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ARTICLES

RESTORING THE CONFRONTATION CLAUSE TO THE SIXTH AMENDMENT

Randolph N. Jonakait*

INTRODUCTION

The relationship between the sixth amendment's confrontation clause and out-of-court statements by absent declarants is a difficult one. Before 1980, the Supreme Court

1. The sixth amendment states:

   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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted 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.

   U.S. Const. amend. VI.

2. “One of the most difficult and perplexing issues arising under the sixth amendment is the relationship between the confrontation clause and the law of hearsay.” Kirkpatrick, Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement, 70 Minn. L. Rev. 665, 665 (1986); see also Lilly, Notes on the Confrontation Clause and Ohio v. Roberts, 36 U. Fla. L. Rev. 207, 207 (1984) (“An intractable problem in criminal trials is to reconcile the accused’s constitutional right ‘to be confronted with the witnesses against him’ with the government’s invocation of various exceptions to the rule against hearsay.”).

   The Court has said that its confrontation “cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination.” Delaware v. Fensterer, 474 U.S. 15, 18 (1985). This Article addresses the first category.

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produced no comprehensive theory to explain the relationship. Then, in *Ohio v. Roberts*, the Court provided a general approach for determining when out-of-court statements could be admitted against criminal defendants without violating the confrontation clause. This framework was immediately controversial, with commentators suggesting that it not be taken seriously. Perhaps hearing the critics, the Court has recently abandoned at least part of the *Roberts* framework.

This Article will examine these recent decisions and others to show that the confrontation clause is now interpreted in a fundamentally different fashion from other guarantees of the Bill of Rights. The confrontation clause is no longer a constitutional right protecting the accused, but essentially a minor adjunct to evidence law. The Article will discuss how the provision's meaninglessness results from the Supreme Court's misidentification of confrontation's central mission, which thereby gives the constitutional provision the same goal as evidence law. Instead, as the Article will demonstrate, the confrontation clause's true purpose is to work in conjunction with other sixth amendment rights to preserve our adversary system. The Article then develops a standard for interpreting the confrontation clause consistent with its purpose.

I. The Supreme Court's Current Interpretation of the Confrontation Clause

A. The Approach in *Ohio v. Roberts*

Before 1980, the Court's confrontation opinions did not fit into a coherent theory. Furthermore, commentators did not agree on the proper approach to interpreting the clause. *Ohio v. Roberts* announced that "a general ap-

4. "Since 1965, when the Supreme Court held the confrontation clause applicable to the states, the Court has applied the clause in a variety of contexts. The resulting interpretations are not easily reconciled." Lilly, supra note 2, at 217 (footnotes omitted). Professor Lilly gives a good short description of the cases predating *Roberts*. *Id.* at 217-21; see also Kirkpatrick, supra note 2, at 670-77, for a description of most of the cases before *Roberts*.
5. *Ohio v. Roberts* noted the diversity of the comments.

The complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commen-
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The approach to the problem is discernible." The Court extracted from its prior opinions two principles: the confrontation clause contains a necessity rule that normally requires the production or unavailability of hearsay declarants and a reliability rule that requires hearsay from absent declarants to have marks of trustworthiness. The Court summarized:

[W]hen 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.

This general framework, discerned but a few years ago, has not lasted. Recent decisions indicate that the reliability branch survives, but the general unavailability requirement has been jettisoned.

B. The Reliability Requirement

Two recent Supreme Court cases reaffirm the reliability prong of Roberts. In Lee v. Illinois, Lee and Thomas were tried jointly in a nonjury trial for homicide. Thomas did not testify, but his confession was introduced against him. The trial judge, however, expressly relied upon Thomas's confession in convicting Lee. The Supreme Court held that this use of hearsay violated Lee's confrontation rights because the hearsay did not have sufficient indicia of reliability, as

448 U.S. at 66-67 n.9. See also Lilly, supra note 2, at 215-17, and Kirkpatrick, supra note 2, at 677-82, for discussions of differing scholarly confrontation interpretations.

6. 448 U.S. at 65.

7. Id. at 66. The Court went on to hold that a declarant is unavailable for confrontation purposes when the prosecutor has made a good faith effort to produce the declarant at trial. Id. at 74.

defined by *Roberts*, to justify its admission without cross-examination.\(^9\) The four-Justice dissent agreed that the case was governed by *Ohio v. Roberts*,\(^10\) but concluded that the confession had sufficient indicia of reliability to pass constitutional muster.\(^11\) In essence, then, while differing over application of the requirement, all the Justices agreed that hearsay must have certain marks of trustworthiness to satisfy the sixth amendment.

A year later, *Bourjaily v. United States*\(^12\) further reaffirmed *Roberts*’s reliability branch. In ruling that coconspirator statements had been constitutionally admitted against the defendant, the Court, citing *Roberts*, held that such declarations could be considered reliable because they fell within a firmly rooted hearsay exception. Therefore, no independent inquiry into the specific reliability of the admitted statements was necessary to satisfy the sixth amendment.\(^13\)

Thus, the reliability prong of *Roberts* remains alive. Hearsay from absent declarants must be reliable, but hearsay admitted through the normal hearsay exceptions is automatically considered reliable enough to satisfy the confrontation clause.\(^14\)

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\(^9\) *Id.* at 2065.

\(^10\) *Id.* at 2066 (Blackmun, J., dissenting).

\(^11\) *Id.* at 2071.

\(^12\) 107 S. Ct. 2775 (1987).

\(^13\) We concluded in *Roberts* that no independent inquiry into reliability is required when the evidence “falls within a firmly rooted hearsay exception.” ... We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements. ... Accordingly, we hold that the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of the co-conspirator exception.

*Id.* at 2782-83.

\(^14\) *Lee v. Illinois* held that hearsay not falling within a firmly rooted exception is “presumptively unreliable and inadmissible for Confrontation Clause purposes, [but] may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.'” 106 S. Ct. at 2064 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).
C. The Unavailability Requirement

In contrast to the Supreme Court reaffirmation of Roberts's reliability prong, United States v. Inadi effectively abandoned Roberts's unavailability branch. Inadi held that coconspirator statements of a nontestifying declarant can be admitted without a showing of unavailability. The logic of this case, if applied to other hearsay areas, indicates that out-of-court statements generally can be constitutionally introduced without producing an available declarant.

The first step in forsaking the general unavailability requirement was to limit Roberts to its specifics, that is, to former testimony. After deciding that it was not bound by the earlier case, the Inadi Court then wove together three strands of reasoning to reach its conclusion that the out-of-court statements of the available coconspirator could be admitted even if he did not testify.

The first strand was the Court's explanation of Roberts, as now limited. Inadi concluded that former testimony seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version.

The Court continued that confrontation principles favor admitting the better evidence. Thus, if the declarant is available, his former testimony cannot be introduced; if he is unavailable, his prior testimony can be admitted since there is no better version of the evidence.

16. Id. at 1129.
17. Roberts should not be read as an abstract answer to questions not presented in that case . . . . Roberts simply reaffirmed a longstanding rule . . . that applies unavailability analysis to prior testimony . . . Roberts cannot fairly be read to 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. Id. at 1125–26.
18. Id. at 1126.
19. "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." Id.
20. Id.
Live testimony, however, is not better than coconspirator hearsay, according to Inadi.

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. . . . Coconspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence.21

Since this hearsay has more evidentiary value than live testimony, or at least has a different kind of value, its admission without requiring unavailability of the declarant does not conflict with the better evidence principle of the confrontation clause.

This reasoning, however, distinguishes more than just prior testimony from coconspirator statements; it distinguishes former testimony from all other admitted hearsay as well. Former testimony is exempted from the general prohibition on hearsay because it incorporates cross-examination and can, therefore, be evaluated nearly as well by the trier of fact as can in-court testimony.22 Other hearsay is exempted, however, because the circumstances in which it was uttered make that class of hearsay more reliable than hearsay generally.23 The evidentiary value of all the other admitted hearsay depends on the context in which it was made. Just as in-court testimony is not a replacement for coconspirator statements, neither is it a replacement for any admissible hearsay, except for former testimony.24 A glance at a few of the frequently utilized hearsay exceptions illustrates this point.

The person who witnesses a robbery can testify at trial that the robber was his neighbor. That testimony is not merely a substitute for his excited utterance during the

21. Id. at 1126–27.
23. See id. at 467–78.
24. The Inadi Court also distinguished former testimony and coconspirator statements by stating: "Roberts and our other prior testimony cases . . . rested in part on the strong similarities between the prior judicial proceedings and the trial. No such strong similarities exist between coconspirator statements and live testimony at trial." 106 S. Ct. at 1127. This, too, sets former testimony off from the rest of admissible hearsay.
crime, "That's my neighbor!" The jury may feel that the context of the hearsay declaration gives that statement a weight and reliability different from the weight of trial testimony. Similarly, the bank official may testify from his memory that a defendant withdrew money. The business record of that transaction, however, has a different evidentiary value from the testimony. Because of the context in which that hearsay was made, that is, because the record was entered in the routine course of business at the time of withdrawal, the jury may easily consider the business record of much greater value than the in-court testimony.

This portion of the Court's reasoning essentially divides the hearsay exceptions into two categories—former testimony and all the rest. With such a division, the confrontation clause actually offers an accused less protection than does normal hearsay doctrine.

Under evidentiary law there are also two divisions for the hearsay exceptions, but they are different from the divisions indicated by Inadi. One group, which can be called the Rule 803 exceptions, allows the admission of hearsay whether or not the declarant is available. The other group, the Rule 804 exceptions, only allows the out-of-court statements to be admitted if the declarant is unavailable. Except for former testimony, the Rule 804 exceptions, like


26. If the jury accepts the rationale for the hearsay exception, that the exciting event stilled the declarant's powers of reflection and fabrication, see Fed. R. Evid. 803(2) advisory committee's note, it will give the hearsay evidence a different weight than the in-court testimony. Cf. McCormick on Evidence § 297, at 855 (E. Cleary 3d ed. 1984) (The rationale for the exception "also serves to justify dispensing with any requirement that the declarant be unavailable, because it suggests that his testimony on the stand, given at a time when his powers of reflection and fabrication are operative, is at least no more reliable than his out-of-court statement.").

27. See Fed. R. Evid. 803(6).

28. Once again, if the jury accepts the rationale for the business record exception and concludes that such documents have "unusual reliability," see McCormick on Evidence, supra note 26, § 306, at 872, the in-court testimony will not be a mere substitution for the hearsay.


30. See Fed. R. Evid. 804. Coconspirator statements do not fall under either Rules 803 or 804 of the Federal Rules of Evidence. Instead, although such statements meet the basic definition of hearsay, see Fed. R. Evid. H801(c), they are specifically excluded from the definition. Fed. R. Evid. 801(d)(2)(E). At common law, these declarations are considered hearsay, but a hearsay exception allows their admission. R. Lempert & S. Saltzburg, A Modern Approach to Evidence
coconspirator statements, really get their evidentiary value from the context in which they were uttered. Under Inadi's analysis, they are not replaceable by live testimony. For example, a statement against interest is made in a context quite different from a trial and has force because its setting indicates that it was against the declarant's interest when uttered. The setting tends to insure the hearsay's reliability and gives the statement a different weight than would be given to the same words uttered by the same person on the witness stand. In the Court's terms, live testimony is not better evidence than statements against interest, but is evidence of a different substantive worth. If the logic of Inadi is applied to this exception, the confrontation clause does not require the unavailability of the declarant who makes a statement against interest, even though evidentiary law does require this unavailability. If there is an unavailability protection, it comes solely from evidence law.

Inadi's second strand of reasoning concluding that the sixth amendment does not require the unavailability of the declarant before admitting coconspirator statements was that such a rule would not offer any significant benefit. Since such a requirement does not forbid out-of-court statements if the declarant is truly unavailable, it would not actually exclude any evidence "unless the prosecution makes the mistake of not producing an otherwise available witness." Moreover, the Court continued, an unavailability rule would not produce much of an increase in worthwhile testimony. If the defendant really wanted the declarant to testify, he could have used his rights under the sixth amendment compulsory clause and produced the declarant. If the defendant chooses

383-86 (2d ed. 1982). Under either scheme, the hearsay is admissible without a showing of the declarant's unavailability.

31. See Jonakait, supra note 22, at 467-70.
32. See FED. R. EVID. 804(b)(3).
33. The exception exists because of the "assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." FED. R. EVID. 804(b)(3) advisory committee's note. This assumption is "premised upon the declarant's recognizing the disavowing nature of his statement at the time he made it." Tague, Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception, 69 Geo. L.J. 851, 907 (1981). If the jury accepts these assumptions, they ought to give the hearsay a different weight than the declarant's in-court testimony.

34. Inadi, 106 S. Ct. at 1127.
not to force the declarant to testify, the Court reasoned, "then it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant 'available.'" 35

Once again, this reasoning applies not just to coconspirator statements, but to all admitted hearsay, including the Rule 804 exceptions. If this logic controls, then the confrontation clause should not require the unavailability of declarants even for Rule 804 exceptions. Inadi again indicates that the confrontation clause gives an accused less protection than traditional hearsay doctrine.

Finally, Inadi cited the burdens from an unavailability rule as its third reason for rejecting such a rule. The burdens would be of two kinds. First, the prosecution would have practical difficulties in "identify[ing] with specificity each declarant, locat[ing] those declarant[s], and then en- deavor[ing] to ensure their continuing availability for trial." 36 Second, since evidentiary law does not require unavailability for coconspirator declarations, a sixth amendment unavailability rule for such statements would require trial courts to make decisions they are not now making and thereby give defendants a possible additional appellate claim. These new avenues of litigation "would impose a substantial burden on the entire criminal justice system." 37

A constitutional unavailability requirement, however, only imposes a substantial burden on prosecutors and courts when an unavailability rule is not already in place. Evidence law already demands that Rule 804 declarants be unavailable before the hearsay is admitted and requires the prosecutor to produce available Rule 804 declarants. If the prosecutor seeks to have the statements admitted, the court already has to decide if the declarant was truly unavailable. A sixth amendment unavailability requirement for this hearsay causes little additional work. 38 Such a requisite burdens the courts and government only if the confrontation clause were

35. Id. at 1128.
36. Id.
37. Id.
38. An unavailability requirement for Rule 804 declarants, while not increasing the work of the state trial and appellate courts, will increase the burden on federal courts. If an unavailability requirement is constitutionally mandated, state prisoners will be able to raise federal habeas corpus claims about state availability rulings.
found to require unavailability when evidence law does not already require it. Only then would the officials have to do something they do not already do. Consequently, if Inadi's concerns about the burdens imposed by the requirement are controlling, the confrontation clause might impose an unavailability requirement for Rule 804 declarants, but not for any other out-of-court declarants.

This last strand of Inadi's logic appears to leave the status of the constitutional unavailability requirement unclear. The opinion accepts Roberts's conclusion that the confrontation clause requires proof of unavailability before prior testimony can be admitted. It then gives two reasons that indicate that an unavailability requirement should be limited solely to former testimony: one, that in-court testimony is not a substitute for coconspirator statements and two, that an unavailability requirement would not produce important benefits because the defendant can produce the declarant. The Court's third reason, however, expressing a concern with the burdens of an unavailability rule could lead to an unavailability requirement for all Rule 804 hearsay. Nothing in the decision, however, indicates that this third reason should be given primacy. It is just one justification of the several the Court gives. Indeed, if the Court later finds that confrontation requires the unavailability of Rule 804 declarants, that decision will not really be the result of sixth amendment analysis, but of evidence law.

The burden the Court is concerned about only exists if evidence law does not now impose an unavailability requirement. This means that if a legislature should do away with the requirement for a Rule 804 exception, such as declarations against interest, the confrontation clause, if it had imposed an unavailability requirement for such hearsay, should no longer do so. All three strands of Inadi's reasoning would now apply: such statements have a different weight in context than courtroom testimony; the accused can always pro-

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39. See Kirkpatrick, supra note 2, at 674.

In cases where the prosecutor is already required to show unavailability under controlling evidence rules, there may be little or no additional burden involved in satisfying constitutional standards of unavailability. It is, however, a substantial additional burden for prosecutors to show unavailability when no such showing is otherwise required.

Id.
duce the declarant if the testimony is truly important; and additional burdens will be placed on the criminal justice system by the constitutional imposition of a rule not required by evidence law.

The extent of the unavailability requirement left by Inadi, then, hardly matters. Either evidence law will give an accused more protection than the sixth amendment offers by requiring unavailability when the amendment does not, or the confrontation clause will require unavailability for former testimony and for the hearsay rules that already require unavailability. Confrontation will never demand it when evidence law does not. A defendant, therefore, should look not to the confrontation clause for protection, but to evidence law.40

This result should not be surprising. The Court has asserted that the values protected by the hearsay rule and the confrontation clause are similar, but the overlap is not complete.41 The logical implication, however, that the confrontation clause bars some statements admitted under hearsay doctrine has not been put into effect.42 The modern Court has found the admission of hearsay to be a constitutional violation only when the prosecution has not made a good faith effort to produce a declarant when the evidence rules already require the declarant's unavailability.43 No other


41. 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 rule stem from the same roots. But this Court has never equated the two . . ."); Ohio v. Roberts, 448 U.S. 56, 66 (1980).

42. See, e.g., FED. R. EVID. art. VIII advisory committee's note ("In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them . . ., the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility."); see also Note, Inculpatory Statements Against Penal Interest and the Confrontation Clause, 83 COLUM. L. REV. 159, 162 (1983) ("The extent of congruence between the hearsay rule and the confrontation clause is not entirely clear. Though the constitutional requirement does not bar all out-of-court statements by an unavailable declarant, not every exception to the hearsay rule will necessarily be an exception to the confrontation clause.").

43. Thus, in Barber v. Page, 390 U.S. 719 (1968), prior testimony was admitted against the accused. The trial court decided that the declarant was unavailable
hearsay properly admitted under the applicable evidence law has been found to violate the confrontation provision. In other words, twenty years of confrontation analysis have

because he was incarcerated in a federal prison in another state. The Supreme Court found a confrontation violation and held that the declarant was not unavailable unless the state had made a good faith effort to produce him. The state had not made such an effort. Pointer v. Texas, 380 U.S. 400 (1965), the first decision applying the confrontation clause to the states and the first modern Supreme Court case interpreting the clause, might be the exceptional case that found a sixth amendment violation on some ground other than availability for evidence validly admitted under the applicable evidence law. Pointer held that the introduction of preliminary hearing testimony violated the confrontation clause. The defendant was not represented by counsel at the hearing, and the defendant did not cross-examine. The prior testimony was admitted at trial apparently without a showing that good faith efforts were made to produce the declarant. The Court’s holding could have several bases, including the fact that the accused was without counsel at the preliminary hearing or that the defendant did not cross-examine at the hearing. See Younger, Confrontation, 24 Washburn L.J. 1, 2-4 (1984) (discussion of possible Pointer rationales). Today, however, the Court sees Pointer as simply an unavailability case. See United States v. Inadi, 106 S. Ct. 1121, 1126 (1986) (“Roberts simply reaffirmed a longstanding rule, foreshadowed in Pointer v. Texas, . . . and refined in a line of cases up through Roberts, that applies unavailability analysis to prior testimony.”).

An earlier case did find that the admission of hearsay in compliance with hearsay rules violated the confrontation clause on grounds other than that a good faith effort had not been made to produce the declarant. See Kirby v. United States, 174 U.S. 47 (1899) (during trial for receipt of stolen goods, confrontation violation to prove goods were stolen by introduction of records of convictions of the three men convicted in a separate trial of stealing goods).

44. In other cases where the Court found confrontation violations because of the use of out-of-court statements at trial, the statements were not introduced against the defendant in accordance with the appropriate evidence law. See Cruz v. New York, 107 S. Ct. 1714 (1987) (confrontation violation to introduce nontestifying codefendant’s confession in joint trial with an instruction that the confession should only be considered against codefendant even though defendant’s interlocking confession also introduced); Lee v. Illinois, 106 S. Ct. 2056 (1986) (confrontation violation to consider nontestifying codefendant’s confession when confession only introduced against codefendant in joint trial); Bruton v. United States, 391 U.S. 123 (1968) (Bruton’s confrontation rights violated by introduction of nontestifying codefendant’s confession in joint trial where jury instructed to consider confession only against codefendant); Douglas v. Alabama, 380 U.S. 415 (1965) (confrontation violation where memory of prosecution witness was “refreshed” by reading his confession in front of jury after witness asserted fifth amendment privilege and refused to testify).

The Court has found no constitutional violation in the admission of evidence whose introduction would have violated traditional evidence rules, but did not violate the expansive evidence rules of the state where the trial was conducted. See Dutton v. Evans, 400 U.S. 74 (1970) (admission of coconspirator statements made during concealment phase did not violate the sixth amendment); California v. Green, 399 U.S. 149 (1970) (substantive admission of prior inconsistent statements did not violate confrontation clause); see also Cruz v. New York, 107 S. Ct. at 1719 (indicating that a nontestifying codefendant’s confession could be used against the defendant if the hearsay has sufficient indicia of reliability).
merely produced a slight redefinition of "unavailability." In reality, the conflicts between the hearsay exceptions and the sixth amendment have all been resolved, as they were in In-adi, in favor of the exceptions.\footnote{45}

Indeed, much of the modern debate about confrontation has assumed that if an interpretation of the confrontation clause conflicts with the evidence rules, then that constitutional interpretation must be wrong. This assumption was especially true in analyses of the unavailability prong of Roberts, which prompted strong, but singular, criticism. An unavailability requirement was wrong, according to these analyses, not because it violated the Framers' intent;\footnote{46} not because it was out of step with interpretations of other constitutional provisions; and not because it ignored the language of the confrontation clause. The requirement was wrong simply because it would have worked a change in the hearsay exceptions. This constitutional interpretation must be discarded, came the unusual cry, because it conflicted with modern evidence law.\footnote{47}

\footnote{45. Although Lee found a confrontation violation, it too falls within this pattern. Lee had a joint, nonjury trial with her codefendant. She withdrew her motion for a separate trial after the judge agreed to consider the evidence against each defendant separately. Lee v. Illinois, 106 S. Ct. at 2060. In spite of the trial judge's statement, and even though the codefendant's confession was not introduced against Lee, the trial judge expressly relied upon the codefendant's confession in finding Lee guilty of murder. Although the Supreme Court held that the confrontation clause was violated because the confession was not reliable enough to be used as substantive evidence, the Court did not find that evidence admitted under normal evidence rules was too unreliable to pass the sixth amendment. The Court has never found any evidence admitted under any hearsay exception to so lack the indicia of reliability as to be unconstitutional.}

\footnote{46. Courts and commentators agree that history teaches little about the Framers' intentions for the clause. See, e.g., Read, The New Confrontation—Hearsay Dilemma, 45 S. CAL. L. REV. 1, 6 (1972) ("The exact intent of the framers of the Constitution in providing [the confrontation clause] is probably undiscoverable."); Note, Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment, 85 COLUM. L. REV. 1294, 1301 (1985) ("Traditional sources of constitutional history shed little light on the intent of the framers of the sixth amendment. . . . Therefore, . . . any determination of whether a given aspect of the hearsay rule satisfies the confrontation clause must be preceded by an examination of the theory and policies underlying the constitutional right.").}

\footnote{See Lilly, supra note 2, at 208-15, for a discussion of this history. It does seem clear, however, that at the time of the clause's adoption, the admission of hearsay was strictly circumscribed. Id. at 212-13.}

\footnote{47. See, e.g., R. LEMPERT & S. SALTBURG, supra note 30, at 593 ("This statement, if taken literally, would work a dramatic change in the way criminal cases are tried. It would mean that all hearsay exceptions in criminal cases require unavail-}
The \textit{Inadi} Court heard these contentions. It recognized that if the \textit{Roberts} opinion truly controlled hearsay, “a wholesale revision of the law of evidence” would result.\textsuperscript{48} Apparently the Court considered it more important to change that constitutional interpretation than to change evidence law. Thus, the Court simply disowned the part of \textit{Roberts}'s general framework that conflicted with hearsay doctrine: “\textit{Roberts} cannot fairly be read to 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.”\textsuperscript{49}

D. \textit{The Confrontation Clause as a Mere Rule of Evidence}

Although composed of different majorities and reaching different results, the recent cases of \textit{Lee}, \textit{Inadi}, and \textit{Bourjaily} are consistent at a fundamental level. Each fits perfectly into the modern debate about confrontation, which is concerned with finding the best evidence rules to apply in a criminal case rather than addressing the content of the confrontation

\textit{ability. ... It is hard to believe that the Court meant to go this far.

It is unlikely that the Supreme Court meant this statement to apply to the whole range of hearsay utterances. It is, for example, not considered necessary, before introducing medical treatise evidence against an accused in a trial for murder by poisoning, to show that the writer of the treatise is unavailable. ... (It seems reasonable to assume that the Court was referring to [former hearing] testimony and other evidence within the scope of Rule 804.

\textit{See also M. Graham, Evidence: Text, Rules, Illustrations and Problems} 290 n.6 (1983):

This quotation contains the disturbing indication that a hearsay statement falling within a hearsay exception contained in Rule 803 may be admitted against the criminal defendant in the normal case only if the government produces the declarant. ... Taken literally, all hearsay exceptions in Rule 803 would require a showing of unavailability or the production of an available declarant when offered against the accused.

Several factors indicate that the Supreme Court had no such intention in mind.

\textit{Accord Kirkpatrick, supra note 2, at 667-68.}

\textit{48. 106 S. Ct. at 1125.}

\textit{49. Id. at 1126; cf. Note, supra note 46, at 1299-1300, written shortly before \textit{Inadi} was decided (“The circuits ... are divided over the need for an unavailability requirement, despite \textit{Roberts}'s explicit command that prosecutors either produce out-of-court declarants or demonstrate their unavailability ... . Most circuits do require proof of unavailability prior to the admission of coconspirator statements.”")}.
clause. In reality, evidence rules set the boundaries for the argument, and evidentiary principles control the content of the confrontation clause.

Thus, the Court has concluded that if a statement does not fall within the traditional definition of hearsay, it does not present a confrontation problem.\(^{50}\) This means that the sixth amendment contains a hearsay definition. The Court, however, has not struggled to determine the proper definition. Instead, the Court has simply placed the notion of hearsay found in evidence law into the Constitution.\(^{51}\) In other words, to know the boundaries of this part of his con-

\(^{50}\) Tennessee v. Street, 471 U.S. 409 (1985), indicates that if an out-of-court statement does not meet a traditional definition of hearsay, it can be admitted without violating the confrontation clause. In Street, a codefendant's confession was read to the jury to rebut the defendant's claim that the defendant's confession had been coerced and derived from the codefendant's statement. The Court stressed that "the prosecutor did not introduce Peele's out-of-court confession to prove the truth of Peele's assertion. Thus, . . . Peele's confession was not hearsay under traditional rules of evidence." Id. at 413 (emphasis in original). The Court concluded, "The nonhearsay aspect of Peele's confession—not to prove what happened at the murder scene but to prove what happened when respondent confessed—raises no Confrontation Clause concerns." Id. at 414 (emphasis in original).

A year later, the Court made more explicit its implication that a statement not falling within the traditional boundaries of hearsay cannot violate the confrontation clause. "[M]any coconspirator statements are not introduced to prove the truth of the matter asserted, and thus do not come within the traditional definition of hearsay. . . . We explained just last Term that admission of nonhearsay 'raises no Confrontation Clause concerns.' Tennessee v. Street, 105 S. Ct. at 2081." United States v. Inadi, 106 S. Ct. 1121, 1128 n.11 (1986); cf. Cruz v. New York, 107 S. Ct. 1714, 1717 (1987) ("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.").

Lower courts have equated hearsay and confrontation analysis to the extent that courts apply a confrontation analysis to determine whether the accused may introduce hearsay. See, e.g., United States v. Harenberg, 732 F.2d 1507, 1515 (10th Cir. 1984).

\(^{51}\) Lee v. Illinois, 106 S. Ct. 2056, 2065 n.4 (1986) (quoting E. Cleary, McCormick on Evidence 584 (2d ed. 1972)), stated,

We have previously turned to McCormick's definition of hearsay as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."

Evidence law, however, does not unanimously accept this or any other definition. "Nearly every important scholar in the field of evidence, and many a lesser one, has written on the problem of the scope of the hearsay rule." Wellborn, The Definition of Hearsay in the Federal Rules of Evidence, 61 Tex. L. Rev. 49, 58 (1982).
frontation right, the accused should look not to constitutional interpretation, but to evidence law.

The determination of reliability required by the confrontation clause fits into the same pattern—the accused must look to hearsay doctrine to see if he has a confrontation right. Bourjaily v. United States reaffirms the rule that no showing is necessary to establish a statement's reliability other than proof that the hearsay falls within a normal exception. Thus, the accused can only expect constitutional protection against unconfronted statements when the evidence does not fall into one of the numerous accepted hearsay exceptions. Of course, if the out-of-court statement does not fall into such a category, it would normally be banned by the hearsay rule. In other words, the absence of a hearsay exception rather than the existence of the sixth amendment, protects the accused. If the evidence law does not give protection, that is, if a hearsay exception exists for the unconfronted declaration, then the confrontation clause also denies protection.

52. See supra text accompanying notes 12–13. The drafters of the Federal Rules of Evidence did not justify the exemption of coconspirator statements from the hearsay prohibition on the grounds of reliability. "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission." FED. R. EVID. 801(d)(2) advisory committee's note; see also Davenport, The Confrontation Clause and the Coconspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 HARV. L. REV. 1378, 1384 (1972) ("the coconspirator exception has usually been supported by a variety of theories unrelated to the trustworthiness of the evidence itself."). Cf. Mueller, The Federal Coconspirator Exception: Action, Assertion, and Hearsay, 12 HOFSTRA L. REV. 323 (1984). "[M]odern commentators have suggested that the [coconspirator] exception exists largely because it is necessary as a means of convicting conspirators. Since conspiracies are dangerous to society and hard to prove at trial, a relaxation of the hearsay doctrine is required. Courts occasionally find something in this view." Id. at 335 (footnotes omitted). Mueller goes on to recommend that the Federal Rules of Evidence include a specific trustworthiness requirement for coconspirator statements. Id. at 388.

If a reliability inquiry is not necessary for coconspirator statements, which do not have a reliability justification, then such an inquiry will be unnecessary for all other firmly rooted hearsay exceptions.

53. Although Bourjaily states that confrontation "does not require" an independent reliability inquiry for firmly rooted hearsay exceptions, the holding really indicates that no such inquiry should be done. The Court's analysis consisted solely of determining that the hearsay fell within an appropriate hearsay exception. That, of course, is all that any future court should have to do. Thus, for example, the analysis done in Williams v. Melton, 733 F.2d 1492 (11th Cir. 1984), cert. denied, 469 U.S. 1073 (1984), was unnecessary. There, where the defendant
look not to constitutional interpretation for the limits of his confrontation rights, but to evidence law.

Even if the evidence is not admissible under normal notions of the hearsay doctrine, it still passes sixth amendment scrutiny with a showing of "particularized guarantees of trustworthiness." The Court has not explicated that term. "Particularized guarantees of trustworthiness," however, bears striking resemblance to modern evidence law's residual hearsay exceptions which permit the admission of hearsay not falling into any traditional exception if the hearsay has "circumstantial guarantees of trustworthiness . . ." equivalent to the guarantees for hearsay admitted under the other exceptions. Roberts's language seems designed to guarantee that if hearsay is properly admitted under a residual exception, it will not violate the confrontation clause. If the accused wins his evidentiary objection that the evidence does not fall within a residual exception, no constitutional analysis will be necessary. If he loses the hearsay objection, the evidence will be reliable enough for confrontation purposes. Once again, the accused should look to evidence law for the content of his right, not to the Constitution.

The confrontation clause's reliability prong will truly provide protection only if evidence gets "admitted" in violation of evidentiary doctrine. In other words, only when evidence law does not give an accused adequate protection against illegally admitted hearsay will a constitutional reliability analysis matter. That, of course, was the situation in Lee. Although codefendant Thomas's confession was prop-

was accused of leaving the scene of an accident, the statements made shortly after the accident by an unidentified person that the driver looked like the defendant were admitted under the state's res gestae exception to the hearsay rule. The court of appeals found this exception to be a firmly rooted one, id. at 1494 n.3, but the court went on to undertake a separate reliability inquiry. It concluded that Roberts's language about firmly rooted exceptions was merely dicta. Id. at 1495.

54. See supra note 14.

55. In Lee v. Illinois, the majority rejected the state's proffered reasons for why the hearsay had sufficient trustworthiness guarantees without explaining what might satisfy that term. 106 S. Ct. 2056, 2064-65 (1986).

56. See Fed. R. Evid. 803(24), 804(b)(5).


erly admitted against him, the hearsay was not legally admitted against Lee in the joint bench trial. Even so, the judge used the confession to convict Lee. Although the Supreme Court relied upon the reliability prong to find a confrontation clause violation, if evidence law had been properly applied, the confession would not have affected Lee's verdict and the Court would not have had to undertake any reliability analysis.

Only in such rare, Lee-like, situations does confrontation's reliability principle matter. Even then, however, the principle may have an insignificant effect, for hearsay inadmissible under evidence rules may still be used at trial without violating the sixth amendment. Thus, in Lee, even though the hearsay was not admissible against the defendant, the Supreme Court undertook its own reliability review. While the majority held that on the specifics of the case the out-of-court statements were not trustworthy enough to satisfy the confrontation clause, the fact of the reliability review itself indicates that hearsay not admissible under well-established evidence law can still be introduced without violating confrontation principles; otherwise the Court did not have to bother with the trustworthiness determination it made. Once again, the accused should look to evidence law, not the sixth amendment, for protection.

II. THE PURPOSE OF THE CONFRONTATION CLAUSE

A. Confrontation's Mission

The confrontation clause is not now a constitutional provision controlling evidence law. Instead, evidence law dominates the confrontation right. The Court uses evidence

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59. By finding that the codefendant's confession was constitutionally reliable, the four dissenters expressly indicated that "It is the unusual conjunction of these indicia of reliability ... that persuades me in this case that the de facto admission of the confession of an unavailable witness as substantive evidence against petitioner did not violate the Confrontation Clause." 106 S. Ct. at 2071 (Blackmun, J., dissenting); see also Cruz v. New York, 107 S. Ct. 1714 (1987), where the Court held that the confrontation clause was violated by introducing in a joint trial the non-testifying codefendant's confession implicating the defendant even though a limiting instruction was given and even though the defendant's own confession was introduced. The Court then went on to state: "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. ..." Id. at 1719.
law's definition of hearsay to determine when the confrontation clause is implicated. It has adopted an unavailability rule that offers no protection in addition to that provided by evidence law, except in the case of former testimony. It has chosen a reliability test that cedes superiority to hearsay doctrine. As a result, the confrontation clause is nearly useless. It is not really a constitutional right, interpreted like other fundamental guarantees, but a mere vestigial appendix of hearsay doctrine.\textsuperscript{60}

There may be many reasons why the Court has interpreted the confrontation clause so that it offers fewer protections than the evidence rules. The outcomes may simply reflect the desire of the Court's majorities to restrict the rights of the accused. One important reason for the present interpretation, however, comes from the Court's misunderstanding of the basic purposes of the confrontation clause.\textsuperscript{61}

\textsuperscript{60} The primacy of evidence law over the confrontation clause is also seen in academic circles where only evidence scholars seem concerned with the provision. It is now pursued solely by evidence specialists, and is viewed as the last section in the discussion of hearsay. The perspective is reflected in virtually every casebook, treatise, and law review article on the subject. . . .

The perspective is also reflected by the omission of any consideration of the confrontation clause in the instruction and scholarship of Constitutional Law by constitutional specialists. Despite the terms of the clause guaranteeing a specific right to accused persons, and despite its location within the Bill of Rights, no constitutional scholar since pre-Wigmore writers Black and Cooley has included a discussion of the clause in a constitutional treatise or casebook.

\textsuperscript{61} In a strong argument, Howard Gutman contends that evidence law has taken primacy over confrontation law because legal educators and scholars have placed study of the confrontation clause in the evidence field. He notes that while early nineteenth century scholars studied the confrontation clause as part of constitutional law, John Henry Wigmore changed this by analyzing confrontation as part of evidence law. \textit{Id.} at 332-43. Gutman notes:

In his attempt to provide the first intellectual and systematic analysis of the clause, Wigmore pondered how the clause affects established trial procedure and the admissibility of evidence and how the Constitution relates to the use of hearsay. . . . Thus, Wigmore interpreted the confrontation clause according to the law of evidence. Consequently, the scope of the clause was to be determined by the same policy considerations that govern the pursuit of correct trial results in evidence law—reliability and necessity.

\textit{Id.} at 340-41. Wigmore's approach, which was not compelled by the then existing cases, \textit{id.} at 338, has controlled case law with few modifications ever since: "Courts at all levels have analyzed the confrontation clause purely from an evi-
The Court's decisions are controlled by the proposition that "the Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials.'" 62 This notion has become so ingrained in confrontation jurisprudence that it has been accepted without reflection by all nine members of the Court. Thus, the Inadi court split on whether verdicts were more or less accurate if an unavailability rule were applied to coconspirator statements, but both majority and dissent expressly noted that the purpose of the confrontation clause is to further accuracy in fact-finding. Seven Justices concluded, "The admission of coconspirators' declarations into evidence thus

dentiary perspective focusing on reliability and necessity and permitting the admission of evidence falling within traditional hearsay exceptions." 62 Id. at 335 n.204. Aspects of Wigmore's position have been challenged, but the critics generally agree that confrontation's goal is "to foster reliability and to accommodate necessity . . . ." 62 Id. at 337. These critics only reaffirm Wigmore's approach of analyzing confrontation by evidence principles and help to assure confrontation's subordination to hearsay doctrine. Gutman concludes:

The longevity and dominance of Wigmore's words, first recorded in 1899, can be explained by his ability, albeit unintended, to avoid constitutionally-focused substantive criticism. Wigmore's power lay not in the answer he provided, but in the questions he asked, the way he characterized the issue, and the perspective which he provided. 62 Id. at 340.


On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. . . . The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.

But the confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.


Logic may not suffice to properly delimit the right of confrontation. There is a strong element of folk justice, gut fairness, or adversary sportsmanship involved in the confrontation notion. . . . The idea that one who accuses another of wrong ought to do so in a forum where he assumes the consequences of his statement has sufficient power that no amount of cynical sneering about the utility of the oath, incidence of perjury prosecutions, or the value of cross-examination will suffice to overcome it as an important symbol of fairness.
actually furthers the 'Confrontation Clause's very mission' which is to 'advance "the accuracy of the truth-determining process in criminal trials."' 63 The two dissenters, moreover, stated that the coconspirator's presence at trial "will contribute to the accuracy of the factfinding enterprise, the accuracy that is the primary concern of the Confrontation Clause." 64

As long as the confrontation clause is interpreted with advancing the accuracy of the truth-determining process as its prime purpose, the sixth amendment provision will be subordinated to evidentiary principles. This subordination occurs because the confrontation clause, according to the Court's premise, will seek no goal not already sought by evidence rules. Evidence law exists to serve "the end that the truth may be ascertained and proceedings justly determined." 65 Although evidence law may have subsidiary purposes, its prime goal is to advance the accuracy of the courts' fact finding function. Thus, the chief missions of the confrontation clause and evidence law coincide. Consequently, if evidence rules are thought to serve their own goals, they will also be thought to further confrontation's goals and pass constitutional muster, and modern evidence rules will naturally appear to further accuracy.

Our present evidence law is the product of common law generations, study by legal giants, many reform efforts, and much recent codification guided by scholars, judges, attorneys, and legislators. These efforts have been undertaken to strengthen the truth-determining process of trials. While

64. Id. at 1133 (Marshall & Brennan, JJ., dissenting).

Once the judicial framework has been established, [an evidence code] draftsman must strike a balance among the goals desirable and achievable within that framework. Truth finding must be a central purpose whatever the tribunal. Unless we are to assume that the substantive law is perverse or irrelevant to the public welfare, then its enforcement is properly the primary aim of litigation: and the substantive law can be best enforced if litigation results in accurate determinations of facts made material by the applicable rule of law. Unless reasonably accurate fact finding is assumed, there does not appear to be any sound basis for our judicial system.

Id. at 243.
disputes about certain provisions may occur, any rule that has survived all this evidentiary analysis can be thought to serve the purpose of making verdicts more accurate. Since confrontation analysis has been scanty compared to that in the evidence field, a court should naturally defer to accumulated evidentiary wisdom when asked if evidence furthers confrontation's mission—does it aid the truth-determination process of criminal trials? If the Court has correctly identified confrontation's purpose, the confrontation clause is an anachronism. Modern evidence law has made it outmoded.

This result, however, depends on the Court having correctly identified the confrontation clause's purpose. Its conclusion does not get support from anything that can be divined about the Framers' original intentions.\textsuperscript{66} Indeed, the Court has only recently asserted that accurate truth-determination is the confrontation clause's mission, a determination which abandons long-accepted views about the provision's core. The Court's first identification of the clause's purpose was different:

The primary object of the constitutional provision . . . was to prevent depositions or \textit{ex parte} affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and 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.\textsuperscript{67}

Here, in its initial discussion of purpose, the Court identified not only what the clause aims to prevent, but also what it seeks to provide and why. The clause prohibits \textit{ex parte} affidavits. Confrontation is satisfied by direct and cross-examination in front of the jury. These examinations are protected so that the jury can assess the believability of the witness. A testing function in front of the jury was originally seen at the clause's core. This was stressed by other early

\textsuperscript{66} See \textit{supra} note 46.

\textsuperscript{67} \textit{Mattox v. United States}, 156 U.S. 237, 242-43 (1895).
confrontation cases,\textsuperscript{68} and the concern continued in the first of the modern decisions interpreting the provision.\textsuperscript{69}

The shift away from this long-recognized purpose, however, soon began. In \textit{Dutton v. Evans} the plurality pronounced,

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'\textsuperscript{70}

This formulation of the provision’s core purpose eliminated eight decades of language that stressed the importance of testimony in front of the jury, and replaced it with a new core goal: the practical concern for accurate truth-determination.\textsuperscript{71} The transformation became complete in \textit{Tennessee v. Street}, which dropped from its explanation of confrontation’s purpose any mention that information was

\begin{itemize}
\item \textit{See} Kirby v. United States, 174 U.S. 47, 55 (1899):
\begin{quote}
But 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.
\end{quote}
\item \textit{See also} Dowdell v. United States, 221 U.S. 325, 330 (1911).
\item Pointer v. Texas, 380 U.S. 400, 406–07 (1965) (stating 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.”); \textit{see also} Barber v. Page, 390 U.S. 719, 725 (1968) (“The right to confrontation . . . includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.”); Douglas v. Alabama, 380 U.S. 415, 418 (1965) (“Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination, . . . ”).
\item 400 U.S. 74, 89 (1970) (quoting California v. Green, 399 U.S. 149, 161 (1970)).
\item Although quoting California v. Green, \textit{Evans}’ statement was a departure from the \textit{Green} holding. In determining whether prior statements of a testifying witness could be used as substantive evidence, the \textit{Green} Court first quoted the \textit{Mattox} formulation and stated, “Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant’s out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.” California v. Green, 399 U.S. at 158. \textit{Green} listed no purpose for the confrontation clause that had not been given by \textit{Mattox}, and \textit{Evans} ignored \textit{Green}’s reliance upon cross-examination in front of the jury. Indeed, \textit{Evans}’s quote from \textit{Green} significantly abridges it. More fully, \textit{Green} states, “[S]ubsequent cross-examination at the defendant’s trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.” \textit{Id.} at 161.
\end{itemize}
to be presented so that the jury could weigh the credibility of the witness. Instead, the Court ruled, the provision's mission is only to further accuracy in truth-determination. As seen above, all members of the Court have now subscribed to that statement of purpose.⁷²

At first glance, the confrontation clause's present goal may seem to be little different from the original one of preserving personal examination in front of the jury so that the jurors can judge the believability of the witness. Parties challenge trial testimony so that juries can accurately determine the facts. Therefore, it may appear that evidence that advances accurate truth-determination will be consistent with the original statement of the clause's purpose, and the Court's present enunciation of the provision's mission is just a reformulation without a change in meaning.

The transformation, however, is more than mere semantics. As shown above, one result is that the accepted primary purpose for confrontation now coincides with the central object of evidence law. This causes the constitutional provision's subordination to evidence law.⁷³

A further consequence also flows from the change. While originally the constitutional provision's purpose granted an accused the right to test evidence so a jury could assess it, the confrontation clause now no longer specifically protects the accused. According to the Court, this constitutional provision merely grants the defendant the right to the most accurate truth-determining process. Granting the defendant this right allows him nothing not given the prosecution. The prosecution's only legitimate desire in a criminal trial is to achieve the best truth-determination. The government's stake and the accused's stake in confrontation are now precisely the same. In asserting his confrontation rights the defendant is no longer claiming a protection from the prosecution, but is seeking exactly what the prosecution can also claim.⁷⁴ The confrontation clause, in spite of its actual

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⁷² See supra text accompanying notes 62-64.
⁷³ See supra text accompanying note 65.
⁷⁴ Professor Bandes argues:

that the state cannot claim to represent the accused's rights. The state can, of course, represent its own interests, but these must be weighed on their own merits, and not be imbued with the borrowed weight of those of the accused. The state's interests are distinct from the accused's interests.
words extending a right to the accused,75 no longer expressly safeguards the accused. Instead, it is a protection which everyone in society, as represented by the prosecutor, can demand. In other words, the accused has no need for this constitutional protection because the accused and the prosecution should always be on the same side of every confrontation question. If the Court's assessment of the clause's mission is correct, the confrontation clause can no longer be understood as a right protecting the accused.

B. Confrontation as an Adversary Right

Confrontation is meaningless as a fundamental right if it has the mission the Court ascribes to it. The Court, however, has divined this purpose for the clause by examining it in isolation. It has not drawn on analysis from other constitutional provisions to shape its conclusion. The confrontation clause, however, does not sit by itself in the Constitution. It has a context; it is but one provision of the sixth amendment. If the clause is interpreted in that context, as part of the sixth amendment, a different mission for the clause is apparent.

Indeed, while the Court's confrontation cases have interpreted that clause separately from its sixth amendment surroundings, other sixth amendment decisions recognize that the confrontation protection interrelates to the right to counsel, notice, and compulsory process provisions. These rights, taken together as they ought to be, prescribe that a

Bandes, Taking Some Rights Too Seriously: The State's Right to a Fair Trial, 60 S. Cal. L. Rev. 1019, 1045 (1987). She notes, “The Constitution makes no mention of the state's right to a fair or impartial trial.” Id. at 1022–23. She contends that any interest of the state must be carefully defined, and then a strict scrutiny test must be employed to see if the state interest outweighs the constitutional rights of an accused.

Cf. Note, supra note 46, at 1304 (footnotes omitted):

Any such public policy limitations on the confrontation clause should be read narrowly, however, only being permitted to prevail if the substance of the individual right otherwise has been satisfied. Focusing on the interests of parties other than the defendant makes it easier for a court to deemphasize the individual rights at stake and permit them to yield to other considerations. Such a result ignores the primary role of the confrontation clause as a guarantor of the rights of defendants against potential abuses of discretion by prosecutors.

75. “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” U.S. Const. amend. VI.
criminal trial is to be an adversary proceeding where the accused has the right to defend himself. As the Supreme Court stated in interpreting the right to counsel clause:

The Sixth Amendment includes a compact statement of the rights necessary to a full defense . . . . [T]hese rights are basic to our adversary system of criminal justice . . . . The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.76

In other words, the right to notice, counsel, confrontation, and compulsory process are specific components of the fundamental guarantee to an accused that he can defend himself through our adversary system.77

These rights fit together because they all seek to guarantee the same aspect of a fundamentally fair criminal proceeding, that is, that “a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tri-

76. Faretta v. California, 422 U.S. 806, 818 (1975). Justices Blackmun and Rehnquist and Chief Justice Burger, while dissenting from the holding in Faretta, agreed that the sixth amendment constitutionalizes adversary criminal trials. Id. at 847–48 (Blackmun, J., dissenting); see also Comment, Confrontation, Cross-Examination, and the Right to Prepare a Defense, 56 GEO. L.J. 939, 939 (1968) (“The sixth amendment, however, protects the basic adversary character of the Anglo-American judicial system; the right of an accused ‘to be confronted with the witnesses against him’ is fundamental to his effective participation as an adversary.”).

77. A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. In re Oliver, 333 U.S. 257, 273 (1948)(footnote omitted); see also Pointer v. Texas, 380 U.S. 400, 405 (1965)(quoting Oliver); Chambers v. Mississippi, 410 U.S. 284, 294 (1973)(quoting Oliver). Chambers also stated:

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. The rights to confront and cross-examine witnesses and to call witnesses in one’s own behalf have long been recognized as essential to due process.

Id.
bunal for resolution of issues defined in advance of the proceeding.78

This collection of rights can be separated from the other sixth amendment guarantees. The rights to a public, a speedy, and a jury trial are essential to our notions of fairness, but they do not interrelate like the remaining sixth amendment rights.79 A secret trial can still be speedy and decided by a jury. A bench trial can be open, and so on. Furthermore, the effectiveness of these rights is not dependent on the amendment’s adversarial provisions since the rights could be effectuated in inquisitorial proceedings as well. Similarly, an adversary process does not necessarily require a jury, a public, or a speedy trial.

On the other hand, the adversary system, while it can be separated from these other guarantees, is not assured simply by the grant of any one component right. It is dependent on the simultaneous functioning of the rights of notice, counsel, confrontation, and compulsory process.80 Defense counsel is necessary for the fair conduct of an adversarial trial,81 but an adversarial trial would still be denied if that counsel could not present favorable witnesses or test adverse evidence. Granting the accused the opportunity to cross-examine witnesses can be meaningless if the accused does not have skilled counsel conduct the questioning.82 An accused can be granted a compulsory process right, but we do not have our adversary system if the accused does not also have the right to confront adverse witnesses.83 All the rights assuring the adversary process must be read together

79. The sixth amendment as a whole does have the unitary purpose of protecting specific components of a fair trial. “The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . . .” Id. at 684–85.
80. Cf. Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 73, 179 (1974) (“All of the various procedural rights in the Bill of Rights are implicitly designed to strengthen the adversary posture of the accused. Indeed, in pursuit of their common end they overlap and complement one another.”) (footnote omitted).
81. “In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.” Lakeside v. Oregon, 435 U.S. 333, 341 (1978).
82. “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” Powell v. Alabama, 287 U.S. 45, 68–69 (1932).
for the adversary system constitutionalized by the sixth amendment to exist, and put simply, as the Court has, "the adversary process [is] protected by the Sixth Amendment . . . ." For the sixth amendment to serve its mission, then, the focus of its notice, confrontation, compulsory process, and assistance of counsel clauses must all be the same—preserving and advancing the adversary system.

That role of the confrontation clause must be kept in mind if the clause is to be properly interpreted. Its purpose can easily be misunderstood. Because confrontation is bundled with other sixth amendment rights to guarantee an accused an adversarial criminal proceeding, it becomes easy to confuse confrontation's goal with our faith in the adversary system. We employ the adversary system because we believe that the system is a good way to ascertain the truth.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . . Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.


86. Cf. Lilly, supra note 2, at 211–12:

The confrontation provisions of the Virginia Declaration of Rights and, subsequently, of the sixth amendment were intended to prevent the perceived abuses of the civil law procedure. The accused's constitutional right to confront adverse witnesses provided security against the inquisitional practice of examining witnesses in closed chambers . . . . The drafters of the sixth amendment [may have] . . . simply wanted to insure adherence to the common law adversarial system.

87. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975); see also Morgan, Hearings and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 185 (1948) ("The theory of the system is that in the contest between the parties, each interested to demonstrate the strength of his own contentions and to expose the weakness of his opponent's, the truth will emerge."); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. REV. 228, 228 (1964) ("The plea for the adversary system is that it elicits a reasonable approximation of the truth.").
This belief apparently leads to the conclusion that the confrontation clause is satisfied as long as the prosecution's presentation of evidence makes the truth-determining process more accurate. This logical leap, however, simply ignores the actual scheme of the sixth amendment. The rights of notice, counsel, confrontation, and compulsory process constitutionalize the adversary system, and while we presume truth comes out of this system, the converging sixth amendment protections guarantee neither accurate determinations nor even the most reliable way to ascertain the facts. Instead, the accused is guaranteed an adversary criminal trial even if that is not the best truth-determining process for him.88 Just as the state cannot deny an accused a jury trial by establishing that a nonjury trial was the better way to determine the facts,89 the accused cannot be denied an adversary criminal trial even if an inquisitorial proceeding would have determined the truth better in the accused's case.

Neither a defendant nor society is given the sixth amendment right to the best truth-determining process. The amendment only guarantees the accused one particular process—a public, speedy, jury trial where the defendant has the right to the adversarial testing and presentation of evidence, where the defendant has the right to notice, counsel, confrontation, and compulsory process. Thus, while confrontation, in its service to the adversary system, may concomitantly advance the truth-determining process, confrontation's mission, like the mission of other sixth amendment rights, is to help guarantee the adversary sys-

We proclaim to each other and to the world that the clash of adversaries is a powerful means for hammering out the truth. . . . That the adversary technique is useful within limits none will doubt. That it is "best" we should all doubt if we were able to be objective about the question. Despite our untested statements of self-congratulation, we know that others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system. We know that most countries of the world seek justice by different routes. What is much more to the point, we know that many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth.

89. Cf. Singer v. United States, 380 U.S. 24 (1965) (holding that while an accused has a sixth amendment right to a jury trial, the accused does not have the correlative constitutional right to waive a jury).
tem. The advancement of the accuracy of the truth-determining process is merely the incidental benefit from confrontation's real purpose of guaranteeing the adversary system as set forth in the sixth amendment.

Consequently, when deciding whether confrontation or one of the other rights protecting the adversary system is violated, the courts should not ask whether the claimed violation directly promotes or hinders the accuracy of the verdict. Instead, the courts must determine whether the disputed practice unconstitutionally infringes on our adversary system.\(^9^0\) That determination can be made properly only if confrontation's role in our adversary system is understood.

C. Confrontation's Role in the Adversary System

Confrontation's role in the adversary system is clear. Confrontation allows for the adversarial testing of evidence. A fundamental principle of our adversary system maintains that a factfinder should normally not rely on the words of a witness until the opponent has had the chance to test and challenge that witness's abilities to narrate the truth. Cross-examination is, of course, the tool used to test and challenge, and is therefore a core component of an adversary system which grants the accused the right to cross-examine the state's witnesses.\(^9^1\) The confrontation clause is the pro-

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90. This point has been recognized in the right to counsel area. If counsel is denied, the courts do not ask whether the truth-determination process was better without counsel than it would have been with one. Instead, because counsel's assistance is essential to the functioning of the adversary system, denial of counsel requires a reversal without inquiry into the accuracy of the result. United States v. Cronic, 466 U.S. 648, 659 (1984). When the question is whether counsel performed effectively, "the appropriate inquiry focuses on the adversarial process . . . ." Id. at 657 n.21. This is because "[i]t is because "of the right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." Id. at 656.

91. "The adversary system's real genius, the heart of the concept, lies in the use and perfection of cross-examination. The central philosophy is that by testing the statements of one against the questions of an adversary the factfinder may determine the truth." Singer, Forensic Misconduct by Federal Prosecutors—And How It Grew, 20 Ala. L. Rev. 227, 268 (1968).

The drafters of the American Law Institute's Model Code of Evidence, for which Edmund M. Morgan was the reporter, stated that the civil law "remains an inquisitorial rather than an adversary system. It does not know anything like the Anglo-American cross-examination. . . . [T]he opportunity for cross-examination is not a necessary element of a jury system, while it is the very heart of an adver-
vision that secures this for the accused, as the Supreme Court has recognized time and again. Consequently, when the prosecution is permitted to introduce evidence without an opportunity for cross-examination, a conflict with the fundamental foundation of the adversary system and with the confrontation clause is apparent. On the face of the situation, a breakdown of the adversary system has occurred. Without doubt, if the accused were totally denied the chance to cross-examine during a trial, we would not have an adversary system as we recognize it. The proper question for confrontation is: When, if ever, does the introduction of evidence without the opportunity for the accused’s cross-examination not cause an unconstitutional malfunctioning of the adversary system?

That question cannot be answered without an understanding of the purpose of cross-examination in our adversary system. Cross-examination’s central role is not to make evidence reliable. Instead, the adversary is given the opportunity to test and challenge the evidence in front of the jury so that the jury will have all the information necessary of litigation.” MODEL CODE OF EVIDENCE ch. VI introductory note (1942).

See also Read, supra note 46, at 49 (“[Cross-examination is the core component to be preserved by the confrontation clause]—because it is essential to our adversary system . . . .”).

92. See, e.g., Davis v. Alaska, 415 U.S. 308, 315 (1974) (“Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' Douglas v. Alabama, 380 U.S. 415, 418 (1965')); Dowdell v. United States, 221 U.S. 325, 330 (1911) ("It was intended to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination."); see also Delaware v. Fensterer, 474 U.S. 15, 18-19 (1985); Note, supra note 46, at 1302: "The most important guarantor of the confrontation right has long been held to be cross-examination."

93. See Brookhart v. Janis, 384 U.S. 1, 3-4 (1966) (holding that complete denial of cross-examination violates the confrontation clause).

94. "All trial testimony is not trustworthy; a jury is commonly presented with contradictory trial declarations. Cross-examination does not invariably provide assurances that the testimony is reliable or trustworthy, but instead presents information to the jurors so they can properly assess the testimony." Jonakait, supra note 22, at 466.

95. [Cross-examination's] function is not merely to confuse or harass adverse witnesses, but to develop the whole truth, which does not always fully appear from the testimony of a witness on his examination in chief. Facts may be omitted, without any wrongful intent, which give an entirely different appearance to the case. Or, if feeling
to best assess what weight the evidence should be given. Consequently, if the jury can properly evaluate the evidence without cross-examination, its absence prejudices no one.

The accused, however, is not adversely affected by all misevaluations of the evidence. He is only harmed when the jury weighs evidence more strongly against him than it should have. He cannot complain if the error favors him. If cross-examination would not have led the jury to weigh the evidence more favorably to the accused, the jury cannot misweigh the evidence to his detriment because of the denial of cross-examination. The lack of cross-examination in this circumstance does not prejudice the accused. Therefore, no confrontation violation has occurred.

Moreover, the mere possibility of harm from the denial of cross-examination does not result in a confrontation violation. Confrontation must be interpreted as part of the package of adversary rights, and those other provisions indicate that the confrontation guarantee is not an absolute one.

or interest colors the evidence of a witness, whether intentionally or not, this can often be made to appear.

Robertson v. Heath, 132 Ga. 310, 312, 64 S.E. 73, 73 (1909) (Robertson was overruled on different grounds in Camp v. Camp, 213 Ga. 65, 69, 97 S.E.2d 125 (1957). Camp, however, explicitly reaffirmed Robertson's reasoning quoted above).

96. The Supreme Court has recognized this: "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. at 316; accord Kentucky v. Stincer, 107 S. Ct. 2658, 2663-64 (1987). Davis went on to hold that a state rule preventing cross-examination about the bias of the prosecution's witness violated the confrontation right: "[D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." 415 U.S. at 318; cf. Delaware v. Fensterer, 474 U.S. 15, 22 (1985) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.").

A classic work on cross-examination gives a good description of its role in our adversary system.

It needs but the simple statement of the nature of cross-examination to demonstrate its indispensable character in all trials of questions of fact. No cause reaches the stage of litigation unless there are two sides to it. If the witnesses on one side deny or qualify the statements made by those on the other, which side is telling the truth? ... The opinions of which side are warped by prejudice or blinded by ignorance? Which side has had the power or opportunity of correct observation? How shall we tell, how make it apparent to a jury of disinterested men who are to decide between the litigants? Obviously, by the means of cross-examination.

The sixth amendment does not prevent the remotest possibility that the factfinder will incorrectly assess the evidence to the defendant's prejudice. Instead, it protects against a reasonable probability or reasonable likelihood of that happening.\textsuperscript{97} Thus, an infringement of the confrontation clause occurs when as a result of the accused being denied the opportunity to cross-examine, a reasonable probability exists that the judge or jury misweighed the evidence to the accused's detriment.\textsuperscript{98}

\textsuperscript{97} See Strickland v. Washington, 466 U.S. 668, 693–94 (1984) (holding that ineffective assistance of counsel only violates the sixth amendment when there is a "reasonable probability" that the unprofessional conduct prejudiced the accused); United States v. Valenzuela-Bernal, 458 U.S. 858, 873–74 (1982) (holding that the sixth amendment compulsory process clause is violated by the deportation of witnesses only when there is a "reasonable likelihood" that the loss of evidence prejudiced the accused).

\textsuperscript{98} Implicit in this statement is that a confrontation violation does not occur by the mere denial of cross-examination, but only when the denial has harmed the accused. This is consistent with the rules governing other adversary rights. Thus, the sixth amendment is not violated by all incompetent counsel, but rather when the ineffective assistance of the counsel has harmed the accused.

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. Strickland v. Washington, 466 U.S. at 691–92. See also United States v. Valenzuela-Bernal, 458 U.S. at 867–69, where the Court, in deciding a compulsory process claim, analyzed various provisions of the sixth amendment and concluded, "Thus, other interests protected by the Sixth Amendment look to the degree of prejudice incurred by a defendant as a result of governmental action or inaction." Id. at 869. The Court held that the compulsory process clause was violated by the deportation of witnesses only if the defendant could show that he was negatively affected by the government's action. Id. at 871. Similarly, since cross-examination is granted to allow the jury to evaluate the evidence, the confrontation clause is only violated if that purpose has been harmed.

For some sixth amendment areas, the prejudice is presumed to be so likely and great that convictions are reversed without a showing of prejudice. See United States v. Cronic, 466 U.S. 648, 658–62 (1984), for a discussion of some of those areas. If this were the rule for confrontation, a reversal would result every time out-of-court statements were admitted without the opportunity for the accused's cross-examination. No court or commentator has suggested that this would be the proper result. All believe that at least some of the time statements which have not been cross-examined can be admitted without violating the sixth amendment. "It is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation." Graham, supra note 62, at 107–08; see also Baker, The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials, 6 CONN. L.
While this standard defines a confrontation violation, it does not explain where the burden of proof that a violation has occurred should lie. General principles about burdens and interpretations of other adversary rights, however, indicate that the prosecution should have to carry the burden of proof on the likelihood of jury misevaluation. The Supreme Court has held that the defendant shoulders the burden for an ineffective assistance of counsel claim, but these claims differ significantly from confrontation disputes. On the one hand, claims of ineffective assistance of counsel invariably arise after a guilty verdict. The judgment based on that verdict is presumptively correct. Our normal rules state that the party trying to upset a final judgment has the burden of establishing the need for the reversal. The ineffectiveness standard in giving the defendant the burden of proving prejudice merely follows this path. A confrontation claim, on

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REV. 529, 539 (1974) ("The other polar view of confrontation—that it requires in all cases an opportunity for cross-examination at trial—by implication excludes all hearsay. This view is clearly incorrect."); Westen, supra note 85, at 615 ("Surely there are some kinds of evidence, such as business records and statements from learned treatises, that should be admissible in hearsay or documentary form without violating the confrontation clause.").

Confrontation is like ineffective assistance claims in that it requires a prejudice inquiry. However, there are also some important differences. To win an ineffectiveness claim, the defendant must first show that his counsel’s performance was deficient. Strickland v. Washington, 466 U.S. at 687. Since on the face of the situation the defendant had counsel as guaranteed by the sixth amendment, no violation is apparent. Until it is established that counsel performed poorly, there is no reason to explore further a possible constitutional violation. When the accused establishes that counsel’s performance was deficient, however, the possibility of a violation of the sixth amendment is apparent and further inquiries are justified.

Confrontation claims differ because the potential constitutional violation is apparent on the record. The confrontation clause assumes that the defendant will have the opportunity to challenge and test evidence against him through cross-examination. Every time the prosecution enters an out-of-court statement without the accused being afforded the opportunity to cross-examine, there is an apparent conflict with the basic mandate of this provision. In contrast to a defendant making ineffectiveness claims, the accused has to show nothing more than what appears on the record to gain a further inquiry into whether the Constitution has been violated. Roberts, in effect, recognized this by setting up a framework for determining the constitutionality of every piece of prosecution hearsay.


100. Cf. R. Martineau, Fundamentals of Modern Appellate Advocacy § 7.21, at 132 (1985) ("The appellant will have to show that not only is there a factual or legal basis for his argument, but under the applicable standard of review he is entitled to prevail.").
the other hand, is lodged before the verdict. The judge must rule on the confrontation claim during the evidence-taking. Thus, in contrast to ineffectiveness claims, the presumption of a judgment's regularity cannot justify placing the burden of proving prejudice on the confrontation claimant.

Compulsory process claims, however, should also arise before the verdict is rendered, when the accused objects during evidence-taking that witnesses he desires have not been produced. Even so, the Supreme Court has held that the defense has to establish the existence of prejudice to win such claims.\textsuperscript{101} Even if this is the correct decision, it does not mean that the burdens should be the same for the confrontation clause for, once again, confrontation claims differ significantly.

Compulsory process does not guarantee the defendant the attendance of all witnesses; instead it guarantees him process "for obtaining witnesses in his favor."\textsuperscript{102} When the defendant claims that he should have been allowed to produce a witness, he is attempting to land within the sixth amendment. He makes it only if the missing witness was favorable to him. The information concerning the favorableness of the unproduced witness will not be in the record. Ordinarily the defendant is in a better position than the prosecutor to establish the importance of that witness, since the defendant should have a good idea of the content of the witness's testimony.

This makes compulsory process much like ineffective assistance claims. The sixth amendment rights of the defendant who had an attorney have been presumptively satisfied. The right to counsel provision should only grant relief if the lawyer was truly ineffective. The incompetence, however, may not appear in the record. If it does not appear, the defendant is in a better position than the prosecutor to show the incompetence of the defense attorney. Since both the compulsory process and ineffective assistance claimant are trying to get within the boundaries of the sixth amendment when no violation is apparent on the record, and both are more likely than the prosecution to possess the relevant

\textsuperscript{101} United States v. Valenzuela-Bernal, 458 U.S. at 870-71.
\textsuperscript{102} For a discussion of this sixth amendment requirement, see id. at 867.
information, both should have the burden of establishing that a violation occurred.

In contrast, since the confrontation clause presumes that the accused will normally have the opportunity to test and challenge the adverse evidence, every time the prosecution introduces evidence without giving the accused an opportunity for cross-examination, the state has presumptively violated the sixth amendment. Unlike compulsory process and ineffective assistance claims, no one has to show that the situation is within the sixth amendment domain. That is clear from the record. The question is not whether there is reason to believe that the confrontation clause has been violated, but whether there is a reason why the normal constitutional rule should not apply. In other words, the prosecutor is seeking an exemption from the general constitutional mandate, and the party seeking an exception from a general rule should bear the burden of establishing the requisites for an exception.103

Moreover, unlike defendants making compulsory process and ineffectiveness claims, the accused should not have the burden of showing prejudice because he does not have better access than the prosecutor to the relevant information. A defendant will seldom have the information to prove the effects that nonexistent cross-examination would have had if it had occurred. Indeed, since the Constitution grants no general right of pretrial discovery,104 the defendant may

103. See W. LaFave & J. Israel, Criminal Procedure § 10.3, at 458 (1985) ("Various principles are often advanced in the course of discussions of where, as a matter of sound policy, the burden of proof should lie in various circumstances. In summary, they are: . . . (2) that the burdens should be placed 'on the party desiring change. . . .'"); see also Dutile, The Burden of Proof in Criminal Cases: A Comment on the Mullaney-Patterson Doctrine, 55 Notre Dame L. Rev. 380, 385 (1980) (concluding that a factor in deciding where burdens should lie in criminal trials should be, "Is the state setting the defendant's conduct out as an exception or is the defendant singling himself out as an exception?").

104. "There is no general constitutional right to discovery in a criminal case . . . ." Weatherford v. Bursey, 429 U.S. 545, 549 (1977); cf. Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987). There, a defendant charged with sexual offenses claimed a denial of confrontation because he was not allowed pretrial discovery of an investigative report prepared by a state agency. The plurality opinion by Justice Powell, writing for himself and three others, concluded, "The opinions of this Court show that the right of confrontation is a trial right . . . . The ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." Id. at 999. Justice Blackmun, who concurred in the result,
learn about the disputed evidence only when it is presented in court. The prosecution will be in a much better position than the defense to present information about the possible effects of cross-examination. Since the party with the better access to the information should have the burden,105 the prosecutor should have the burden of showing that the lack of confrontation did not prejudice the defendant. Thus, because confrontation claims arise before a final judgment, because the prosecutor is seeking exemption from the normal constitutional rule that appears to have been violated, and because the prosecutor has better access to the relevant information, the prosecutor has the burden of establishing the lack of prejudice when he introduces evidence without affording the opportunity for the accused to cross-examine.

Finally, the correct confrontation standard limits the prejudice analysis to the evidence which has not been cross-examined. The confrontation clause protects the specific aspect of the adversary system that gives the defendant the right to test and challenge the prosecution's witnesses. Its denial, therefore, will only directly affect how the jury assesses the evidence that the accused could not confront.

This the Supreme Court has recognized. It has rejected the argument that an accused must show a reasonable probability that the verdict would have been different to establish a confrontation clause violation. Instead,

the focus of the Confrontation Clause is on the individual witnesses. . . . It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of that right would not have affected the jury's verdict.106

In other words, the Court correctly refused to import the standard for ineffective assistance of counsel into the confrontation area.107 The right to counsel is a protection

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105. See W. LaFAVE & J. ISRAEL, supra note 103; § 10.3, at 458.
107. That standard requires a reasonable probability that the proceeding's outcome would have been different. Strickland v. Washington, 466 U.S. 668, 693–94 (1984).
for the entire adversary process. It aids the accused in the exercise not only of his constitutional confrontation and compulsory process rights, but in every portion of the trial including jury selection, opening statements, evidentiary rulings, and summations. Ineffective counsel, therefore, can affect any part of the trial, and one searching for its effect should scour the entire proceeding. A confrontation denial, on the other hand, does not have these direct, far-reaching consequences. It only affects the jury's evaluation of the unconfronted witness. An inquiry into prejudicial effect of a confrontation denial, therefore, does not extend to all aspects of the trial, but is limited to analyzing how the lack of cross-examination affects the jury's assessment of the particular evidence.

In summary, then, confrontation is an adversarial right that protects the accused from the incorrect assessment of evidence by granting him the right to cross-examine wit-

108. A standard that considers the effect on the entire trial can only be ascertained when all the evidence has been presented. That, of course, does not present a problem for a reviewing court which makes an ineffective assistance ruling when all evidence-gathering is over. The trial judge, however, has to make the confrontation ruling during the trial, when the ineffectiveness standard is unworkable. If the confrontation clause were only violated when the outcome of the case is affected, the trial judge could not make a ruling when the prosecution attempted to introduce evidence without affording defense cross-examination. The court, however, has to resolve the situation before the case's outcome is determined. The court has to decide whether to admit the evidence, and that decision decides the constitutional question. A confrontation prejudice standard that looks to the trial's outcome is just unworkable.

109. This does not mean to say that all cases should be reversed just because the admission of unconfronted evidence caused prejudice. The confrontation clause may be violated, but that error, in light of the entire case, might still be harmless. See Delaware v. Van Arsdall, 106 S. Ct. at 1438 (holding that a confrontation violation resulting from an improper restriction of the cross-examination of an in-court witness was subject to a harmless error analysis).

Professor Kirkpatrick contends that the centrality of the hearsay should be a factor in determining whether the confrontation clause requires the production of available witnesses. "Cross-examination is less significant in circumstances in which the hearsay relates only to minor, collateral, or undisputed issues, or is merely cumulative evidence on a point already well established by other evidence." Kirkpatrick, supra note 2, at 683. This approach looks at the entire trial to determine whether confrontation rights were violated, instead of focusing on the unconfronted evidence as required. It also uses a harmless error analysis, rather than a confrontation clause analysis. Of course, if the evidence is so peripheral that it was not expected to have an effect on the jury, the prosecution would not have introduced it. Indeed, the prosecution in arguing for Kirkpatrick's approach is really arguing for having its cake and eating it, too: "I want the evidence admitted, but I tell you it's really not important."
nesses. Therefore, the confrontation clause is violated when denial of cross-examination gives rise to a reasonable probability that the accused's cross-examination would have led the jury to weigh the evidence more favorably to him.110

110. This approach, unlike the Court's, grants the protection of the confrontation clause to the accused; the provision is not merely a right given equally to all in society to get the most accurate verdicts or the best trial process. Potential violations are measured from the accused's vantage, not from society's. Cf. Weston, supra note 80, at 156: "The high standard required by the confrontation clause for incriminating hearsay arises from a specific right of the accused." This point makes this approach not only consistent with the other adversary rights, but also with the other sixth amendment guarantees, which grant protections to the accused and not rights to society. For example, the sixth amendment guarantees the criminal defendant a jury even though a jury trial may not be the most accurate way to determine facts. As Justice Harlan maintained, "Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges . . . ." Duncan v. Louisiana, 391 U.S. 145, 188 (1968) (Harlan, J., dissenting).

Jury trials are guaranteed to protect the accused from governmental oppression. The jury trial clause reflects "a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." Id. at 155; accord Ballew v. Georgia, 435 U.S. 223, 229 (1978). Juries prevent governmental oppression by assuring that criminal verdicts will reflect the community's sense of justice. Taylor v. Louisiana, 419 U.S. 522, 529 n.7 (1975). While governmental oppression is prevented when the jury accurately determines the facts of an unfounded charge, honest, unbiased, conscientious judges would also serve this function. Compare Duncan v. Louisiana, 391 U.S. at 156. "Those who wrote our constitutions knew from history and experience that [a jury trial] was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority."

No matter how good the judges may be, judicial determination does not permit the community to participate in criminal verdicts as juries do. The Constitution seeks to make sure that juries will represent the community by having its verdicts be the product of group deliberation free from outside intimidation. The decisions of such a body will reflect the community's sense of justice.

That sense was deemed important because it would not always be the same as that of a judge or another governmental power. Instead, the jury's sense of justice was expected to be more favorable to the accused than the entrenched power's notion of justice, thereby serving as a shield against governmental oppression. The Supreme Court has noted that juries generally reach sound verdicts and "that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the purposes for which they were created and for which they are now employed." Duncan v. Louisiana, 391 U.S. at 157. The Court was referring to Kalven and Zeisel's research that showed when juries differed with judges, juries generally favored defendants. H. Kalven, Jr. & H. Zeisel, The American Jury (1966). We have juries because as an institution they are more likely than other factfinders to resolve evidence questions in the defendant's favor and because they may exercise the community's sense of justice to acquit a defendant even when the legal facts say he is guilty. We have juries not because they are the most accurate truth-determining process. We know they make "mistakes," but we expect those mistakes usually to favor defendants. The jury clause principally exists not to protect the general public, but to protect a
And since the burden of proof on this question properly lies with the prosecution, the prosecutor has to establish that no such reasonable probability exists.¹¹¹

III. THE PROPER CONFRONTATION STANDARD AND ITS APPLICATION TO HEARSAY DECLARANTS

A. Unconfronted Statements Without Prejudice to the Accused

Until now, courts and commentators analyzing confrontation claims have, in essence, asked what hearsay best serves the goals of evidence law. If confrontation is to take its rightful place in the sixth amendment, we need instead to determine when in-court cross-examination of the prosecution's out-of-court declarant is inconsequential from the defendant's perspective.¹¹²

¹¹¹ In a recent case, the Court came close to identifying the correct factors when it considered a claim that confrontation was violated not by the admission of statements from an absent declarant, but because the defendant was excluded from a hearing to determine whether prosecution witnesses were competent to testify. The Court concluded, "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." Kentucky v. Stincer, 107 S. Ct. 2658, 2664 (1987). The Court, however, has not applied this standard to the admission of hearsay statements such as coconspirator declarations. Compare a commentator's test for when restrictions on in-court cross-examination are constitutional: "[(C)onstitutionally protected cross-examination has been precluded by a particular restriction unless it is clear beyond a reasonable doubt, (1) that the defendant would have been convicted without the witness' testimony, or (2) that the restricted line of inquiry would not have weakened the impact of the witness' testimony.]" Note, Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska, 73 MICH. L. REV. 1465, 1473 (1975).

¹¹² As this path of inquiry indicates, the protections of the confrontation clause are not defined by an evidence law's definition of hearsay. This is as it should be since confrontation is a constitutional right, not merely an evidence rule. The sixth amendment question is not whether the evidence falls outside the prevailing evidence law's notion of hearsay, but whether cross-examination of the absent declarant might have affected the weight of the evidence. Compare Kirkpatrick, supra note 2, at 707 n.214 ("In some cases . . . statements of coconspirators are not hearsay at all, but verbal acts in furtherance of the conspiracy. When the coconspirator's statements are not being offered to prove the truth of what is asserted, the confrontation clause should not affect their admissibility.").

Often, of course, when a statement is not hearsay, such cross-examination could not have affected the jury's assessment of the evidence. For example, the disputed evidence in Tennessee v. Street, 471 U.S. 409 (1985), was the reading to the jury of an accomplice's confession. That occurred after the defendant testified that his own confession given to the sheriff was coerced and derived from the
Such analysis has not yet been done. There are, however, three categories of evidence which would not run afoul of the sixth amendment: statements that still allow the jury to weigh the evidence correctly; statements where cross-examination of the declarant is unlikely to produce information that would make the jury weigh the statement more favorably to the defendant; and statements that are so reliable that the misevaluation of them could only favor the accused. Some examples will illustrate these categories.

The accomplice’s confession also given to the sheriff. On rebuttal, the sheriff read the accomplice’s confession to the jury for the purpose of showing the differences between the confessions and thereby undercutting the notion that defendant’s statements were derived from the previous admissions.

Used this way, the out-of-court statements did not violate the confrontation clause. Cross-examination of the accomplice could not have affected the weight to be given his confession as a rebuttal for the claim that the defendant’s confession was derived from it. Such cross-examination might have tended to clarify ambiguities in the out-of-court statements, to show that the statements were not true, or to show that the statements were not even made, but none of this would have affected the jury’s assessment of the evidence for the purpose for which it was introduced. The important fact for determining whether the defendant’s confession was coercively derived from the accomplice’s was the content of the confession the sheriff claimed to have obtained from the accomplice. Since the sheriff testified subject to cross-examination to what the accomplice said, there was confrontation on that issue.

The evidence did not violate the confrontation clause because it fell outside a hearsay definition, but because there was no reasonable probability that cross-examination of the declarant would have led the jury to weigh the out-of-court statements more favorably for the defense. See Lyle v. Koehler, 720 F.2d 426 (6th Cir. 1983). There, in a joint trial, letters written by a codefendant soliciting a false alibi for the codefendant and the defendant were introduced. The court first undertook an extended analysis to determine whether the letters were hearsay. After noting that Wigmore apparently would not have labeled them hearsay, id. at 432, the court continued, “Although we consider the question of the proper classification of the letters exceedingly close, . . . we conclude that the letters are hearsay . . . .” Id. at 433. Only after this conclusion was reached did the court conclude that the defendant’s confrontation rights were violated. See also United States v. Reynolds, 715 F.2d 99 (3d Cir. 1983) (the court first analyzed out-of-court statements finding that their implied assertions made them hearsay and only then found a sixth amendment violation).

See also Seidelson, Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts, 24 Duq. L. Rev. 741, 766–69 (1986), which discusses United States v. Zenni, 492 F. Supp. 464 (E.D. Ky. 1980). Although Zenni concluded that out-of-court statements were not hearsay and consequently undertook no confrontation analysis, Professor Seidelson demonstrates that cross-examination of the declarant could have affected the weight of the evidence and that the confrontation clause was implicated by the admission of the evidence.

For mere matters of convenience, the term “hearsay” is used in this Article to mean all out-of-court statements.
1. Former Testimony

Former testimony falls into the first category of statements that still allow the jury to weigh the evidence correctly. If the prior testimony was taken under circumstances giving the accused the opportunity for full cross-examination, when he had the same interest in testing the evidence as he would have had at trial, and when he had comparable information to prepare as he would have had at trial, then cross-examination at trial is unlikely to lead the jury to weigh the declarant's evidence differently. If this assertion is correct, former testimony can be admitted without infringing on our adversary system generally or confrontation's specific role within it.

The determination of whether former testimony can be constitutionally admitted, however, requires a much closer scrutiny of the prior proceeding than has been done by courts reviewing confrontation claims. The Supreme Court has never barred former testimony because of the nature of the prior proceeding. Such hearsay has been admitted even when there were quite different incentives to cross-examine in the prior proceeding than those produced by a trial.113

Under an evidentiary approach to former testimony, these differences may not matter. The hearsay prohibition exists because hearsay cannot be properly evaluated; the testing of the declarant's abilities to narrate the truth has not occurred. Former testimony, however, differs from ordinary hearsay because it has been subjected to the accused's challenge and, therefore, can be evaluated better than hearsay generally. Even when the different nature of the prior proceeding causes some restrictions on the cross-examination or produces less of a reason for full cross-examination, the trial jury may still be able to evaluate the former testimony much better than other hearsay, and the former testimony can be admissible under evidence law.

The sixth amendment, however, does not measure out-of-court statements against other out-of-court statements. Instead, it compares the ability of the jury to evaluate such a statement with its ability to evaluate the statement if it had been presented at trial subject to the accused's cross-examination. For confrontation purposes, it does not matter that

113. See infra text accompanying note 118.
some hearsay can be evaluated better than other hearsay. All that matters is whether the hearsay can be assessed as well as in-court testimony.\textsuperscript{114}

With this point in mind, it should be evident that the former testimony that most readily satisfies the confrontation clause is testimony from the accused's prior trial on the same issue. At the prior trial, the accused had the full opportunity and the same interest to test and challenge the witness on the issues as at the present trial. Therefore, the hearsay evidence is comparable to what would have been presented at trial.\textsuperscript{115} Consequently, there is little reason to believe that an additional confrontation will much benefit the accused.\textsuperscript{116}

\textsuperscript{114} Former testimony illustrates the weakness of the evidentiary approach to confrontation which focuses on the reliability of the hearsay. The Court's conclusion that former testimony can be constitutionally admitted because of its reliability is not defensible. \textit{See}, e.g., \textit{Ohio v. Roberts}, 448 U.S. 56, 67–70 (1980); \textit{Mancusi v. Stubbs}, 408 U.S. 204, 216 (1972). Just as in-court testimony is not reliable, but can be evaluated by the jury, \textit{see supra note} 94, former testimony can only be constitutionally admitted because of the jury's ability to evaluate it.

Indeed, if an oath and cross-examination made testimony reliable, then prior testimony should be admissible no matter who the parties were at the former proceeding. If the accused's cross-examination makes a witness' testimony so reliable that it can be admitted against the accused in a subsequent trial, then the prior testimony should also be admissible in other actions such as a codefendant's separate trial. That, however, is not permitted. The reliable testimony will be seen as unreliable when introduced into the codefendant's trial. Since the evidence remains the same, this makes no sense. Instead, these correct results are based intuitively on the proper rationale; that is, that the prior testimony is admissible against the accused because when the accused has had the prior opportunity to test and challenge the hearsay it is not likely to be subsequently mistakenly weighed to his detriment. When the prosecution seeks to introduce the evidence against the codefendant who did not have that chance, even though the reliability of the hearsay remains the same, we cannot be so confident that the evidence will not be mistakenly weighed to the codefendant's detriment. Therefore, the evidence is not constitutionally admissible. \textit{See}, e.g., \textit{Mattes v. Gagnon}, 700 F.2d 1096, 1101–04 (7th Cir. 1983) (holding that it violated the defendant's confrontation rights to introduce testimony from another trial where the defendant was not a party).

\textsuperscript{115} \textit{Compare} \textit{Mattox v. United States}, 156 U.S. 237, 244 (1895) (finding no confrontation violation from the admission of testimony from the prior trial of the accused. "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.").

\textsuperscript{116} This conclusion is also a conclusion that the witness's demeanor in front of the trier of fact is unlikely to lead the jury to assess the evidence more favorably to the defendant. Such a conclusion is necessary if any unconfronted statements are to be admitted, and seems justifiable when the hearsay includes a full cross-examination of the witness. \textit{Compare} \textit{State v. Anthony}, 448 A.2d 744 (R.I. 1982).
While this result should hold true for testimony from a prior trial on the same issues, testimony produced at other hearings presents more difficulties. Such prior testimony can be constitutionally admitted only when it can reasonably be expected to present the jury with practically the same information as would direct and cross-examination at the present trial. Only then is it reasonable to believe that the jury will not mistakenly weigh the hearsay to the accused's detriment.

Such confidence can only come from proceedings where a reasonable attorney for the accused would have thoroughly explored the now contested issue and in fact would have been allowed to do so by the court. When these conditions are met, the information developed at the proceeding should be so comparable to trial testimony that it can be constitutionally admitted.

In assessing the constitutional admissibility of prior testimony, the Supreme Court, however, has decided that testi-

There, the declarant testified at a pretrial hearing implicating the accused. He refused to testify at the trial, the hearsay was admitted, and the accused was convicted. Four years later, the declarant testified at a new trial, stated that he previously lied, and confessed that he committed the crime. The reviewing court concluded that any assessment of Fairhurst's conflicting testimony based upon a cold record, even with the benefit of hindsight, is at best very difficult. Of course, evaluating a witness's credibility from a dispassionate record is a problem inherent in almost any prior recorded testimony. . . .

Our comment is offered merely to highlight the importance of live testimony so that the trier of fact can assess a witness's credibility on the basis of demeanor as well as the testimony.

Id. at 753; also compare Jones v. United States, 441 A.2d. 1004, 1006 (D.C. 1982), where after a declarant refused to testify, his former testimony, which had been tape-recorded, was introduced: "In this case, the jury could monitor Smith's demeanor by listening to the tape recording of his voice while answering questions propounded to him at the first trial. It also saw him on the stand, refusing to testify."

117. Cf. Martin, The Former-Testimony Exception in the Proposed Federal Rules of Evidence, 57 Iowa L. Rev. 547, 556, 559 (1972), who contends that for former testimony under the evidence rules the crucial question is whether, given that the opponent can not now cross-examine the witness, the examination on the prior occasion was fairly equivalent to cross-examination in the present situation. . . . It is unfair to hold a party to the former examination if no reasonable attorney would be expected to have elicited the now-relevant facts; but if the circumstances were such that those facts could have been brought out if they were available, the present opponent can be fairly held.
mony is admissible if the hearing that produced it merely had trappings similar to a trial. Thus, *California v. Green*, the first decision to uphold the constitutionality of the admission of preliminary hearing testimony, concluded that the declarant’s “statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. . . . [W]e do not find the instant preliminary hearing significantly different from an actual trial to warrant distinguishing the two cases for purposes of the Confrontation Clause.”

While the Court was correct in noting that the hearing had some of the accoutrements of a trial, the Court did not decide the correct question of whether a reasonable attorney would have produced substantially the same cross-examination as at trial. Such cross-examination can seldom be produced in the preliminary hearing. As one court recognized in deciding that such hearing testimony was not admissible:

The hearing was not one where a motive existed to develop testimony as one would have in a trial. The appellants were represented by attorneys but were not obligated to cross-examine the witness. To presume that they should have done so would be to presume that they knew the testimony could be used later in the absence of the witness. That would mean a preliminary hearing could not be one solely to learn if only probable cause existed. It is questionable whether there is even a right to conduct a searching cross-examination at a preliminary hearing. Moreover, a defendant, having no obligation to cross-examine, may for strategy’s sake forego examination. The defense may not wish to disclose its theory of defense.  

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118. 399 U.S. 149, 165 (1970). The Court noted, “Porter was under oath; respondent was represented by counsel . . .; 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*.

119. Scott v. State, 272 Ark. 88, 612 S.W.2d 110, 113 (1981); see also *California v. Green*, 399 U.S. at 197 (Brennan, J., dissenting), giving substantially the same reasons for why “[c]ross-examination at the hearing pales beside that which takes place at trial.” *Id*.

It is interesting to note one court’s response when a defendant sought to introduce preliminary hearing testimony:

As a practical matter, a prosecutor cannot reasonably be expected always to use a preliminary hearing to elicit answers not needed at the preliminary hearing, simply because he should anticipate the wit-
There may be justifications in evidence law to admit prior hearing testimony, since such testimony can be evaluated better than other hearsay. Prior hearing testimony, however, generally will not satisfy the confrontation clause as correctly interpreted.\textsuperscript{120}

Even if the previous proceeding is the kind at which a reasonable attorney would have fully explored the now contested issue, the former testimony cannot be constitutionally admitted if the attorney was not permitted that full exploration. Former testimony can only be admitted when the jury would not have weighed the evidence differently from trial testimony. Therefore, preliminary hearing restrictions that prevent testimony from yielding the same information as would be yielded by in-court testimony make that hearsay constitutionally inadmissible in criminal trials. Certainly, when a court has specifically prevented questions at a preliminary hearing which would be permissible at trial, the preliminary hearing testimony cannot satisfy the confrontation clause.\textsuperscript{121}


\textsuperscript{120} Some preliminary hearing testimony should be constitutionally admissible. Thus, if the accused moves prior to trial to suppress admissions as involuntarily given, the testimony adduced at that hearing could be admissible at trial on the issue of whether the statements were made voluntarily.

United States ex rel. Haywood v. Wolff, 658 F.2d 455 (7th Cir.), cert. denied, 454 U.S. 1088 (1981), presents an example of how application of existing confrontation principles can lead to the admission of former testimony that clearly should have been excluded by the sixth amendment. There, preliminary hearing testimony was used to convict the defendant in state court even though his counsel was specifically prevented from asking questions that would have shed light on many relevant subjects, including the declarant's background, credibility, and ability to identify the accused. While the Seventh Circuit conceded that similar restrictions at trial probably would have violated the confrontation clause and due process and been reversible state error, the court held that the preliminary hearing testimony was admitted without violating the confrontation clause. The sixth amendment was satisfied because the test for determining whether preliminary hearing testimony is admissible under the Confrontation Clause, as with all hearsay, is not whether there was an opportunity for full and complete cross-examination, but whether there are adequate indicia of reliability to justify
In summary, former testimony can be admitted without violating the confrontation clause, but its admission cannot be just a routine matter. Instead, the proceeding which produced the hearsay must be analyzed to see if it is reasonable to conclude that the former testimony will be weighed against the defendant in the same way as if the declarant

its placement before the jury, even though there is no contemporaneous confrontation of the declarant.

Id. at 463.

This result might make sense under evidence law. There was cross-examination at the preliminary hearing so the hearsay could be evaluated better than hearsay generally; thus, the former testimony might justifiably be exempted from evidence’s hearsay ban. To say, however, that evidence can be admitted in the form of prior testimony when its introduction as in-court testimony would have violated the defendant’s rights makes no sense. The Seventh Circuit cited Alford v. United States, 282 U.S. 687 (1931), for its conclusion that the hearing’s cross-examination restrictions would have violated the Constitution if imposed at trial. 658 F.2d at 461. In Alford, the Court unanimously held that the defendant’s rights were violated when he was prevented from asking at trial where a prosecution witness lived. The court concluded that cross-examination’s permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, . . . that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, . . . and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.

282 U.S. at 691-92.

In other words, restrictions on cross-examination like that imposed in Alford cannot be placed at trial because it may prevent the accused from having the jury correctly assess the evidence. If the in-court testimony cannot be properly evaluated because of the restriction, surely the evidence cannot be better weighed when it takes the less desirable hearsay form. The confrontation clause exists not as a turnstile to admit more reliable hearsay than hearsay generally, but to allow the accused the adversarial testing of evidence so that the jury will not unfairly weigh the evidence against him.

Other courts have followed Haywood in allowing the admission of preliminary hearing testimony even though the accused was prevented from cross-examining on crucial topics. See, e.g., State v. Bauer, 109 Wis. 2d 204, 325 N.W.2d 857, 864 (1982) (holding that the introduction of preliminary hearing testimony did not violate the confrontation clause even though the accused was prohibited from cross-examining on “an important issue” in the case).

A related situation occurs when cross-examination at the hearing cannot be as extensive as it would have been at trial because investigation and discovery that occurs by trial has not been completed at the hearing. When this occurs, it is not reasonable to conclude that the hearsay will be evaluated no more harshly for the defendant than the trial testimony. But see Gonzalez v. Scully, 578 F. Supp. 1063, 1073 (S.D.N.Y. 1984), where the court found that the admission of preliminary hearing testimony did not violate the sixth amendment although material impeaching a witness was turned over only after the hearing. The court concluded, “Preliminary hearing testimony is per se reliable as long as the witness testifying was subject to cross examination.” Id.
were confronted at the present trial. Hearsay from trials on the same issue should be admissible while that from pretrial hearings seldom will pass sixth amendment scrutiny.

Prosecutors may complain about this interpretation, concluding that it will make it impossible to win convictions when key witnesses cannot be produced at trial. That, however, need not be the result. Testimony from a hearing should not offend confrontation principles where the defense has been notified that the proceeding’s purpose is to preserve evidence for trial and where the defense is given full opportunity for cross-examination after completing discovery. Prosecutors may wish to avoid such hearings to prevent disclosure of their evidence and theories in advance of trial. The present interpretation of the confrontation clause, however, places that risk of disclosure on the accused. Since there is a chance that the preliminary hearing testimony will be used at trial, a defendant’s attorney should cross-examine a witness as extensively as he can at the hearing. In doing so, of course, he may divulge strategies, information, and defenses. Furthermore, the hearing testimony may be admitted even if the accused’s attempt at full cross-examination is thwarted by hearing court limitations or by his own inability to do a thorough investigation before the hearing. In other words, although our adversary system is supposed to provide protection for the accused, the Court’s present interpretation of the former testimony rule often protects the prosecution at the expense of the accused, which proper interpretation should not allow.

2. Business Records

Out-of-court statements can be admitted when they consist of information that can be correctly interpreted by the jury. They can also be admitted when cross-examination of the declarant at trial would be unlikely to produce useful evidence for the proper assessment of the statement. In such a circumstance, since trial testimony will not produce additional helpful information, the out-of-court statement will not be mistakenly weighed to the defendant’s detriment because of the absence of cross-examination. The truly routine business record, such as a bank teller’s notation that the defendant made a deposit, or employment records showing that he was not at his assembly line job, serve as examples.
CONFRONTATION CLAUSE

If such evidence is introduced with opportunity for cross-examination of the declarant by the defense, the court must determine whether cross-examination of the teller might have led the jury to assess the bank record more favorably for the accused. If the recording was truly routine, done with little reflection as were other recordings, then the teller is unlikely to remember anything about this transaction. If forced to testify, all he could relate would be the procedures for record-making and record-keeping. When the records are made and kept under an established system that requires little personal judgment by the teller, he can be no more helpful for the jury’s assessment of the evidence than the custodian of the record can be. Cross-examination of the teller will accomplish nothing more for the accused than cross-examination of the custodian. As long as the custodian is produced and can be cross-examined about the routine of record creation and preservation, the hearsay can be constitutionally admitted.

This does not mean that all business records admissible under evidence law can be constitutionally introduced. Evidence law only demands that the record be made and kept in the ordinary course of business, that it be made at or near the time of the event, and that it not have been made in circumstances indicating untrustworthiness. The confrontation clause looks at the issues from the defendant’s viewpoint and asks when the cross-examination of the business declarant might affect evaluation of the hearsay. Hearsay can satisfy the business records hearsay exception and still fail to satisfy the sixth amendment. For example, when the declarant should remember a regularly recorded and maintained but nonroutine event, the accused’s cross-exami-

122. See infra note 125.
123. See Kirkpatrick, supra note 2, at 698–99 (quoting Dutton v. Evans, 400 U.S. 74 (1970)):

Records of regularly conducted activity also tend to lack susceptibility to testing by cross-examination because the declarant’s recollection of the matter recorded will frequently be less trustworthy than the record itself. Occasionally, cross-examination of the witness who establishes the foundation for the records, or another witness familiar with the recording process will provide the trier of fact with “a satisfactory basis for evaluating the truth of the prior statement” that is a constitutionally adequate substitute for cross-examination of the declarant.

nation may change the jury's perception of the evidence. When the statement records the declarant's individual expertise or judgment, cross-examination about the declarant's standards in his exercise of opinions and judgments, even though he may not remember the event, may make the jury view the hearsay more favorably for the accused. Consequently, such hearsay cannot be introduced without cross-examination of the declarant.


Business records are reliable because they are recorded in the daily course of business by a trained entrant, checked by systematic balance-striking, and relied upon as the basis for future business activity. This reliability, combined with the probability that the entrant, if he can be identified, will not recall the transaction among the hundred he has handled, makes the requirement of proof of unavailability impractical. A coroner's report is not made subject to these conditions which insure reliability. A coroner must make subjective conclusions which only he can best explain. Additionally, the examining coroner is identifiable and he is likely to remember the specific examination.

126. See, e.g., United States v. McClintock, 784 F.2d 1278, 1292 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985) (holding that the admission of routine gemstone grading reports violated the confrontation clause. "[B]ecause of the various means of evaluation and apparent subjective decisions that enter into the evaluation of gems, McClintock's confrontation of the preparers of the reports may have been valuable to his defense."); Imwinkelried, The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants, 30 HASTINGS L.J. 621, 639 (1979):

When the subject of the report is evaluative, equally qualified experts in the field will often reach conflicting opinions on the very same facts. Precedent and principle compel the conclusions that there is too great a likelihood that a lay trier of fact will generally be unable to determine the proper weight to assign to an evaluative opinion in a police laboratory report if they do not have the opportunity to have the expert cross-examined.

See also Westen, The Future of Confrontation, 77 MICH. L. REV. 1185, 1209 n.92 (1979):

The prosecution is not required to produce the author of business records, because ordinarily the prosecutor can reasonably assume that the defendant would not wish to examine the author of the records in person. To be sure, some business records contain evaluative statements that the defendant can reasonably be expected to wish to examine; in that event, the confrontation clause would require the prosecution to produce the maker of the records in person.
3. Reliable Statements

Finally, reliable out-of-court statements can be admitted consistently with the confrontation clause, but the level of reliability must be qualitatively different from that accepted by evidence law for a hearsay exception. Just because evidence has the reliability of a hearsay exception does not mean that the statement cannot be mistakenly weighed to the accused's detriment. Evidence law may admit an out-of-court statement when the circumstances of its utterance lessen the chances of insincerity or a mistaken perception or memory. While such hearsay may be more reliable than hearsay generally, the lessened chance of mistake does not guarantee that the accused's cross-examination of the declarant would not have helped his case.


Current analyses are unpersuasive even in their attempts to identify which categories of hearsay are reliable. The reliability of hearsay is usually determined by examining the degree to which believing the evidence requires unsupported reliance upon the declarant's four testimonial capacities: narration, sincerity, memory, and perception. If circumstances indicate that no danger would result from reliance upon one or more of these capacities, an exception is sometimes said to be warranted. Yet it is not clear why the hearsay problem is "solved" when only one or two of the four defects have been removed.

128 On numerous occasions the [Federal Rules of Evidence] Advisory Committee, in keeping with tradition, finds justification for admitting out-of-court statements, either by excepting them from the hearsay rule or by excluding them from the definition of hearsay, on the assumption that under the circumstances the declarant would not lie. Accuracy of perception and memory receive less attention in determining admissibility, even though errors and distortion in perception and memory are probably the most important source of testimonial conflict.

Stewart, Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 Utah L. Rev. 1, 9. See Morgan, supra note 87, at 188 ("While cross-examination can and occasionally does reveal insincerity and peculiarities in the use of language, experience in the courtroom demonstrates that its most important service is in exposing faults in perception and memory."); see also Graham, supra note 62, at 136:

[N]one of the factors supposed to give some classes of hearsay a special reliability have ever been empirically demonstrated to have the effects on accuracy attributed to them, and some actually have been proved to negate rather than enhance reliability. Since this justification for the use of hearsay did not develop until later, it is doubtful that the drafters of the Sixth Amendment envisaged confrontation being satisfied by anything other than cross-examination in the presence of the jury.
example, may have little chance of being a lie, but cross-examination may reveal that the statement could have been the product of a distorted perception and still incorrect. The out-of-court statement, because of the lessened sincerity problem, may be reliable enough for a hearsay exception, but not for the sixth amendment since defense cross-examination of the declarant may have aided the accused. Instead, to satisfy the confrontation clause, the statement has to be so trustworthy that it must be accurate. Thus, any jury mis-evaluation of such a statement introduced against the defendant without cross-examination will have to be in the defendant's favor. The only possible way to mistakenly weigh the statement would be to give it less weight than it deserves. That can only harm the prosecution's case.129

Supreme Court opinions have occasionally come close to affirming this correct approach. For example, dicta in *Mattox v. United States* acknowledged the constitutionality of dying declarations.130 The Court seemed to say that this conclusion was required simply because dying declarations were accepted at the time of the Constitution's adoption.131 The Court, however, also went on to indicate that dying declarations are so accurate that an accused's confrontation interests cannot be harmed by their admission: "[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath."132 The Court was accepting the traditional rationale for that hearsay exception's existence: a person does not die with a lie on his lips.133

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129. Cf. Note, supra note 46, at 1304 ("[T]he admission of coconspirator statements solely on the basis of their presumptive reliability would pose no confrontation clause problem as long as the statements are inherently so trustworthy that cross-examination would be superfluous.").

130. Dying declarations "from time immemorial . . . have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility." *Mattox v. United States*, 156 U.S. 237, 243-44 (1895).

131. We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted . . . . Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected.

Id. at 243.

132. Id. at 244.

Thus, the Court seems to be indicating that such evidence was so reliable that it could not be mistakenly weighed to the defendant's disadvantage any more than in-court testimony could be.

Language in *Dutton v. Evans* comes even closer to the mark. Although the plurality opinion seemed to combine a number of reasons for concluding that a coconspirator's declaration was admissible, the opinion finally concluded, "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." This statement essentially announces a correct standard. Hearsay can be admitted without confrontation if the accused's cross-examination could not have led the jury to assess the evidence more favorably to the accused.

That these courts may have come close to enunciating the right approach does not mean, however, that their conclusions were correct. Even if the rationale for dying declarations is accepted, it only tends to insure that the declarant was not intending to mislead when he made the pronouncement. It guarantees nothing about the accuracy of the declarant's perception, and since modern studies indicate that stress warps perception, there are reasons to doubt the accuracy of a dying declaration.

Similarly, *Dutton v. Evans* may have announced a correct standard without reaching a correct result. There, the declarant stated to a fellow prisoner: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this (basing the reliability of a dying declaration upon the classic statement that no one "who is immediately going into the presence of his Maker will do so with a lie upon his lips.").

135. *Cf.* R. LEMPRT & S. SALTZBURG, *supra* note 30, at 483:

[C]ountervailing factors exist which suggest [a dying declaration's] unreliability. Chief among these is the probability that the declarant will have been under great stress before, during and after the homicidal attack. Stress . . . interferes with accurate perception and can lead to memory or narration problems. Yet stress may not be the threat to perception in this area that it is in others. The most significant of the facts commonly proved by dying declarations, the identity of a previously known killer, seems unlikely to be either misperceived or forgotten. Where the declarant describes the circumstances of the homicide, the more detailed the account, the greater the threat posed by problems of perception.
now." 136 This statement was introduced "because the jury was being invited to infer that Williams had implicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament." 137 If this meaning is what Williams intended by his assertion, then the Court may have been right in concluding that the assertion was so unlikely to have been the product of a faulty memory or mistaken perception or insincerity that cross-examination would not have altered its weight. It is not clear from the statement, however, that Williams intended to assert that Evans was the murderer. The statement was ambiguous, and cross-examination may well have shown that it had a different meaning. 138 In-court testimony, therefore, may well have convinced the jury that the statement was not as damaging to the accused as first thought. In other words, while the Court's words approached the correct standard, that standard was not employed. The hearsay was admitted simply because some of the hearsay dangers were reduced even though the statement was not so reliable that it could not be mistakenly weighed to the accused's disadvantage. 139

The Court's present analysis, of course, does not even attempt to apply the proper standard. Instead, the Court

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136. 400 U.S. at 77.
137. Id. at 88.
138. In dissent, Justice Marshall, joined by three others, said about the conclusion that cross-examination would not have had an effect:

A trial lawyer might well doubt, as an article of skeptical faith of that profession, such a categorical prophecy about the likely results of careful cross-examination. . . . At his trial Evans himself gave unsworn testimony to the effect that the murder prosecution might have arisen from enmities that Evans' own law enforcement activities had stirred up in the locality. Did Williams' accusation relate to Evans as a man with powerful and unscrupulous enemies, or Evans as a murderer? Mr. Justice Stewart's opinion opts for the latter interpretation . . . . But at this great distance from events, no one can be certain. The point is that absent cross-examination of Williams himself, the jury was left with only the unelucidated, apparently damning, and patently damaging accusation . . . .

Id. at 103–04 (Marshall, J., dissenting). Indeed, a majority of the Court found that cross-examination of the declarant may have made a difference. Justice Harlan who concurred in the result, but not in Justice Stewart's opinion, stated that Justice Marshall had satisfactorily rebutted the claim that cross-examination would not have mattered. Id. at 93–94 (Harlan, J., concurring).

139. See Davenport, supra note 52, at 1390: "Absent sufficient inherent assurances of reliability, the only permissible guarantor of the hearsay declaration's evidentiary value is the defendant's cross-examination."
only requires an evidentiary analysis to determine whether the usual hearsay rules have been employed.\textsuperscript{140} Thus, instead of grappling with the difficult and crucial question of what effect cross-examination might have had in assessing the weight of a declarant’s words, confrontation analysis is now only concerned with the arcanum of hearsay exceptions. As long as this approach continues, criminal defendants will not get the full protection of the confrontation clause.\textsuperscript{141}

**B. The Unavailable Declarant**

In its confrontation analyses, the Court has not only incorrectly indicated the kind of hearsay that can be admitted, but also incorrectly asserted that some hearsay otherwise constitutionally inadmissible becomes admissible if the declarant is unavailable.\textsuperscript{142} The proper standard, that the sixth amendment is violated by the introduction of unconfronted statements when cross-examination would have led to a more favorable evaluation for the accused, indicates otherwise. Constitutionally inadmissible hearsay does not become admissible just because the declarant is absent through no fault of the prosecutor. Even if the declarant cannot be produced after good faith prosecutorial efforts, out-of-court statements failing to meet the proper standard cannot be constitutionally introduced.

At first glance, a rule that prohibits evidence from even a dead declarant seems unduly hard on the prosecution. Why should the state suffer when the declarant is absent through no fault of its own? This question misses the point. The confrontation clause is not a matter of blame. It does not merely forbid the state from depriving the accused of the opportunity to cross-examine the hearsay declarant. Instead, the clause flatly grants a protection to the accused. This is not surprising because the prejudice to the defendant

\textsuperscript{140} See supra text accompanying notes 52–57.

\textsuperscript{141} Whether any hearsay does have the quality of being so trustworthy that it cannot be mistakenly weighed to the defendant’s disadvantage is not easy to decide because unconfronted evidence has not yet been subjected to the proper analysis. A continuing appropriate case-by-case analysis is now needed. From such an analysis categories of admissible statements may eventually emerge.

\textsuperscript{142} Roberts stated that in general, declarants must be unavailable for their statements to be admitted. See supra text accompanying note 7. Inadai limits the unavailability rule to former testimony or perhaps to Rule 804 evidence. See supra text accompanying notes 15–38.
from the unconfronted statements does not vary with the reason for the declarant's unavailability. The accused is harmed just as much by hearsay that came from a dead declarant as from a live one whom the prosecution did not seek.143

This result is really no harsher for the state than what regularly occurs. If an important prosecution witness dies without producing admissible hearsay, that witness's evidence is lost. We do not allow the prosecution to introduce a summary of the evidence it expected to produce simply because it was blameless for the declarant's absence. The fact that the declarant uttered admissible hearsay alters the situation from confrontation's perspective only if the hearsay cannot be misevaluated to the defendant's detriment.

C. The Available Declarant

One final situation remains: hearsay from an available, but unproduced declarant. An analysis of this situation is more complex than that for absent declarants. First, of course, if the hearsay is the kind that will not be mistakenly weighed to the accused's detriment, then the evidence may be admitted without producing the available declarant. If the evidence meets this standard, cross-examination will not matter, and there is no point in requiring the prosecution to produce the declarant.144 Therefore, such out-of-court statements can be introduced whether or not an available declarant is produced.

143. In discussing the Court's holding that hearsay can be admitted when the declarant is unavailable through no fault of the prosecution, Professor Kenneth Graham notes,

[The Court seems to ignore the fact that in a great many cases it will not be the 'fault' of the defendant either. In such cases one might have supposed that the function of the confrontation clause and the constitutionally required burden of proof was to place the risk of the absence of reliable evidence of guilt or innocence upon the State rather than the defendant.]

Graham, supra note 62, at 121 (emphasis in original); cf. Seidelson, Hearsay Exceptions and the Sixth Amendment, 40 Geo. Wash. L. Rev. 76, 90 (1971) ("Inherent in the [Mattox] Court's decision [to admit the former testimony of a dead declarant] was the conclusion that the accused, rather than the prosecution, should suffer the adverse consequences arising from the adventitious fact of the declarant's death.").

144. "The Constitution should not compel witness' presence in the courtroom when confrontation would not be helpful to the accused." Lilly, supra note 2, at 225.
If the out-of-court statements are not of the kind that satisfies the proper confrontation standard, then they cannot be admitted without allowing the defense the opportunity for cross-examination. Does this mean that the prosecutor has to produce the declarant to get the evidence admitted, or is the confrontation clause satisfied if the accused can call the witness to the stand and examine him? By holding that the prosecutor does not have to produce the declarant before introducing coconspirator statements, Inadi indicates the latter rule is the correct one.

Inadi's logic is appealing: Since the defendant can put the declarant on the stand, the defense is allowed to test and challenge the evidence just as much as if the prosecutor had produced the declarant. Since the same information can be presented to the jury as if the prosecution had called the witness, the trier's evaluation of the evidence should not change; there appears to be no reasonable probability that the factfinder would assess the witness more favorably if the prosecution had been required to produce him. The confrontation clause seems satisfied.

Inadi's appeal, however, is superficial. First, it sets the sixth amendment into conflict with itself by ignoring the wording and interpretation of the compulsory process clause. Inadi indicates that the defendant does not have to be confronted with the witnesses against him because under the compulsory process clause he has a right to compel their in-court testimony. Compulsory process, however, merely gives the accused the right to produce favorable witnesses, not the right to produce witnesses against him. In

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145. California v. Green, 399 U.S. 149 (1970), held that hearsay can be admitted in conformity with the confrontation clause when the declarant testifies subject to cross-examination at trial.

146. See supra text accompanying note 35.

147. After noting that Federal Rule of Evidence 806 permits the adverse party calling the declarant to examine the declarant as if under cross-examination, the Court concluded, "The Compulsory Process Clause would have aided respondent in obtaining the testimony of any of these declarants." United States v. Inadi, 106 S. Ct. 1121, 1128 (1986).

148. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for witnesses in his favor . . . ." U.S. Const. amend VI; see Graham, Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions, 40 Miami L. Rev. 19, 65 (1985):

The clause is "to be confronted with," which requires presentation of evidence by the prosecution. The clause does not merely say "to
its fullest explication of a compulsory process standard, the Court held that when the government deports alien witnesses, the defendant can win a compulsory process claim only if he establishes that a potential witness's testimony would have been favorable to him, and that such favorable testimony would have produced a reasonable probability of a different verdict. If this holding represents the correct compulsory process standard, then the accused does not generally have a constitutional right to compel the presence of a person who has uttered incriminating hearsay.

While Inadi's logic regarding compulsory process ignored the Court's own recent decisions, its argument...
about practicalities also presents difficulties. Little is to be gained, the Court stated, by placing the significant burden of production on the prosecution when the defendant has not thought it important enough to produce the declarant himself. This position misconceives the difficulty of the potential prosecutorial burden and ignores the effect of placing the burden on the defense.

When the prosecution must produce a witness because he has not uttered admissible hearsay, experience convincingly demonstrates that the prosecution's burdens are not insuperable. Such witnesses are routinely put on the stand by the government, and indeed many, if not most, prosecutions are proved successfully without hearsay from absent declarants. When the prosecutor truly desires to produce a witness in court, failure is not the rule.

The difficulties for the government do not change merely because a witness has produced admissible hearsay. Indeed, it is hard to believe that the prosecution in Inadi would have found it very difficult to produce the declarant if it had wanted to. The government had subpoenaed the declarant, but he failed to appear, claiming car trouble. In other words, the prosecution had the wherewithal to serve the declarant and ascertain an excuse for his nonappearance. Without much difficulty, it had the means to produce him if it had chosen to do so. Surely, if the government had made a deal with the declarant to incriminate the defendant at

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footnotes:

152. Moreover, an unavailability rule places a significant practical burden on the prosecution. Any marginal protection to the defendant by forcing the government to call as witnesses those coconspirator declarants who are available, willing to testify, hostile to the defense and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarant, cannot support an unavailability rule.

106 S. Ct. at 1128-29.

153. "An unavailability requirement imposes no more than a minimal burden on the prosecution in most cases." Note, supra note 46, at 1313.

154. 106 S. Ct. at 1124.
trial, the prosecution would not have found the burden too
great to produce the declarant. The Court's concern about
the significant practical burden for the prosecutor was at
best an abstract one; it did not refer to the facts of Inadi. The
prosecution failed to produce the declarant not because it
would have been so hard to get him to the witness stand, but
simply because as a matter of strategy it chose not to.

The Court, however, did not consider the effects of its
decision on the defense. Whatever difficulty a production
burden might give the prosecution, the difficulty is even
greater for a defendant. He has all the problems encoun-
tered by the prosecutor, and then some. For example, an
accused can expect to receive less cooperation from prison
officials in producing a jailed declarant than would a prose-
cuttor. In addition, since the ordinary defendant has fewer
resources than the state, the burden, even if it were equal for
the two sides, will be proportionately more difficult for the
defense. Moreover, the accused has no constitutional right
to discover the prosecution's incriminating evidence.\footnote{155} The
defendant, therefore, may not know that the prosecution is
relying on hearsay until it is produced. While the prosecutor
should have had time in advance of trial to produce the de-
clarant, the defendant may get his first opportunity to search
for the declarant during the trial. Even if he then has a right
to compulsory process, it will often be useless.

Ignoring these practicalities, the Court went on to con-
clude that its removal of the burden of production from the
prosecution would not cause the loss of valuable informa-
tion: “[A]n unavailability rule is not likely to produce much
testimony that adds anything to the truth-determining pro-
cess over and above that which would be produced without
such a rule... Presumably only those declarant that neither
side believes will be particularly helpful will not have been
subpoenaed as witnesses.”\footnote{156} This conclusion is simply in-
correct, and the facts of Inadi itself indicate why.

According to the government, the declarant in Inadi was
an active participant in the conspiracy. This person surely
had “helpful” information; he had valuable knowledge that

\footnotesize
\begin{itemize}
\item[155.] See supra note 104.
\item[156.] 106 S. Ct. at 1127.
\end{itemize}
confirmed or undercut the prosecution's case.157 The Court's conclusion that this person was not produced because the jury would have found his testimony useless does not make sense. Instead, what the Court refused to recognize is that the declarant was not produced because neither side wanted to take the risks inherent in calling him.

The risks to the parties are apparent. Since the declarant was not under the control of either party, no one could be sure what he would say. If, on the one hand, it had been certain that the declarant would testify detrimentally to the defense, the prosecution would have called him. If, on the other, he would have testified in favor of the accused, the defense would have had him testify. Instead, neither side produced him because it was unclear to all how the witness would testify or how the jury would perceive that testimony. Although the testimony should have been useful for a factfinder trying to ascertain the truth, neither party was sure whether the testimony would be helpful to its case.

Each side faced the fact that while the declarant's testimony might help its position, it also might hurt. Calling him to the stand was a gamble. Inadi relieves the prosecutor of having to confront this risk and instead places all the risk-taking burden on the defense. Since the prosecution can present the damaging hearsay without having to chance what the declarant will say, the prosecution will not call him. Instead, the defense is now presented with the dilemma of determining whether to let the hearsay stand uncontested or to take the risk of calling the witness.

This dilemma is the real issue of Inadi. How does shifting this risk onto the defense affect the sixth amendment's guarantee of our adversary system?158 That crucial question

157. Inadi was convicted of conspiring to manufacture and distribute methamphetamine. He was to supply cash and chemicals for the manufacture and distribution of the product. The declarant, an unindicted coconspirator, was present during the manufacture. 106 S. Ct. at 1123.

158. Even under the Court's confrontation standard of deciding whether the accuracy of the truth-determining process was advanced, Inadi is wrong. If there are three eyewitnesses to a murder, truth-determination is better served by calling all three eyewitnesses rather than just one. The presentation of all, not just part, of the relevant evidence produces greater accuracy. The parties, however, might see risks in calling everybody. For example, if neither side was able to talk with the two witnesses before trial, the two might not be called. Time-worn admonitions tell the advocate not to call someone without knowing what he will say. In such a situation, when the parties have not called eyewitnesses, the Court's logic
went unaddressed by any of the Justices, but it is clear that it changes the situation in several ways.

First, the placement of the burden on the defense to call the witness allows the prosecution to seek a guilty verdict without presenting information that might be harmful to its case. It eliminates an incentive for the prosecutor to make the fullest presentation of evidence. Since truth should be best ascertained and the conviction of the innocent be best prevented after receipt of all the relevant, nonprejudicial evidence, the incentive for the prosecutor to seek the truth is passed on to the defense by forcing the defense to decide whether or not to call the witness.

Thus, Inadi reverses firmly established roles in our adversary system which state that the prosecution, not the defense, must make sure that the trial is a search for truth. As Justice White has explained:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal

suggests that since neither side produced the two witnesses, their testimony would not have significantly aided truth determination. Common sense, however, indicates that the testimony would have aided the jury, but no one knows which side will be happier with the evidence.

In another example, the defendant claims self-defense in the shooting of Smith outside a bar. At trial, he produces a bar patron who was inside the building at the time of the shooting and could not see the incident. He did hear Jones exclaim right before the shooting, “Smith has a knife!” This statement is admitted as an excited utterance, an exception that permits the admission of evidence without the production of an available declarant. See Fed. R. Evid. 803(2). This situation, then, is much like Inadi. Hearsay, the value of which depends on its context, is admitted without having the declarant testify. If neither side calls the declarant, is truth-determination as well served as by his production? Inadi says “yes,” but the question can only be answered if we know what the declarant would have said. Thus, assume that the defense interviewed the declarant, who stated, “Yes, I made that exclamation, but I was wrong. Immediately after the shooting I went over to Smith. He had no knife. I don’t know how I could have made such a mistake, and the defendant was much closer to Smith than I was. If I am called at trial, I will tell the truth. But I am defendant’s friend, so I won’t cooperate with the prosecution before trial.”

Knowing this, we know that calling the declarant would have aided truth determination, yet neither side might call him. The Inadi court would conclude that both parties’ failure to produce indicates that the declarant’s in-court testimony would not have aided accurate factfinding. The Court is wrong.

The testimony of the declarant in Inadi also would have helped truth-determination. The coconspirator declarant is in effect an eyewitness to the crime of conspiracy. Surely his testimony would have shed important light on the conspiracy’s membership, actions, goals, and existence. Surely his testimony would have aided the jury.
CONFRONTATION CLAUSE

Trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is.\footnote{159. United States v. Wade, 388 U.S. 218, 256–58 (1967) (White, J., concurring and dissenting).}

Under the Court’s confrontation interpretation, the prosecutor is no longer obligated to present the evidence. In effect, the defense is coerced into doing so or suffering the consequences of having the jury weigh the hearsay without all the possible information.\footnote{160. Even from the Court’s viewpoint that the confrontation clause should be interpreted to promote the accuracy of the trial process, the burden of production should be placed on the prosecution. For accuracy, the trial should have the fullest presentation of evidence. When the defendant is presented with the dilemma of leaving the hearsay unchallenged or calling the declarant without knowing whether he will help or hurt his case, the defendant may choose not to call the declarant and hope that the jury will find that guilt beyond a reasonable doubt has not been established. He may prefer just to have some detrimental evidence, the hearsay, admitted against him without taking the risk that further evidence, from the declarant’s testimony, might also be harmful to him. If the burden is on the state, the declarant is more likely to be produced. To get the hearsay before the jury, the prosecutor will have to produce the declarant, and the requirement that the prosecution has to prove the case beyond a reasonable doubt will bring pressures on him to get the hearsay admitted. Thus, placing the burden on the prosecution makes it more likely that all the relevant evidence will be introduced.}

Not only does Inadi’s logic conflict with the prosecutor’s task of ascertaining the truth and not convicting the innocent, it also alters another accepted part of our adversary system. Ordinarily, when the prosecution presents damaging evidence, the defendant is given the opportunity immediately after its receipt to challenge and test the evidence through cross-examination. Concomitantly, when the defense presents exonerating evidence, the prosecution is given the immediate chance to cross-examine. Neither side has to produce the adverse witness for cross-examination. Neither side has to wait until later in the case to challenge and test the evidence.
The Inadi approach changes this scheme with regard to hearsay from an available declarant. Now the defendant must produce the person he wishes to confront, and he must wait until it is his turn to produce witnesses before he can cross-examine. This approach suggests that our entire trial system could be similarly restructured in such a way that the opposing side would not be allowed to cross-examine a witness after he testifies, but would only be permitted to call the witness and conduct cross-examination as part of its own case. In other words, the prosecution would be allowed to introduce all its direct examination from several witnesses unimpeded by defense cross-examination. The defense would then call those witnesses unimpeded by the prosecution's cross-examination. Finally, the prosecution could call and cross-examine all the favorable defense witnesses. If Inadi is correct, this system must be constitutional, for the defendant gets his chance to cross-examine. The change, however, is clearly a radical alteration in the way we conduct trials, and one that should be found to violate the sixth amendment.  

161. Professor Westen has demonstrated that the right to cross-examine a prosecution's witness right after the conclusion of his direct examination is at the heart of the confrontation clause.

The gross order-of-proof in American criminal procedure is dictated partly by tradition and partly by constitutional compulsion. Thus, tradition provides that as between the two sides, the prosecution presents its case first and the defendant presents his case second. In addition, however, the sixth amendment entitles a defendant to interrupt the prosecution's case-in-chief by intervening to elicit evidence in his defense by means of cross-examination. . . . Indeed, the right of a defendant to interrupt the state's presentation of evidence by cross-examining prosecution witnesses is at the core of the sixth amendment right of confrontation.

Westen, Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense, 66 Calif. L. Rev. 934, 981–83 (1978). Westen goes on to imagine a system without a confrontation right where the defense would have to rely on compulsory process to present information usually elicited on cross-examination.

In that sense, the compulsory process clause already provides the defendant with every benefit he would otherwise enjoy under the confrontation clause, with one important exception—more effective timing and sequence. The main (and perhaps the only) thing the confrontation clause adds to the compulsory process clause is that it gives a defendant the right to examine certain witnesses—i.e., those persons whose incriminating statements the prosecution introduces against the defendant in its case-in-chief—at the time during trial when the statements are first made to the jury and are uppermost in the jurors' minds. In other words, the essential attribute of the right
Indeed, let's go further. If the defendant's confrontation rights are preserved by his ability to produce witnesses for cross-examination, why should hearsay have to be reliable to be admitted? Direct examination does not have to be trustworthy to be presented. Instead, the defense can cross-examine the witness to allow the jury to properly assess the testimony. Thus, the prosecution can produce any kind of hearsay as long as the defense can later call the declarant for cross-examination. Inadi's logic should lead to the conclusion that the confrontation clause allows the prosecution to produce summaries of its evidence or ex parte affidavits without calling witnesses, so long as the defense can later produce those witnesses. Surely the confrontation clause prohibits such a result.  

If these new approaches to the entire trial violate the sixth amendment, why should these same approaches to part of the trial be treated differently? Why should hearsay from available declarants be treated differently from any other evidence presented by the prosecution? The simple answer is that such hearsay should not be treated differently unless the admission of the hearsay would not infringe the accused's right to the adversary system guaranteed by the sixth amendment.  

of confrontation is that it regulates the defendant's order-of-proof: where the defendant would otherwise have to wait to elicit impeaching evidence as part of his own case-in-chief, the confrontation clause allows him to interrupt the state's case-in-chief to elicit that evidence at a time when the impeachment will be most effective.

Id. at 983. See also Westen, supra note 85, at 616 (confrontation and compulsory process "enable the defendant to examine the witnesses whose statements are used against him at a time when their statements are still fresh in the factfinder's mind.").

162. "Historical evidence indicates that the Founding Fathers intended to ban precisely this result: cases wherein the prosecution's only evidence consists of relatively formal documents such as affidavits to which the jury is likely to attach great weight." Imwinkelried, supra note 126, at 647. See also Graham, supra note 148, at 66 (Writing shortly before Inadi, Graham states, "In this long line of decisions, there is not even the slightest hint that the sixth amendment permits the prosecution to introduce an ex parte affidavit merely because the complaining witness is available to be called and examined by the accused at trial."); Westen, supra note 85, at 574–75 ("Yet it has been understood since the earliest confrontation cases that the prohibition of trials by affidavit lies at the very core of our notions of confrontation."); cf. Davenport, supra note 52, at 1403 ("There is something innately unfair and reminiscent of trial by affidavit in a process that allows the prosecutor to build a case with hearsay, while the defendant is forced to scramble about and exhaust his own, often scarce resources to attempt to produce the declarants.").
amendment. This right is not infringed if the cross-examination of the declarant would not have aided the defense. Only then can we be sure that a delayed cross-examination has not radically altered our adversary system. Thus, if the hearsay is of the quality that meets the confrontation standard, the declarant need not be produced by the prosecution to have the out-of-court statements admitted. For all other hearsay, the declarant must be produced or the hearsay cannot be admitted.

Conclusion

In interpreting the confrontation clause, the Supreme Court has misunderstood the purpose of the provision. As a result, evidence law now controls the content of the confrontation clause, and the clause now offers an accused little protection. Correctly interpreted, the confrontation clause is not a minor adjunct of evidence law, but is one of a bundle of rights that assures the accused the protection of our adversary system. It assures the accused the right to the adversarial testing of the prosecution's evidence. This is granted to assure that the jury will not overvalue the evidence against the defendant. The confrontation clause gives the accused the right to exclude all out-of-court statements when the declarant is not produced except when the prosecutor establishes the lack of a reasonable probability that the accused's cross-examination of the declarant would have led the jury to weigh the evidence more favorably to the accused. With this proper standard, the confrontation clause can be returned to its rightful place in the sixth amendment.