 1128. There is no support for this view in *Ohio v. Roberts*; the Court never mentioned that the defendant's failure to take steps to secure the witness' attendance at trial was a significant factor. Moreover, although the Court mentioned the defendant's right to call the declarant in *Dutton v. Evans*, 400 U.S. 74, 88 n.19 (1970), the Court's confrontation analysis did not rely on this factor.

As one commentator has noted:

The danger here is that the defendant will find himself in a dilemma: if he stands on the claim of error and refuses to invoke his right of compulsory process to produce the witness on his own initiative, the appellate court may conclude that he never had a genuine interest in an in-person examination of the declarant; yet if the defendant tries to mitigate the injury by proceeding to produce and examine the witness on his own, the appellate court may conclude that the prosecutor's error was harmless. This dilemma is obviously unacceptable, because it would preclude defendants from ever successfully challenging a prosecutor's failure to take the initiative in producing a witness in person. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 623-24 (1978).

Thus, failure to call the analyst should not be construed as a waiver of the right to confront him. See *Phillips v. Neal*, 452 F.2d 337, 348-49 (6th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972); *Gregory v. State*, 40 Md. App. 297, 328 n.28, 391 A.2d 437, 455 n.28 (1978).

#### REFERENCES

- 4 D. Louisell & C. Mueller, *Federal Evidence* §§ 418, 447, 455, 456 (1980).
- 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶¶ 800[04], 803 (6)[07], 803(8)[04] (1981).
- Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 *Hastings L.J.* 621 (1979).
- Annot., *Admissibility, over hearsay objection, of police observations and investigative findings offered by government in criminal prosecution, excluded from the public records exception to hearsay rule under Rule 803(8)(B) or (C), Federal Rules of Evidence*, 56 *A.L.R. Fed.* 168 (1982).
- Annot., *Construction and application of provision of Rule 803(8)(B), Federal Rules of Evidence, excluding from exceptions to hearsay rule in criminal cases matters observed by law enforcement officers*, 37 *A.L.R. Fed.* 831 (1978).