1982

The Right of Confrontation: Part II

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PUBLIC DEFENDER REPORTER

Vol. 5, No. 4 July-August, 1982

THE RIGHT OF CONFRONTATION
Part II

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This is the second of a two-part article examining the right of confrontation. Part II focuses on the relationship between the hearsay rule and the Confrontation Clause.

In the absence of an exception, the hearsay rule prohibits the admission of evidence of a declarant's out-of-court statements if the statements are offered for the truth of the assertions contained therein. *See* Fed. R. Evid. 801; Ohio R. Evid. 801. If a statement is not offered for the truth of the assertion, the hearsay rule is not violated. Nor, according to the Supreme Court, is the Confrontation Clause. *See* Dutton v. Evans, 400 U.S. 74, 88 (1970) ("Neither a hearsay nor a confrontation question would arise had [the witness'] testimony been used to prove merely that the statement was made."). It should be noted, however, that the probability that a statement may be used by the jury to establish the truth of the assertions therein may trigger a confrontation issue even though the evidence was not technically offered for that purpose. *See* Bruton v. U.S., 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965).

Because a hearsay declarant is, in effect, a "witness," a literal application of the Confrontation Clause would preclude the prosecution from introducing any hearsay statement, notwithstanding the applicability of a recognized hearsay exception. The Supreme Court, however, has rejected this view. *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."). On the other hand, the Confrontation Clause could be interpreted as requiring only the right to cross-examine in-court witnesses and not out-of-court declarants. This was Wigmore's view. *See* 5 J. Wigmore, Evidence § 1397 (Chadbourn rev. 1974). Under this view, all recognized hearsay exceptions would be upheld in the face of a confrontation challenge. The 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.").

In some cases, the Court has held the Confrontation Clause violated by the admission of evidence that fell within a traditional hearsay exception. *E.g.,* Barber v. Page, 390 U.S. 719 (1968) (former testimony exception); Pointer v. Texas, 380 U.S. 400 (1965) (former testimony). In other cases, the Court has upheld the admissibility of evidence that did not fall within a traditional exception. *E.g.,* Dutton v. Evans, 400 U.S. 74 (1970) (expansive co-conspirator exception); California v. Green, 399 U.S. 149 (1970) (substantive use of prior inconsistent statements).

Thus, it can safely be said that the Court has not adopted either of the extreme views of the Confrontation Clause. Explaining what the Court has *not* done is a far easier task than explaining

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what it has done. As one commentator has remarked:

> Few tasks in criminal evidence are more perplexing than to describe the effect of the Confrontation Clause of the Sixth Amendment upon the hearsay doctrine. Signals from the Supreme Court point in different directions; the views of commentators differ; and while the subject is potentially as vast as the hearsay doctrine itself, benchmarks in the form of authoritative decisions are few and far between. 4 D. Louisell & C. Mueller, Federal Evidence 123 (1980).

See also 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶800[04], at 800-20 (1981) ("The Court has not spoken clearly on confrontation issues, and a number of the opinions are difficult to reconcile"); M. Graham, Handbook of Federal Evidence 772 (1981) ("Today the relationship of the confrontation clause and the hearsay rule is to say the least confused."). Perhaps the best place to start is with the Court's latest pronouncement on the subject, Ohio v. Roberts, 448 U.S. 56 (1980).

OHIO V. ROBERTS

Herschel Roberts was charged with forging a check and possession of stolen credit cards. At the preliminary hearing, the defense called Anita Isaacs, the daughter of the owner of the credit cards and check, apparently for the purpose of showing that she "had given [the defendant] checks and the credit cards without informing him that she did not have permission to use them. Anita, however, denied this." *Id.* at 58. At trial Roberts testified that Anita had given him permission to use the credit cards and check. On rebuttal the prosecution introduced Anita's preliminary hearing testimony. Prior to trial the prosecution had issued subpoenas, without success, to compel her attendance, and at trial her mother testified that her whereabouts were unknown. The Ohio Supreme Court held that the admission of the preliminary hearing testimony violated the defendant's right of confrontation. State v. Roberts, 55 Ohio St.2d 191, 378 N.E.2d 492 (1978). The U.S. Supreme Court reversed.

In *Roberts* the Court provided the following standard for determining the constitutionality of hearsay statements:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Id.* at 66.

Thus, the Confrontation Clause appears to require both the unavailability of the declarant and some indicia establishing the reliability of the hearsay statement. The unavailability requirement is a procedural requirement, manifesting a preference for in-court testimony subject to oath, cross-examination, and jury observation of demeanor. The reliability requirement is a substantive requirement, evidencing a view that the Confrontation Clause is designed to protect against convictions based on unreliable evidence. *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L. Rev. 567 (1978).

UNAVAILABILITY

The first prong in the *Roberts* analysis provides that the right of confrontation "normally requires a showing that the [declarant] is unavailable." *Id.* at 66. Explaining this requirement, the Court wrote:

> [I]n conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. *Id.* at 65.

The preference for in-court confrontation and cross-examination of prosecution witnesses has long been recognized by the Court. In an early case the Court stated that the Clause requires

> 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 v. U.S., 156 U.S. 237, 242-43 (1895).

See also Barber v. Page, 390 U.S. 719, 725 (1968) ("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.").

Test for Determining Unavailability

The test for determining the unavailability of the declarant was first set forth in Barber v. Page, 390 U.S. 719 (1968), in which the Court held: "[A] witness is not 'unavailable' for purposes for 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, 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. *Id.* at 74-75.

Because the extent of the effort that the prosecution must make in order to comply with the unavailability requirement is a question of reasonableness, courts may disagree as to whether the

standard has been satisfied in particular cases. Indeed, *Roberts* presented such a situation. The Ohio court of appeals found the prosecution's efforts to be inadequate under the *Barber* standard, while the Ohio Supreme Court reached the opposite conclusion. State v. Roberts, 55 Ohio St.2d 191, 378 N.E.2d 492 (1978). Similarly, a majority of the Supreme Court held the unavailability showing adequate, but the dissenting Justices found that additional efforts could have been attempted. 448 U.S. at 77-82. *See also* Mancusi v. Stubbs, 408 U.S. 204 (1972).

Reasons for Unavailability

A witness may be unavailable at trial for a number of different reasons, each of which will affect the prosecution's obligation to produce the witness. Before considering the various reasons, it should be noted that if the witness' unavailability is attributable to the prosecution, the Confrontation Clause would preclude the use of the witness' hearsay statements. *See* Motes v. U.S., 178 U.S. 458 (1900).

First, a witness may be unavailable because his present whereabouts are unknown. This was the situation in *Roberts,* now the controlling case for determining the diligence of prosecutorial efforts required in such a situation. *See also* State v. Madison, 64 Ohio St.2d 322, 415 N.E.2d 272 (1980). At the very least, *Roberts* establishes that the issuance of subpoenas alone is insufficient to satisfy the constitutional test. Second, the witness may be dead. In this situation *Roberts* indicates that "'good faith' demands nothing of the prosecution" (except producing sufficient evidence of death). *See also* Mattox v. U.S., 156 U.S. 237 (1895). Third, the witness may be ill at the time of trial. In this situation, a continuance may resolve problems associated with a temporary infirmity. *See* U.S. v. Amaya, 533 F.2d 188, 191 (5th Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977); Peterson v. U.S., 344 F.2d 419, 425 (5th Cir. 1965); Mitchell v. State, 40 Ohio App. 367, 178 N.E. 325 (1931); C. McCormick, Evidence 610 (2d ed. 1972) ("A mere temporary disability appears not to conform with the standard established by Barber v. Page."). Another solution would be to take the witness' testimony in the presence of the jury at the hospital or witness' home. *See* State v. Lamonge, 117 Ohio App. 143, 191 N.E.2d 207 (1962), *appeal dismissed,* 174 Ohio St. 545, 190 N.E.2d 691 (1963), *cert. denied,* 375 U.S. 942 (1963).

Fourth, the witness may claim a valid privilege, such as the privilege against self-incrimination. *See* California v. Green, 399 U.S. 149, 167-68 (1970); U.S. v. Lang, 589 F.2d 92 (2d Cir. 1978); U.S. v. Wood, 550 F.2d 435 (9th Cir. 1976). Under these circumstances, it could be argued that the prosecution is obliged to grant the witness immunity. *See* Dutton v. Evans, 400 U.S. 74, 101 n.2 (1970) (J. Marshall, dissenting); U.S. v. Yates, 524 F.2d 1282, 1286 (D.C. Cir. 1975); State v. Broady, 41 Ohio App.2d 17, 321 N.E.2d 890 (1974); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L. Rev. 567, 584-85 n.43 (1978); 4 D. Louisell & C. Mueller, Federal Evidence 1070-74 (1981).

Fifth, the witness could simply refuse to testify, notwithstanding the absence of a valid privilege. *See* California v. Green, 399 U.S. 149, 167-68 (1970); U.S. v. Satterfield, 572 F.2d 687 (9th Cir.), *cert. denied,* 439 U.S. 840 (1978); United States v. Bailey, 581 F.2d 341 (3d Cir. 1978). Such a witness could be held in contempt. *See* State v. Kilbane, 61 Ohio St.2d 201, 400 N.E.2d 386 (1980); State v. Antill, 176 Ohio St. 61, 197 N.E.2d 548 (1964). Whether or not the witness' conduct is found to be contumacious, the refusal makes the witness' testimony unavailable.

Sixth, the witness' testimony may be unavailable due to a lack of memory. This was the situation in California v. Green, 399 U.S. 149 (1970). *See also* U.S. v. Lyon, 567 F.2d 777 (8th Cir. 1977), *cert. denied,* 435 U.S. 918 (1978). In this type of case, the witness would have to be called, placed under oath, and examined as to the lack of memory.

Finally, the witness may be beyond the subpoena power of the trial court. *Barber v. Page* makes clear that this ground alone is not constitutionally sufficient. In that case the witness, whose preliminary hearing testimony was admitted at the state trial, was incarcerated in a federal prison in another state at the time of trial. The Court pointed out that 28 U.S.C. § 2241(c)(5) empowered federal courts to issue writs of habeas corpus *ad testificandum* at the request of state prosecutorial authorities and that the policy of the U.S. Bureau of Prisons was to honor such writs issued by state courts. 390 U.S. at 724. Because the prosecution had failed to use any of these means to secure the attendance of the witness, the Court found a confrontation violation. In a footnote the Court noted that "the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings provides a means by which prosecuting authorities from one State can obtain an order from a court in the State where the witness is found directing the witness to appear in court in the first State to testify." *Id.* at 723 n. 4. *See also* Berger v. California, 393 U.S. 314 (1969); Pointer v. Texas, 380 U.S. 400 (1965).

One other case deserves comment. In Mancusi v. Stubbs, 408 U.S. 204 (1972), the defendant challenged the prosecution's failure to produce a witness, an American national, who was permanently residing in Sweden at the time of a retrial. In the absence of the witness, the trial court admitted the witness' testimony given at the first trial. The Court found no constitutional violation.

> Upon discovering that [the witness] resided in a foreign nation, the State of Tennessee, so far as this record shows, was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government. . . . We therefore hold that the predicate of unavailability was sufficiently stronger here than in Barber that a

> federal habeas court was not warranted in upsetting the determination of the state trial court as to [the witness'] unavailability. *Id.* at 212-13.

Despite the Court's attempt to distinquish *Barber, Mancusi v. Stubbs* appears to water-down the *Barber* "actual unavailability" standard because, as Justice Marshall noted in dissent, the prosecution never attempted to contact the witness in order to secure his voluntary attendance. *Stubbs,* perhaps can be best viewed as an exceptional case, applicable only where the witness is in a foreign country. This view is supported by *Roberts'* reliance on *Barber,* not *Stubbs,* as the controlling standard in the typical case. It may also be that the type of hearsay admitted in *Stubbs,* former trial testimony, played a determinative role. Such testimony is probably the most reliable form of hearsay; it has been subjected to cross-examination at trial when the witness was under oath, and the transcript reduces the possibility of errors in transmission. A less reliable form of hearsay may require a more demanding standard of unavailability.

Both the Federal and Ohio Rules of Evidence set forth standards of unavailability for the purpose of applying certain hearsay exceptions. *See* Fed. R. Evid. 804(a); Ohio R. Evid. 804(A). Of course, these standards would have to be read in light of the constitutional requirements discussed above. Nevertheless, they do provide guidance and texts on those rules should be consulted. *See* 4 D. Louisell & C. Mueller, Federal Evidence § 486 (1980); 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶804(a)(01) (1981). For a discussion of the available procedures for producing witnesses at trial, *see* Western, *Compulsory Process II,* 74 Mich. L. Rev. 191, 283-89 (1975).

The Exception

Although the Court specified the unavailability of the declarant as a requirement of confrontation in *Ohio v. Roberts,* it undercut that requirement by using the word "normally" and inserting the following footnote:

> A demonstration of unavailability, however, is not always required. In Dutton v. Evans, 400 U.S. 74 . . . (1970), for example, 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.

In *Dutton v. Evans* the defendant and two accomplices were charged with the murder of three Georgia policemen. Williams, one of the accomplices, was previously convicted in a separate trial. The other accomplice, Truett, received immunity and was the principal prosecution witness at Evans' trial. In addition to Truett's testimony, the prosecution offered the testimony of a man named Shaw, who had been incarcerated with Williams prior to the latter's trial. When Williams returned from his arraignment, Shaw asked: "How did you make out in court?," to which Williams responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." 400 U.S. at 77. This statement was admitted at Evans' trial under an expansive coconspirator exception to the hearsay rule recognized by the Georgia courts.

A plurality of the Supreme Court held that the Confrontation Clause had not been infringed because:

> First, the statement contained no express assertion about past fact, and consequently carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. 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. *Id.* at 88-89.

For present purposes, the critical aspect of *Evans* is the fact that the prosecution made no attempt to call Williams as a witness. The Court summarily addressed this point, stating that "the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal." *Id.* at 89. As discussed below, the standard for determining when the "utility" of cross-examination will be "so-remote" as to relieve the prosecution of the responsibility for establishing unavailability is extremely important.

The Federal and Ohio Rules of Evidence

Traditional hearsay exceptions can be divided into two categories: those exceptions that require the unavailability of the declarant and those that do not. Thus, Federal Rule 804 and Ohio Rule 804 require that the unavailability of the declarant be shown before former testimony, dying declarations, and declarations against interests are admissible. With these exceptions, the hearsay rule itself demands a demonstration of unavailability. Thus, the unavailability requirement of *Roberts* will not substantially affect these exceptions, except perhaps to require a more demanding standard in some instances. Consequently, footnote 7 of *Roberts* will not be critical with these exceptions.

On the other hand, Federal Rule 803 and Ohio Rule 803 permit the admission of hearsay statements without a showing of unavailability. A number of common exceptions fall within this category: excited utterances, business records, official records, and statements of state of mind and physical condition. The application of the *Roberts* unavailability requirement will presumably have a substantial impact on the admissibility of state-

ments falling within these exceptions. For example, if the prosecution wants to introduce a business record, the hearsay rule does not require a showing of the declarant's unavailability. *Roberts,* however, requires the prosecution to establish unavailability - unless, of course, footnote 7 applies. It could be argued that in many cases the declarant would not remember the facts recorded in the business record and thus the utility of cross-examination would be remote. *See* C. McCormick, Evidence 720 (2d ed. 1972) ("the inconvenience of calling those with firsthand knowledge and the unlikelihood of their remembering accurately the details of specific transactions convincingly demonstrate the need for recourse to their written records, without regard to physical unavailability."). It was apparently this view of business records that prompted Justice Harlan to write in his concurring opinion in *Evans* that "production of the declarant is likely to be difficult, unavailing, or pointless." 400 U.S. at 96. On the other hand, if the business record is a hospital report of a physical examination of a rape victim, *see* State v. Tims, 9 Ohio St.2d 136, 224 N.E.2d 348 (1967), it is not so obvious that the declarant would not remember the event or that cross-examination would be "pointless." Or, the business record may be an autopsy report purporting to establish the cause of death in a homicide case. Cross-examination may be critical if the defendant's theory is suicide, rather than homicide. How does the trial court decide? Unfortunately, we have only *Evans,* which involved a rather rare combination of circumstances, as a guide. *See also* Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants,* 30 Hastings L.J. 621 (1979).

The Compulsory Process Issue

One other aspect of *Dutton v. Evans* deserves attention. In footnote 19 the Court stated:

> Of course Evans had the right to subpoena witnesses, including Williams, whose testimony might show that the statement had not been made. Counsel for Evans informed us at oral argument that he could have subpoenaed Williams but had concluded that this course would not be in the best interests of his client. 400 U.S. at 88 n. 19.

This footnote and the availability of the right of compulsory process played a crucial role in State v. Spikes, 67 Ohio St.2d 405, 423 N.E.2d 1122 (1981), in which hospital records were admitted over a defense objection. At trial the prosecution offered no evidence establishing the unavailability of the persons who prepared those records. Nevertheless, the Ohio Supreme Court held that the defendant's right of confrontation was not violated. In support of this conclusion, the court wrote:

> Prior to trial, defense counsel could have deposed the preparers of the reports. Crim. R. 15. Likewise, he could have subpoenaed those same people to testify at trial. Crim. R. 17. . . . Rather, defense counsel made a tactical decision to do neither. Counsel for the defendant, in *Dutton,* made much the same choice [citing footnote 19 of *Dutton*].
>
> The United States Constitution does not require that this court install a procedural safety valve which would permit criminal defendants to sit idly by at trial and during its preparation and which would decimate established and reliable exceptions to the rule against hearsay. Defense counsel did not pursue his options of discovery and compulsory process. Claims of constitutional violations do not disguise the fact that defense counsel's choice of tactics determined whether the potential witnesses would testify. *Id.* at 411-12.

There are two flaws with this analysis. The first involves Ohio Criminal Rule 15, which governs the use of depositions. Apparently, the Court was unaware that Rule 15, which was promulgated by the Court, does not permit discovery depositions. Rule 15 permits depositions only for the purpose of *preserving* the testimony of a witness. *See* Crim. R. 15(A)("If it appears that a prospective witness will be unable to attend or will be prevented from attending a trial or hearing . . .).

Second, and more importantly, the compulsory process argument, if accepted, would mean that the prosecution would never have to establish the unavailability of a declarant; it could always argue that the witness was unavailable because the defense failed to produce the witness at trial. As Professor Westen 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).

Furthermore, there is no support for the Ohio Supreme Court's position in the U.S. Supreme Court's cases. Although the Court included footnote 19 in *Dutton v. Evans,* the Court's confrontation analysis did not rely on that footnote. In *Ohio v. Roberts* the Court never mentioned the possibility that the defendant's failure to take steps to secure the witness' attendance at trial was a crucial factor. Indeed, the Court adopted the opposite position, casting upon the prosecution the responsibility of producing the witness.

INDICIA OF RELIABILITY

In addition to the unavailability requirement, *Roberts* provides that the "statement is admissible only if it bears adequate 'indicia of reliability.' " The indicia of reliability standard is found in only two of the Court's prior opinions. *See* Mancusi v. Stubbs, 408 U.S. 204, 213-14 (1972); Dutton v. Evans, 400 U.S. 74, 88-89 (1970). For purposes of reviewing the reliability requirement, the Court's cases are divided into three categories: (1) cases

in which the hearsay statement is subjected to cross-examination at the time it was made (prior cross-examination); (2) cases in which the hearsay declarant is subjected to cross-examination at trial (delayed cross-examination); and (3) cases where there is no cross-examination.

Prior Cross-Examination

The prior cross-examination cases involve the hearsay exception for former testimony, which includes preliminary hearing testimony, deposition testimony, and former trial testimony in the event of a retrial. The critical aspect of former testimony is that the opportunity to cross-examine the declarant through counsel has been afforded. Moreover, the testimony is taken under oath and the transcript assures accurate recordation. Since, however, the declarant must be shown to be unavailable at trial as a prerequisite for admitting such evidence, the jury is deprived of the opportunity to observe the demeanor of the witness.

It was the presence of the safeguards mentioned above that the Court found persuasive in deciding the confrontation issue raised in California v. Green, 399 U.S. 149 (1970). In that case, the witness, Porter, had testified at the preliminary hearing, but claimed a lack of memory at trial. The Court upheld the admissibility of the preliminary hearing testimony.

> Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. *Id.* at 165.

Because the right of cross-examination had been afforded and the witness' unavailability was not attributable to the prosecution, the Court found "substantial compliance with the purposes behind the confrontation requirement . . ." *Id.* at 166.

The Court had previously upheld the admissibility of former testimony in Mattox v. U.S., 156 U.S. 237 (1895). *Mattox,* however, had involved the use of prior trial testimony, whereas *Green* involved preliminary hearing testimony. Although the Court recognized that "the preliminary hearing is ordinarily a less searching exploration into the merits of a case than a trial," it did not find this distinction critical—at least not under the facts in *Green.* "In the present case respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness Porter at the preliminary hearing." 399 U.S. at 166.

Although the Court upheld the use of former testimony in *Green,* it did not apply the indicia of reliability standard. This is due to the fact that that standard was first used in Dutton v. Evans, 400 U.S. 74 (1970), which was decided after *Green.* In Mancusi v. Stubbs, 408 U.S. 204 (1972), however, the Court employed the indicia of reliability standard to the admissibility of former testimony. *Stubbs* involved the use of former trial testimony at a retrial. After holding that the witness was unavailable, the Court stated

> The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," Dutton v. Evans, . . . and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," California v. Green . . . *Id.* at 213.

The Court then concluded that these standards had been satisfied in *Stubbs* because there had been "an adequate opportunity to cross-examine [the witness] at the first trial, and counsel . . . availed himself of the opportunity . . ." *Id.* at 216.

The Court relied on *Green* and *Stubbs* in holding that the preliminary hearing testimony in *Ohio v. Roberts* satisfied the reliability standard. The only distinguishing circumstances in *Roberts* were that, unlike *Green*, different counsel represented Roberts at the preliminary hearing and at trial, and the witness was called by the defense, rather than the prosecution, at Roberts' preliminary hearing. The Court found no significance in the change of counsel. Furthermore, after reviewing the record, the Court concluded that although the witness was questioned on direct examination, the "questioning clearly partook of cross-examination as a matter of *form,*" 448 U.S. at 70, and there was no significant limitation on the scope or nature of the cross-examination.

Roberts also indicates that the reliability requirement does not demand an ad hoc evaluation of the effectiveness of the cross-examination in every case.

> We need not consider whether defense counsel's questioning at the preliminary hearing surmounts some inevitable nebulous threshold of "effectiveness." . . . We hold that in all but such extraordinary cases, no inquiry into "effectiveness" is required. A holding that every case involving prior testimony requires such as inquiry would frustrate the principal objective of generally validating the prior testimony exception in the first place - increasing certainty and consistency in the application of the Confrontation Clause. *Id.* at 73 n.12.

See also State v. Madison, 64 Ohio St.2d 322, 415 N.E.2d 272 (1980). Nevertheless, the Supreme Court did leave unresolved one issue concerning effectiveness; that is, situations in which there is no, or only *pro forma,* cross-examination. "We need not decide whether the Supreme Court of Ohio correctly dismissed statements in *Green* suggesting that the mere opportunity to cross-examine rendered the prior testimony admissible. . . . Nor need we decide whether *de minumus* questioning is sufficient, for defense counsel in this case tested [the witness'] testimony with the equivalent of significant cross-examination." 448 U.S. at 70.

Delayed Cross-Examination

Two of the Court's decisions involve situations in which the defendant was afforded the opportunity to cross-examine the hearsay declarant at trial. For example, the preliminary hearing testimony in *Green* was also admissible as substantive evidence under California law as a prior inconsistent statement in addition to being admissible as former testimony. According to the Court, the presence of the declarant at trial "afford[s] the trier of fact a satisfactory basis for evaluating the truth of the prior statement." 399 U.S. at 161. Under these circumstances, the witness is under oath, is subject to cross-examination, and the jury has the opportunity to observe the witness' demeanor. *Id.* at 159-61.

Green, however, did leave one issue unresolved. In that case, the preliminary hearing witness claimed a lack of memory when called to testify at trial. This factor, of course, undercut the defendant's opportunity to cross-examine at trial. Nevertheless, the Court did not explore this point. "Whether [the witness'] apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture." 399 U.S. at 168-69. The Court remanded the case on this issue.

In Nelson v. O'Neil, 402 U.S. 622 (1971), a codefendant's statement implicating O'Neil was introduced at a joint trial. The admission of the statement would have violated the Court's decision in Bruton v. U.S., 391 U.S. 123 (1968), but for the fact that the codefendant took the stand and thereby was subject to cross-examination. "We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." *Id.* at 629-30.

In sum, *Green* and *O'Neil* indicate that delayed cross-examination of the hearsay declarant will usually satisfy the reliability requirement. The most important impact of these cases involves the substantive use of prior inconsistent statements under Federal Evidence Rule 801(d)(1)(a). For a discussion of this issue, *see* 4 D. Louisell & C. Mueller, Federal Evidence § 422 (1980); 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶801(d)(1)(A)[04] (1979); Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness,* 56 Tex. L. Rev. 151 (1978).

Absence of Cross-Examination

The previously discussed categories involved situations in which cross-examination occurred, either prior to trial or at trial. Unlike the former testimony exception, however, most hearsay exceptions do not require cross-examination at the time the statement is made. Present sense impressions, excited utterances, statements of state of mind or physical condition, business records, official records, dying declarations, and declarations against interest fall into this category. Moreover, if the declarant is not available at the time of trial, delayed cross-examination is not possible. In this situation, there will be no cross-examination.

Dutton v. Evans, 400 U.S. 74 (1970), was such a case. In that case, the Court made an *ad hoc* evaluation as to the reliability of the hearsay statement; the Court held that the lack of any memory problem, the spontaneity of the statement, the declarant's obvious personal knowledge of the underlying facts, and the fact that the statement was against his interests were sufficient indicia of reliability to satisfy confrontation requirements.

After *Dutton v. Evans,* many courts employed an ad hoc approach to determine whether the reliability requirement had been satisfied. *E.g.* U.S. v. Nick, 604 F.2d 1199, 1202-04 (9th Cir. 1979); U.S. v. Wright, 588 F.2d 31, 38 (2d Cir. 1978), *cert. denied,* 440 U.S. 917 (1979). *See also* 5 J. Wigmore, Evidence § 1397, at 185 (Chadbourn rev. 1974) ("case-by-case approach"); 4 D. Louisell & C. Mueller, Federal Evidence 155-57 (1980). *Ohio v. Roberts,* however, indicates that an ad hoc review is not usually required. After positing the reliability requirement, the Court wrote: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U.S. at 66. In another part of the case, the Court commented: "The Court has applied this 'indicia of reliability' requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Id.* at 66, *quoting* Mattox v. U.S., 156 U.S. 237, 244 (1895).

Thus, it could be argued that the reliability requirement is presumptively satisfied when traditional ("firmly rooted") hearsay exceptions are used by the prosecution. This is Judge Weinstein and Professor Berger's interpretation: "It would seem, therefore, that the Court's test amounts to 1) unavailability plus 2) traditional hearsay exception." 4 J. Weinstein & M. Berger, Weinstein's Evidence 7 (1981 Supp.). The *Roberts* opinion, however, undercuts this interpretation. If the Weinstein interpretation is correct, the Court would have only had to point out that the former testimony exception, which includes preliminary hearing testimony, was "firmly rooted." Instead, the Court spent time in determining whether this requirement had been satisfied in *Roberts.* This suggests that a more searching inquiry is demanded, and after *Roberts* some federal courts have undertaken such an independent analysis of reliability. *E.g.,* U.S. v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), *cert. denied,* 101 S.Ct. 1709 (1981).

This approach is also supported by the values underlying the Confrontation Clause. Assume, for example, that a defendant's homicide conviction rests principally on an identification made in the

form of a dying declaration. In *Roberts* the Court cited dying declarations, 448 U.S. at 66 n.8, as an example of one of the hearsay exceptions that "rest upon such solid foundation that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Id.* at 66. Nevertheless, because the evidence is so crucial and the exception has "long [been] thought by commentators to be the least reliable form of hearsay," 4 J. Weinstein & M. Berger, Weinstein's Evidence 7 (1981 Supp.), it is difficult to imagine the Court mechanically upholding the admissibility of such a statement without an independent analysis of its reliability. *See* Ohio v. Roberts, 448 U.S. 56, 64 (1980) ("the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact finding process.'").

Roberts also leaves unresolved the problem of determining which exceptions are "firmly rooted." A number of exceptions recognized in the Federal Rules of Evidence are clearly not "firmly rooted." *See* Olson v. Green, 668 F.2d 421, 427-28 (8th Cir. 1982) (Rule 804(b)(3), statements against penal interests not "firmly rooted"). Other exceptions, although long recognized, have been considerably expanded by the Rules. *See* United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), *cert. denied,* 101 S.Ct. 1709 (1981) (statement made for medical diagnosis). Exceptions falling into this category must be subjected to "a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts.* 448 U.S. at 66.

WAIVER

Although a number of recent cases have considered the waiver of confrontation rights in the hearsay context, the Supreme Court has yet to definitively review this issue. In other contexts, however, the Court has provided a mixed answer. In Brookhart v. Janis, 384 U.S. 1 (1966), the Court applied a stringent waiver standard, requiring the prosecution to establish "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 4, *quoting* Johnson v. Zerbst, 304 U.S. 458 (1938). In other cases the Court has found a waiver by conduct. *See* Taylor v. U.S., 414 U.S. 17 (1973); Allen v. Illinois, 397 U.S. 337 (1970). These latter cases have led some commentators to suggest that a forfeiture, rather than a waiver, theory is a more accurate description of the Court's decisions. *See* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One,* 8 Crim. L. Bull. 99, 140-43 (1972).

One of the leading hearsay-confrontation cases involving waiver is U.S. v. Thevis, 665 F.2d 616 (5th Cir. 1982), in which the grand jury testimony and FBI interview statements of a witness were admitted after the prosecution established that the defendant had murdered the witness.

> We conclude that a defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying . . . waives his right under the *Zerbst* standard. A defendant who undertakes this conduct realizes that the witness is no longer available and cannot be cross-examined. Hence, in such a situation the defendant has intelligently and knowingly waived his confrontation rights. *Id.* at 630.

The court also held that the prosecution has the burden of establishing such a waiver by clear and convincing evidence. *Id.* at 630-31. *See also* Reynolds v. U.S., 98 U.S. 145, 158 (1878) ("The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away."); Black v. Woods, 651 F.2d 528, 531 (8th Cir.), *cert. denied.* 102 S.Ct. 164 (1981) (waiver due to intimidation of witness); U.S. v. Balano, 618 F.2d 624 (10th Cir. 1979), *cert. denied,* 449 U.S. 840 (1980) (waiver due to intimidation of witness); U.S. v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977) (waiver due to intimidation witness); *but see* Olson v. Green, 668 F.2d 421 (8th Cir. 1982) (prosecution must establish defendant's involvement with threats against witness).