UIC Law Review

Volume 32 | Issue 4 Article 12

Summer 1999

When to Hear the Hearsay: A Proposal for a New Rule of Evidence Designed to Protect the Constitutional Right of the Criminally Accused to Confront the Witnesses against Her, 32 J. Marshall L. Rev. 1287 (1999)

Scott A. Smith

WHEN TO HEAR THE HEARSAY: A PROPOSAL FOR A NEW RULE OF EVIDENCE DESIGNED TO PROTECT THE CONSTITUTIONAL RIGHT OF THE CRIMINALLY ACCUSED TO CONFRONT THE WITNESSES AGAINST HER

SCOTT A. SMITH*

INTRODUCTION

Mary, a three-year-old girl, is sitting in Doctor McCracken's office having a conversation about the man who has sexually abused her. Mary hesitantly answers the questions from Dr. McCracken about her own abuse, but she is also quick to answer questions about the sexual abuse that has been suffered by her five-year-old brother, Ted. Dr. McCracken knows the answers he wants from Mary and asks her questions that suggest the answer. There is no video or audio tape of the conversation. Subsequently, a court determines that Mary is too young to be asked to testify regarding the answers she gave Dr. McCracken. The State prosecutor, Terrence Medrah, has arrested Neil for sexually abusing these two children, and would like Dr. McCracken to testify to Mary's statements. This testimony is very damaging to Neil's case, and if Mary does not testify, Neil's lawyer will not have the opportunity to ask her questions in front of the jury. If Mary's testimony is allowed into evidence, it could violate Neil's Sixth Amendment right to confront a witness who gives testimony against him. However, if the testimony is not allowed into evidence, a sexual predator of children could be cruising the playgrounds tomorrow.[1] In order for a court to allow Dr.

* J.D. Candidate, January 2000. Law Clerk for the United States District Court of the Northern District of Indiana, August 2000. The Author would like to dedicate this Comment to Mildred Gehl, and to the loving memory of her daughter and his mother, Katherine.

1. *See* Idaho v. Wright, 497 U.S. 805, 827 (1990) (holding that the hearsay statements of a two-and-one-half year old girl made to her doctor during an examination did not exhibit indicia of reliability such that the statements could be admitted against the accused). In *Wright*, the doctor asked the young girl leading questions that suggested answers, which would implicate her father, the defendant. *Id.* at 810. The statements of the girl were not recorded

McCracken to repeat Mary's statements, the statements must meet certain standards. A portion of the current federal standard requires that statements demonstrate "particularized guarantees of trustworthiness."[2]

The concept of particularized guarantees of trustworthiness is related, in a legal context, to the rules for admitting hearsay statements into evidence during a criminal trial.[3] According to the Federal Rules of Evidence, hearsay is "a statement[4] other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted."[5] Generally, hearsay will not be admitted into evidence during a trial;[6] however, certain statements that are hearsay can be admitted if they qualify as a hearsay exception.[7] When a hearsay statement is inculpatory[8] against the defendant in a criminal trial and the government wishes to introduce that statement into evidence, the Sixth Amendment[9] must be satisfied.[10] The Sixth

---

in any manner, and the court ruled that the girl was unavailable to testify herself. *Id.* at 812. In the five to four decision, Justice O'Connor held that the trial court erred by allowing the doctor to testify as to what the girl had told him. *Id.* at 813.

2. *See* Ohio v. Roberts, 448 U.S. 56, 57 (1980) (stating particularized guarantees of trustworthiness is one of the two methods for establishing the appropriate level of reliability necessary for admission of inculpatory hearsay statements against the defendant when the confrontation clause is in issue). "There are few subjects . . . upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965).

3. *Roberts*, 448 U.S. at 57.

4. FED. R. EVID. 801(a). According to the Federal Rules of Evidence, a statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." *Id.*

5. FED. R. EVID. 801(C).

6. FED. R. EVID. 802. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." *Id.*

7. *See* FED. R. EVID. 803 (including hearsay exceptions when the availability of the declarant is immaterial); FED. R. EVID. 804 (listing the hearsay exceptions, which require that the declarant is unavailable to testify). *See generally* John Corkery, *Conflict with the Confrontation Clause, 'Gangbangers' Exception v. Cross-Examination*, CHI. DAILY LAW BULL., Mar. 6, 1997, at 6 (examining an Illinois hearsay exception designed to admit inculpatory hearsay statements when the reason the declarant is unavailable is his own refusal to testify). Dean Corkery writes that the Illinois exception, designed to combat gang silence, does not comport with the Confrontation Clause. *Id.*

8. BLACK'S LAW DICTIONARY 908 (4th ed. 1968) defines inculpatory as "[g]oing or tending to establish guilt; intended to establish guilt; criminative."

9. U.S. CONST. amend. VI.

> 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

amendment, which includes the Confrontation Clause,[11] gives the defendant in a criminal case the opportunity "to be confronted with the witnesses against him."[12]

When the declarant of an inculpatory statement is not available[13] to testify and the government plans to use this

---

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 assistance of counsel for his defense.

Id. If a witness for the government in a murder case dies before a second trial, it does not violate the confrontation clause to allow a "transcribed copy of the reporter's stenographic notes of his testimony" to be read into evidence against the accused. Mattox v. United States, 156 U.S. 237, 240 (1895). "The rule that a witness must be cross-examined as to his contradictory statements before they are given into evidence to impeach his credit is a rule of convenient and orderly practice, and not a rule of the competency of evidence." *Id.* at 260.

10. *See* White v. Illinois, 502 U.S. 346, 352 (1992) (stating that the Confrontation Clause of the Sixth amendment cannot be read so narrowly as to not include the exclusion of hearsay testimony). *See also* California v. Green, 399 U.S. 149, 155 (explaining that "hearsay rules and the Confrontation Clause are generally designed to protect similar values").

11. U.S CONST. amend. VI. The right of confrontation has a "lineage that traces back to the beginnings of Western legal culture." Coy v. Iowa, 487 U.S. 1012, 1015 (1988). The importance of confrontation is that the witness is under oath and the jury has an opportunity to observe the witness and determine if they are credible. Lee v. Illinois, 476 U.S. 530, 540 (1986). The right to confrontation and cross-examination is a fundamental right. Pointer v. Texas, 380 U.S. 400, 403 (1965).

12. U.S. CONST. amend. VI. *See* Ohio v. Roberts, 448 U.S. 56, 63-64 (1980) (discussing the connection between the Confrontation Clause and cross-examination).

> [T]he Clause envisions 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 also of compelling the witness to stand face to face with the jury in order that they may look at him, and judge by his demeanor whether his testimony is worthy of belief.

Id.

13. *See* FED. R. EVID. 804(a) (defining unavailability). "Unavailability as a witness" includes situations in which the declarant—

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

statement to prove the truth of the matter asserted,[14] the statement is rank hearsay. In order for the government to use such a statement against the accused, the statement must qualify as a hearsay exception[15] and satisfy the Sixth Amendment protections which belong to the accused. Once a court rules that the statement is admissible as a hearsay exception, the admission may be challenged on the grounds that it violates the Sixth Amendment.

The Supreme Court in *Ohio v. Roberts*[16] outlined a standard for testing the constitutionality of the admission of such statements against the accused:

> When a hearsay declarant is not present for cross-examination at trial, the confrontation clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[17]

To meet the current standard of admissibility, a statement must demonstrate particularized guarantees of trustworthiness if it does not fall within a firmly rooted hearsay exception.[18]

"Particularized guarantees of trustworthiness" is the standard that must be interpreted by the judge in determining admissibility of inculpatory hearsay statements when the declarant is unavailable and the statement does not fall within a firmly rooted hearsay exception.[19] Part I of this Comment reviews the creation of the standard. Part II discusses different ways in which federal courts have implemented the standard, and Part III

> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Id.

14. FED. R. EVID. 801(C).

15. FED. R. EVID. 802.

16. *Roberts*, 448 U.S. at 57.

17. *Id.* According to the *Roberts* Court, the integrity of the entire judicial system is called into question when defendants are not given the opportunity to properly confront witnesses. *Id.* at. 64.

18. Lee v. Illinois, 476 U.S. 530, 543 (1986) (holding that one of the hearsay exceptions which is so firmly rooted in our judicial history as to not require analysis is the co-conspirator exception).

19. *See* Idaho v. Wright, 497 U.S. 805, 817 (1990) (noting that hearsay evidence that does not fall within a firmly rooted hearsay exception creates a presumption of unreliability). The presumption of unreliability can be overcome, by a showing of particularized guarantees of trustworthiness. *Id.* If the presumption is overcome, the hearsay evidence will pass the constitutional muster of the Confrontation Clause. *Id.*

proposes a federal rule of evidence which reflects a concern for preservation of the Sixth Amendment right of the accused in criminal cases. To understand the implementation of the standard, it is important to understand the development of the standard.

I. CREATION OF THE STANDARD BY THE SUPREME COURT

In a criminal case, when the government seeks to introduce uncross-examined testimony that is against the defendant's interest into evidence, the defendant's Sixth Amendment protection must be considered. The current standard for admission has taken many years to develop and has caused a great deal of debate.

A. California v. Green

In 1970, Justice Harlan's concurring opinion in *California v. Green*[20] suggested an outline that was the inspiration for the current standard for admitting hearsay evidence which conflicts with the Confrontation Clause.[21] In *Green*, Melvin Porter, a sixteen-year-old boy, was arrested for selling marijuana and testified at the preliminary hearing of Green, who was alleged to have supplied the drugs.[22] In his testimony, Porter made inculpatory statements that implicated Green as the supplier of the marijuana.[23] During the preliminary hearing, Porter was cross-examined by Green's attorney, the same attorney who represented Green at trial.[24] Two months later at Green's formal

20. California v. Green, 399 U.S. 149 (1970). Justice Harlan suggested the possibility of admitting hearsay statements against the defendant under certain circumstances when the declarant was not present in the courtroom for cross-examination. *Id.* at 186-87. Harlan's notion was unusual because prior to his concurrence, cross-examination was considered synonymous with the defendant's rights under the Confrontation Clause. William S. Pittman, Note, *Barker v. Morris and the Right to Confrontation*, 14 HASTINGS CONST. L.Q. 839, 849 (1987).

21. U.S. CONST. amend. VI.

22. *Green*, 399 U.S. at 151.

23. *Id.* Porter named Green four days after Porter had been arrested. *Id.* He told a police officer named Wade that about a month prior to his arrest Green had called him to see if he would sell some marijuana for him. *Id.* Porter claimed that later that afternoon Green gave him a shopping bag containing twenty-nine bags of marijuana. *Id.* Porter was arrested for selling a portion of these drugs to an undercover narcotics officer. *Id.* At the preliminary hearing Porter again implicated Green, but instead of saying Green personally delivered the drugs, Porter claims that Green told him where to pick up the drugs. *Id.* At the hearing, Porter was subjected to a rigorous cross-examination by Green's attorney. *Id.* At the close of the hearing, Green was charged with furnishing marijuana to a minor. *Id.*

24. *Id.*

trial, Porter was again called to testify.[25] During his testimony, Porter recanted his earlier inculpatory statements about Green, claiming he was unable to remember the statements due to drug use.[26] The state read his earlier statements into evidence in order to impeach Porter.[27]

The Supreme Court held that the admission of the testimony satisfied the Confrontation Clause.[28] The Court reasoned that the statement was sufficiently reliable for admission because Porter had been subject to cross-examination at the preliminary hearing.[29]

Justice Harlan, in his concurrence, proposed a standard that placed heavy emphasis on the prosecution's duty to produce witnesses.[30] In cases where a witness can not be produced, a hearsay statement could only be admitted if there is a determination that the statement is reliable.[31] This emphasis on the importance of a showing of unavailability would put pressure on prosecutors to find witnesses so that they could be cross-examined at the trial of the accused.[32] The concept that hearsay statements might be admitted when the defendant does not have the opportunity to cross-examine the witness was put into practice

---

25. *Id.* Under the current Federal Rules of Evidence, which were enacted after *Green*, these statements could be used by the prosecution to refresh the recollection of the witness, if he came to court and claimed that the statements could not be remembered. FED. R. EVID. 612.

26. *Green*, 399 U.S. at 152.

27. *Id.* Even though the statements would not qualify as hearsay under the current federal rules, the statements present a Confrontation Clause problem. *Id.* at 153. The Sixth Amendment offers an opportunity for a criminal defendant to confront the witnesses against him. U.S. CONST. amend. VI. One of the earliest opinions to allow pre-recorded testimony from a previous case into evidence was *Mattox v. United States*, 156 U.S. 237, 243-44 (1895). *Mattox* held that the reading of the transcribed reports of the defendant's earlier testimony under oath, did not infringe on his Sixth Amendment rights. *Id.* at 244.

28. *Green*, 399 U.S. at 170.

29. *Id.* at 165.

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

> The precise holding of the court today is that the Confrontation Clause does not preclude the introduction of an out-of-court declaration, taken under oath and subject to cross-examination, to prove the truth of the matters asserted therein, when the declarant is available as a witness at trial. With this I agree.

Id. at 172. Justice Harlan explained that he would have remanded the case to determine the admissibility of statements made to the officer (Wade). *Id.* at 189. See *supra* note 23 for a discussion of Officer Wade.

31. *Green*, 399 U.S. at 187 (1970).

32. *See id.* at 186 (Harlan, J., concurring) (stating that he would require states to conform to what he considered to be the true meaning of the Confrontation Clause). According to Justice Harlan, the Confrontation Clause would forbid the use of hearsay evidence when the declarant is unavailable. *Id.*

six months after the *Green* decision in *Dutton v. Evans*.[33]

B. Dutton v. Evans

In *Dutton*, a co-conspirator of the defendant made a statement to his cellmate implicating the defendant, who had been charged with murder.[34] When the co-conspirator refused to testify, the prosecutor called the cellmate, who was one of twenty witnesses against the defendant.[35] The defendant objected to this cellmate's hearsay statement which was admitted under the Georgia co-conspirator hearsay exception.[36] The objection was overruled, and the Supreme Court upheld the ruling.[37] The defendant was given an opportunity to cross-examine the cellmate, but the co-conspirator had not been cross-examined as to the statement.[38]

In coming to its decision, the Supreme Court outlined four factors to take into account when determining the reliability of a statement against the defendant when cross-examination is not

---

33. *See* 400 U.S. 74, 74 (1970) (holding that a Georgia co-conspirator hearsay exception is not automatically invalid because it goes farther than the federal rules in terms of the kinds of hearsay it allows). The court also held that the admission of the statements made in the case did not deny the defendant his Confrontation Clause rights because the statements, although not cross-examined, were sufficiently trustworthy for the jury to hear. *Id.* at 75.

34. *Id.* at 77. In April 1964, the brutally beaten bodies of three police officers were found handcuffed together in the pine forests of Gwinnet County, Georgia. *Id.* at 76. Each of the officers died as the result of multiple gunshot wounds delivered in the back of the head. *Id.* After a long investigation, police arrested four men including the defendant, Evans. *Id.* An alleged accomplice of the defendant (Williams), after returning from his own arraignment hearing, made a statement to a fellow prisoner named Shaw. *Id.* He told Shaw that if it had not been for the defendant, "we wouldn't be in this now." *Id.* At the trial of the defendant, the prosecution called Shaw to repeat the statement of Williams. *Id.* The Georgia court admitted the statement under a Georgia co-conspirator hearsay exception, which allows the admission of statements made by co-conspirators when they are in the process of concealing the conspiracy. *Id.* at 78. *But see* FED. R. EVID. 801(D)(2)(E) (providing for admission into evidence of only co-conspirator statements made in furtherance of the conspiracy). "A statement is not hearsay if—[t]he statement is offered against a party and is . . . (E) a statement made by a co-conspirator of a party during the course and in furtherance of the conspiracy." *Id.*

35. *Dutton*, 400 U.S. at 77. The prosecution offered 19 witnesses other than Shaw, and the defendant counsel was given the opportunity to cross-examine each of the witnesses. *Id.* One of the other witnesses gave an eyewitness account of the murder. *Id.* at 87.

36. GA. CODE ANN. § 38—306 (1954). "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." *Id.*

37. *Dutton*, 400 U.S. at 77-78.

38. *Id.*

possible.[39] These factors include: (1) does the statement contain an assertion of a past fact?;[40] (2) was the declarant speaking from personal knowledge?;[41] (3) what is the likelihood that the assertion was based on faulty recollection?;[42] and (4) did the circumstances under which the statements were made indicate reliability?[43]

In *Dutton*, the Court tied Confrontation Clause analysis to hearsay exceptions in its discussion of the co-conspirator exception.[44] Justice Harlan, in his *Dutton* concurrence, rejected a tie between hearsay exceptions and Confrontation Clause analysis noting that the Constitution was not written to establish laws of evidence. Justice Harlan felt that hearsay analysis should be used to determine if evidence is admissible and that the Confrontation Clause analysis is reserved to protect defendants when those statements are ruled admissible.[45] Using Justice Harlan's analysis

---

39. *Id.* at 87-89.

40. *See id.* (holding that the statement by Williams and repeated by Shaw was not "an express assertion of a past fact"). The court also concluded that the statement carried its own warning to the jury so that it would not be given an undue weight as to its truth. *Id.*

41. *See id.* (stating that because Williams had personal knowledge of the crime, cross-examination of him would not possibly be able to show the statement to be false). Since Williams was clearly in a position to know that the defendant was part of the murder, the court ruled that cross-examination would be of little value. *Id.* at 87-89.

42. *See* Dutton, 400 U.S. at 87-89 (ruling that the possibility of Williams' statement being made as a result of a bad memory was so remote that this lended some reliability to the statement).

43. *Id.* The court found that the circumstances which lead to Williams' statement went toward establishing reliability. *Id.* This was because Williams' statements to his cell mate were spontaneous and, at the time, were against his penal interest to make. *Id.*

44. *Id.* at 78.

45. *Id.* at 94 (Harlan, J., concurring). After *Green,* Judge Harlan rethought his stance of determining if evidence met Confrontation Clause requirements based on the production of witnesses at trial. *Id.* By the time *Dutton* was decided, Harlan thought that hearsay analysis should not be governed or intermingled with Confrontation Clause analysis. *Id.* Quoting Wigmore, 5 J WIGMORE, EVIDENCE § 1397, at 131 (3d ed. 1940), J. Harlan wrote:

> [t]he Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure should be followed—i.e. a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially.

Id. Justice Harlan conceded that the shift from Confrontation Clause analysis was natural, but wrote, "however natural the shift may be, once made it carries the seeds of great mischief for enlightened development in the law of evidence." *Dutton,* 400 U.S. at 95 (Harlan, J., concurring). By *Dutton*, Justice Harlan was no longer satisfied with his own opinion in *Green*. See *supra* note 32 for a discussion of Justice Harlan's concurrence in *Green*. In *Dutton*, Justice Harlan explained that the purpose of the Confrontation Clause was not to create preferential treatment toward defendants by requiring the

from *Dutton* and *Green*, along with various other historical references, the Supreme Court outlined the current standard of admissibility in *Ohio v. Roberts*.

C. *Ohio v. Roberts*

In 1980, the Supreme Court established the current federal standard with the help of the earlier decisions and a historical look at the Confrontation Clause in *Ohio v. Roberts*.[46] Roberts was accused, among other things, of forging checks from the account of Bernard Isaacs. Roberts' attorney called Isaacs' daughter at the preliminary hearing, and she admitted to letting Roberts into her apartment but denied giving him her father's checks.[47] Roberts' attorney did not ask the judge if the girl could be treated as a hostile witness and did not attempt to cross-examine the girl about this denial.[48] When the daughter, who was subpoenaed five times, failed to appear at the trial, Roberts claimed she had given him permission to use the checks, and the prosecution was allowed to read the girl's earlier testimony into evidence.[49]

---

prosecution to produce witnesses, but rather to ensure a degree of fairness. *Id.* at 95.

46. Ohio v. Roberts, 448 U.S. 56 (1979).

47. *Id.* at 58. On January 7, 1975, Herschel Roberts was arrested and charged with forging a check in the name of Bernard Isaacs and for possession of a credit card also belonging to Mr. Isaac. *Id.* He was arrested in Lake County, Ohio, and his preliminary hearing was scheduled for three days later on January 10th. *Id.* The prosecution called several witnesses at the preliminary hearing, including Mr. Isaacs. *Id.* at 59. Roberts' appointed counsel had seen Anita Isaacs, Bernard's daughter, in the courtroom hallway and called her as the only witness for the defense at the preliminary hearing. *Id.* at 60. During the hearing Anita confessed that she had allowed Herschel Roberts to use her apartment while she was away. *Id.* Roberts' counsel asked Anita if she had given Roberts permission to use the checks and credit card, as this was Roberts' story. *Id.* Anita denied giving Roberts permission. *Id.* Roberts' counsel did not ask the court if he could treat the witness as hostile and cross-examine her and the prosecution asked the girl no questions. *Id.* at 58.

48. *Id.* After the preliminary hearing, Roberts' counsel became a municipal court judge, and a new defender was appointed to represent him. *Id.* at 59. Anita was subpoenaed five times between November 1975 and March 1976, but she did not appear at trial. *Id.*

49. *Id.* at 59. Roberts' jury trial began in March of 1976. *Id.* When Roberts took the stand in his own defense, he claimed that Anita Isaacs had given him the checkbook and credit cards of her parents with the understanding that he had the right to use them. *Id.* In order to rebut this, the prosecution admitted Anita's testimony from the preliminary hearing. *Id.* In order to admit the testimony, the prosecution in *Roberts* relied on OHIO REV. CODE ANN. § 2945.49 (1975), which states:

> [t]estimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or state, may be used whenever the witness giving such testimony, dies, or cannot for any

In a five to four decision, the Supreme Court upheld the admission of the hearsay statement against the defendant.[50] According to the Supreme Court, the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay."[51] In order to keep with the intent of the Framers of the Constitution, the Court ruled that it is first necessary for the prosecution to produce the witness.[52] If it can be demonstrated that the defendant is unavailable,[53] only hearsay "marked with such trustworthiness that there is no material departure from the reason of the general rule" can be admitted.[54] To be this trustworthy, a statement must bear adequate indicia of reliability, which can be established in two ways.[55] The first is if the

---

> reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions or transcript otherwise by testimony.

Id. at 59. *See also* FED. R. EVID. 804 (b)(1) (allowing the admission of certain hearsay statements which were recorded during some other proceeding). Former testimony is:

> [t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, predecessor in interest, had an opportunity and a similar motive to develop the testimony through direct, cross, or redirect testimony.

Id.

50. *Roberts*, 448 U.S. at 56-57.

51. *Id.* at 65.

52. *See id.* (noting that, according to the Framers' intent, the best way to satisfy the Confrontation Clause is face-to-face confrontation of a witness). The U.S. Supreme Court went on to state that in every case the prosecution is under an obligation to produce the declarant or demonstrate the unavailability of the declarant. *Id.*

53. See *supra* note 13 for a definition of unavailability.

54. *Roberts*, 448 U.S. at 65.

55. *Id.* at 66. *See also* Lee v. Illinois, 476 U.S. 530 (1986) (finding a hearsay statement to lack reliability). In *Lee*, an Illinois court convicted the defendant of murder. *Id.* at 538. Lee was arrested after confessing to the murder of a person in her apartment building. *Id.* She confessed that she and her boyfriend had worked together on the plan for the murder and later signed a confession implicating both her and her boyfriend. *Id.* When Lee's boyfriend later arrived at the police station, he was confronted by her. *Id.* The police gave the two an opportunity to hug and an officer prompted Lee to explain that she had already told the police everything. *Id.* Lee explained that they were caught and reminded her boyfriend of their agreement not to let the other take the blame for the murder. *Id.* at 533-34. The boyfriend also signed a confession. *Id.* At trial, the State of Illinois attempted to use the confession of her boyfriend against Lee. *Id.* The trial court permitted the confession into evidence and the decision was affirmed on appeal. *Id.* The U.S. Supreme Court, however, found that the statement lacked the indicia of reliability necessary for admission. *Id.* at 530. This is because the confession was given after Lee implicated the boyfriend, so the Court ruled it to be presumptively

statement falls within a "firmly rooted hearsay exception,"[56] and the second is if the circumstances surrounding the statement show particularized guarantees of trustworthiness.[57] According to *Roberts*, if one of these two criteria is met, a hearsay statement can be admitted against the defendant. This, of course, requires first that the declarant is not available to be cross-examined at the defendant's trial.

Today, the *Roberts* standard is the prevailing standard for admission of these kinds of statements. The question addressed in this Comment is whether this standard is sufficient to protect the Sixth Amendment rights of the accused. To help form an opinion, it is important to look at how the standard has been used and interpreted since 1980.

II. INTERPRETATION OF THE STANDARD

The application of the particularized guarantees of trustworthiness concept that was articulated in *Roberts* left room for a great deal of interpretation. When discussing the legal interpretation of the *Roberts* standard, it is helpful to look at cases that have implemented it. The standard arises most often in cases involving the sexual abuse of children and cases involving criminal co-defendants. To completely understand the problem with the current standard, it is also helpful to review cases with uncommon outcomes.

A. Idaho v. Wright

Ten years after the *Roberts* decision, the Supreme Court decided *Idaho v. Wright*,[58] one of the most important cases that interpreted and modified the standard. In *Wright*, the Court announced that the proper analysis to determine whether a statement demonstrated particularized guarantees of

unreliable. *Id.* at 536.

56. *Roberts*, 488 U.S. at 66. In *White v. Illinois*, 502 U.S. 346, 348 (1992), the defendant was convicted of criminal sexual assault, residential burglary, and home invasion. The four-year-old girl, whom the defendant was convicted of assaulting, made statements to her mother and police before the trial. *Id.* The girl, S.G., told her mother that the defendant had "put his mouth on her front part," and S.G. told a police officer the defendant "used his tongue on her in her private parts." *Id.* At trial, S.G. was unable to appear in court because it was too difficult for her. *Id.* The trial judge admitted her earlier statements into evidence under an Illinois hearsay exception known as a spontaneous declaration. *Id.* at 352. The court ruled that this was not "a firmly rooted hearsay exception." *Id.* at 350. The Illinois exception defines a spontaneous declaration as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

57. *White*, 502 U.S. at 350.

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

trustworthiness was to look at the totality of the circumstances that surrounded the making of the statement.[59] The Court also explained that it is improper for a judge to consider other evidence that corroborates the statement when determining reliability.[60] According to the Court, the use of corroborating evidence to show reliability was the equivalent of "bootstrapping" the statement into evidence based on the reliability of other incriminating evidence.[61] According to *Wright*, this practice does not provide the defendant the protection that the Confrontation Clause intended.[62]

Wright, a case involving sexual abuse, did not offer a comprehensive list of the factors needed to establish particularized guarantees of trustworthiness. The Court did list some factors that could be considered by the trial judge when determining the admissibility of statements made by the child victim in a sexual abuse case.[63] The Court stated that some factors to examine when determining the reliability of these statements are the "mental state of the declarant," "the motive to fabricate," "the use of terminology unexpected of a child of similar age" and "the spontaneity and consistent repetition" of the statement.[64]

The question of what amounts to particularized guarantees of trustworthiness arises in all types of criminal cases. These cases frequently involve sexual assault against children. In order to understand the way federal courts have interpreted the standard, it is important to examine particularized guarantees of trustworthiness as it applies to child sexual abuse cases.

B. Child Sexual Abuse Cases

Two years after *Wright*, the Ninth Circuit had an opportunity to hear *United States v. George*.[65] In *George*, the defendant appealed from a conviction of sexual abuse of his twelve-year-old daughter.[66] At trial, the girl's doctor testified as to statements

59. *Id.* at 820. See *supra* note 1 for a discussion of the facts in the case.

60. *Wright*, 497 U.S. at 822. In order to be admitted, hearsay evidence must have its own indicia of reliability, its own "inherent trustworthiness." *Id.* This reliability cannot be established by reference to other evidence in the trial. *Id.*

61. *Id.* at 823. According to the Court, admission of these kinds of statements based on corroborating circumstances is at odds with the Confrontation Clause. *Id.* To be admitted under the Confrontation Clause, inculpatory hearsay evidence must be deemed so reliable that cross examination of the statement would only be of "marginal utility." *Id.*

62. *Id.*

63. *Id.* at 826.

64. *Id.* The Court noted that this list was not exclusive and was not meant to be exclusive. *Id.* at 822. Specifically, the Court stated it was not endorsing a "mechanical test" for determining what amounted to particularized guarantees. *Id.*

65. United States v. George, 960 F.2d 97 (1992).

66. *Id.* at 98.

made by the girl relating to the dates the abuse had occurred.[67] When the girl told the doctor about the abuse, she made reference to specific months and days on which she was sexually abused.[68] George argued that admission of the statements violated his Confrontation Clause rights because he was never given a chance to cross-examine the girl about the statements and she was ruled to be unavailable to testify.[69]

The *George* court ruled that although the statements did not fall within a firmly rooted hearsay exception, they did demonstrate particularized guarantees of trustworthiness.[70] The court held that the statements were sufficiently reliable because the victim had no motive to lie, she referred to the dates of her abuse by days of the week "as would be expected from a child her age" and the evidence did not show that the investigator used leading questions when interviewing the girl.[71]

The following year, the Eighth Circuit interpreted one of the *Wright* factors contrary to the way the *George* court did. In *Ring v Erickson*,[72] the statements of a twelve-year-old girl to her social worker regarding sexual abuse were ruled unreliable under the

67. *Id.* at 99. Dr. Ortiz-Pino, who had examined the girl approximately five months after the last attack, testified as to statements the girl had made to him. *Id.* at 98-99.

68. *Id.* at 98. The girl described the sexual acts to the doctor and was able to recall the approximate date of the third incident, but she did not remember the dates of the first two counts of sexual abuse. *Id.*

69. *Id.* at 99.

70. *George*, 960 F.2d at 100. *Cf.* United States v. Barrett, 8 F.3d 1296, 1297 (1993) (vacating the conviction of a mother convicted of assaulting her daughter with a deadly weapon). The *Barret* court held that the defendant's Confrontation Clause rights were violated. *Id.* The defendant's three-year-old daughter told others that her mother had burned her with cigarettes. *Id.* at 1298. The judge ruled that the daughter was not fit to testify, but her statements were repeated at the mother's trial. *Id.* The girl could not explain the difference between the truth and a lie during her preliminary hearing, and the mother was not given the opportunity to present those statements to show that the daughter was not credible. *Id.* The appellate court ruled that the trial court erred in not allowing the mother to attack the reliability of the girl's statement through a demonstration that the girl was an incompetent witness. *Id.*

71. *George*, 960 F.2d at 100. In considering the motive to fabricate, the court noted that the girl did not have a motive to lie about the dates of the attacks. *Id.* It is worth mentioning that the court did not focus on the girl's motive to lie about the sexual abuse happening, but rather her motive to lie about the dates of the attacks.

72. 983 F.2d 818 (1993). Ring was convicted on four counts of second degree criminal sexual conduct in the state court of Minnesota. *Id.* at 819. The conduct involved two of the defendant's nieces, and at the time of the appeal, the defendant had already served 54 months of his sentence. *Id.* Ring's appeal sought to challenge the admission of two videotaped statements of one of his nieces. *Id.*

particularized guarantees standard.[73] The *Ring* court stated the fact that a child uses words typical of children her age favors unreliability, instead of the reliability attributed by the *George* court.[74]

In *Webb v. Lewis*,[75] the Ninth Circuit found that the videotaped interview of a child who was alleged to have been sexually abused failed to demonstrate particularized guarantees of trustworthiness.[76] After quoting the four factors used to decide the *Wright* case, the court proceeded to consider two other factors.[77] The *Webb* court focused its reliability inquiry on the child's reputation for telling the truth and whether the child tended to fantasize.[78]

Another factor which courts have considered when testing the reliability of child statements is whether the person who

---

73. *Id.* at 821. The trial court admitted the videotaped statements made to the social worker under a special Minnesota hearsay exception for sexually abused children. *Id.*

74. *Id.*

75. 44 F.3d 1387 (1994). *See also* Larson v. Nutt, 34 F.3d 647, 648 (1994) (holding that the admission of a three-year-old child's inculpatory statement did not violate the defendant's Sixth Amendment right to confrontation). In *Larson*, the defendant was convicted of criminal sexual conduct and files a petition for habeas corpus. *Id.* The defendant argued that the inculpatory statements of the child victim were inadmissible because there was not a showing that the declarant was unavailable. *Id.* The girl was available, but did not testify. *Id.* The court explained that the availability of the declarant was no longer relevant after *White v. Illinois*. *Id.* According to *White*, for the purposes of Confrontation Clause analysis, the availability of the declarant is only important when the out of court statements were made during an earlier judicial hearing. White v. Illinois, 502 U.S. 346, 354 (1992). The Court explained that the burden of showing that the declarant was unavailable in most cases would put an unnecessary burden on the prosecution. *Id.* at 355. By reaching these conclusions, the Supreme Court made it clear that they intended to limit the *Roberts* decision by limiting the circumstances in which the unavailability requirement applied. *Id.* at 353.

76. *Webb*, 44 F.3d at 1393. In *Webb*, a two and one-half year old girl made inculpatory videotaped statements to a social worker about the defendant, Terry Webb. *Id.* at 1389. Prior to her statements to a Children Protective Service social worker, the girl's baby-sitter told her, "Heather, you know what Terry did to you was very very bad, and that Heavenly Father and Jesus does not like bad things to happen to his little children, and He has given us special friends to help us." *Id.* The same day of the interview while the baby-sitter was telling the girl's mother about the abuse, the girl approached the baby-sitter and said, "Terry no do those things to me, Connie." *Id.*

77. *Id.* at 1391.

78. *Id.* at 1392. When considering the girl's reputation for telling the truth on direct examination, the girl's mother stated that the girl always told the truth. *Id.* On cross-examination, the mother did admit that the girl was not always truthful in the way she conducted herself. *Id.* The girl also told of a time when her mother had intercourse with Terry (the defendant). *Id.* The mother denied any sexual relation, and the court concluded that either the mother had lied or that the girl did have a tendency to fantasize. *Id.*

interviewed the child asked leading questions. In *Hutchcraft v. Roberts,*[79] the statements of a sixteen-year-old mentally retarded girl were ruled not to demonstrate particularized guarantees of trustworthiness.[80] During the girl's interview, her sister told the interviewer to ask the disabled girl about certain instances.[81] Apart from sexual abuse cases, the particularized guarantees standard of reliability arises often in cases involving co-defendant statements in which the co-defendant makes an inculpatory statement about the defendant and is then unavailable to testify.[82] To fully understand the range of court opinions in this area, it is important to examine some of these cases.

C. *The Co-defendant Cases*

In *Lee v. Illinois,*[83] the Supreme Court held that evidence falling within the residual hearsay exception creates a presumption of unreliability.[84] This presumption can only be overcome by a showing of particularized guarantees of trustworthiness.[85] The government was able to overcome this presumption in *United States v. Deeb.*[86] In *Deeb*, the government introduced the inculpatory former testimony of a co-defendant.[87]

---

79. Hutchcraft v. Roberts, 809 F. Supp. 846 (1992).

80. *Id.* at 851. Prior to giving testimony, the girl stated that she did not know what the truth was, nor what it meant to tell a lie. *Id.* at 847.

81. *Id.* at 850. On at least two occasions, during her interviews, the girl's sister was with her and instructed the investigator to ask her questions about certain instances. *Id.*

82. See *supra* note 13 for the federal rule defining unavailability of a declarant.

83. Lee v. Illinois, 476 U.S. 530 (1986).

84. *Id.* at 543. In *Lee*, the Illinois court convicted the defendant of murdering two people, and his conviction was affirmed on appeal. *Id.* at 530. At trial, the confession of a co-defendant was used against the defendant. *Id.* In a five to four decision, the Supreme Court held that the confession did not possess the reliability needed for admissibility, neither because of corroborating evidence nor because of the fact that the confession was interlocking. *Id.*

85. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

86. United States v. Deeb, 13 F.3d 1532 (1994). In *United States v. Gomez-Lemos*, 939 F.2d 326, 329 (1991), the district court admitted the inculpatory grand jury testimony of a co-defendant. In *Gomez-Lemos*, the declarant, Orsorio, told the grand jury that he had met the defendant in Miami Beach and that the defendant later offered him money to drive a van from Washington, D.C. to Detroit. *Id.*

87. *Deeb*, 13 F.3d at 1534. In *Deeb*, defendant Deeb and one of his co-defendants, Biamby, were indicted by the grand jury for charges involving the importation of cocaine. *Id.* at 1533. Biamby made an agreement with the government to cooperate and testify against Deeb and the others who were charged. *Id.* When the day of the trial arrived, Deeb did not come to court. *Id.* at 1534. Two years later, Deeb was arrested in the Dominican Republic and brought to the United States to stand trial. *Id.* By this time, Biamby was very sick with AIDS and had a great deal of memory loss so he was

The *Deeb* court assumed that the former testimony exception did not apply to the statement and analyzed its reliability under the residual hearsay exception.[88] According to the *Deeb* court, particularized guarantees of trustworthiness were demonstrated by the facts that the testimony was given under oath, the statements were self-inculpatory to the co-defendant and were subject to the cross-examination of other co-defendants in the case.[89]

The government was unable to overcome the presumption of unreliability in *Miller v. Miller*.[90] In *Miller*, the confession of a co-

---

unavailable to testify against Deeb. *Id.* At Deeb's trial, the testimony of Biamby made two years earlier was admitted against Deeb. *Id.*

88. *Id.* at 1538. Federal Rule of Evidence 804 (b)(5), which was relied upon by the *Deeb* court and which was later amended in 1997, defines statements not excluded by the hearsay rule:

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5).

89. *Deeb*, 13 F.3d at 1538. *See also* United States v. Shaw, 69 F.3d 1249, 1254-55 (1995) (upholding a trial court decision to admit inculpatory hearsay testimony into evidence against a drug crime defendant). In *Shaw*, various defendants were tried and convicted for federal drug crimes. *Id.* at 1251. While Shaw himself was still a fugitive, one of the government witnesses against him died. *Id.* at 1252. Prior to the witness' death, the witness had testified at the trials of other defendants in the case. *Id.* The testimony implicated Shaw and the government introduced a transcript of that testimony into evidence against him. *Id.* The appellate court upheld the admission of the transcript for several reasons. *Id.* at 1254. The court relied on the fact that the decedent's testimony "involved the same transactions as those involved in the Shaw trial" and also that the decedent's statements had been cross-examined by a lawyer representing another defendant. *Id.* Since the other defendant had a similar interest to Shaw, the court found the transcript sufficiently reliable. *Id.* A final reason the *Shaw* court cited in determining reliability was the fact that the deceased woman's testimony was consistent on both direct and cross-examination. *Id.*

90. 784 F. Supp. 390 (1992). *See also* Bruton v. United States, 391 U.S. 123, 126 (1968) (holding that instructing a jury not to apply the confession of a co-defendant to both defendants in a criminal trial violates the Confrontation Clause). In *Bruton*, two defendants were jointly tried for armed robbery. *Id.* at 124. At trial, the government introduced a confession made by one of the co-defendants implicating the other. *Id.* at 127. The confessing co-defendant was unavailable because he refused to testify, and the court instructed the

defendant, which implicated the defendant, was introduced against the defendant in a trial for murder.[91] When the co-defendant was asked why he implicated the defendant, he explained that he was "not going to take the fall alone."[92] The court ruled that the confession did not demonstrate particularized guarantees of trustworthiness because it was made while the defendant was in police custody, and according to the confessor, he had a motive to implicate others in the murder.[93]

In 1993, the Fifth Circuit took a different approach to determining the reliability of a co-defendant's statement. In *United States v. Flores*,[94] the Court ruled that inculpatory grand jury testimony of a co-defendant was especially unreliable because the declarant was unavailable.[95] The Federal Rules of Evidence list five different situations in which a declarant is considered unavailable for hearsay purposes.[96] Under *Roberts*, the prosecution must establish the unavailability of the declarant before admission of an inculpatory hearsay statement can be considered.[97] According to the *Flores* court, the very fact that the co-defendant was unavailable because of his invocation of Fifth Amendment protection made the statements less reliable.[98]

---

jury to disregard the confession as to the non-confessing defendant. *Id.* at 125. The Supreme Court held that the statement should not have been admitted because it was not cross-examined and added substantial weight to the case of the government. *Id.* at 127-28.

91. *Miller*, 784 F. Supp. at 393. In *Miller*, the defendant was convicted of murder, assault, kidnapping and use of a firearm. *Id.* at 390. While the defendant and Jordan, a co-defendant, were under arrest and had received their Miranda warnings, they both made confessions which implicated the other in the crime. *Id.* at 392-93. Neither of the defendants testified at trial, and the state introduced the confessions as substantive evidence against all of the defendants. *Id.* at 393. The trial court admitted the evidence under a Michigan rule of evidence that allows hearsay when the statement was against the declarant's interest at the time it was made. *Id.* On petition for habeas corpus, the court held that the statement was not properly admitted as a declaration against interest because the portions of the confession that implicated the defendant were not against Jordan's interest. *Id.* at 395.

92. *Id.* at 393.

93. *Id.* at 396.

94. United States v. Flores, 985 F.2d 770 (1993).

95. *Id.* at 777. The court explained that statements against interest should not be admissible when the declarant is unavailable to testify because of his invocation of the Fifth Amendment. *Id.* at 780. According to the *Flores* court, these types of statements are inherently unreliable for two reasons. *Id.* The first reason is that the statement is accusatory in nature. *Id.* The second reason is that the statement is given to plain clothes law enforcement officials after the declarant has been arrested. *Id.* Because of the conditions under which the statement is made, there is always the possibility that the declarant is trying to shift the blame. *Id.*

96. FED. R. EVID. 804(a).

97. Ohio v. Roberts, 448 U.S. 56, 56 (1980).

98. *Flores*, 985 F.2d at 780. The Fifth Amendment states that "no person

Although discussions as to what amounts to particularized guarantees of trustworthiness happen often in sexual abuse and co-defendant cases, the issue arises in all types of situations. A discussion of some of the more unusual cases will clarify the conflict between the interests of prosecutors and the Confrontation Clause.

D. The Fringe Cases

In *United States v. Clarke*,[99] the defendant was indicted for possession with intent to distribute fifty or more grams of cocaine and conspiracy to do the same.[100] The defendant's brother was also indicted and made a statement at his own suppression hearing that implicated the defendant in the crime.[101] The United States introduced this testimony at the trial of the defendant.[102] The trial court admitted the evidence against the defendant and found that it was sufficiently reliable.[103] In coming to this conclusion, the court stated that the suppression hearing testimony was admissible because the brother "had no motive to lie at the hearing or to implicate his brother for any ulterior purpose."[104] Unfortunately, this type of analysis does almost nothing to test the

---

shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V.

99. United States v. Clarke, 2 F.3d 81 (1993). *See generally* Manocchio v. Morgan, 919 F.2d 770, 784 (1989) (holding that admission of an autopsy report to show the victim's cause of death was admissible even though the medical examiner who prepared the report was not at trial). In *Manocchio*, the reliability of the autopsy report was established by the facts that the report was prepared by a qualified physician and the physician had no reason to lie. *Id.* at 777.

100. *Clarke*, 2 F.3d at 81. In *Clarke*, Michael Clarke, the brother of the defendant, was indicted for intent to distribute crack cocaine. *Id.* at 83. The cocaine was found in a toolbox, and Michael testified at his grand jury hearing that he had told Christopher, the defendant, to buy the toolbox prior to the crime. *Id.* Christopher was indicted for conspiracy in the crime for his alleged involvement in purchasing the toolbox. *Id.* Michael refused to testify against his brother, and the district court ruled that he was unavailable. *Id.* It was at this point when the court admitted the uncross-examined grand jury testimony of the defendant's brother into evidence against him. *Id.*

101. *Clarke*, 2 F.3d at 83.

102. *Id.* *See generally* United States v. Mitchell, 145 F.3d 572, 579 (1998) (holding that trial court erred in admitting an anonymous note that implicated the defendant in a robbery). In *Mitchell*, the defendant was convicted of robbing an armored car. *Id.* at 575. After the robbery, police found a getaway car that contained a note with the license plate number of the car in which the defendant had been apprehended. *Id.* On appeal, the court ruled that the note was improperly admitted into evidence, but that its admission was harmless error. *Id.* at 579. In *Sherman v. Scott*, 62 F.3d 136, 142 (1995), the Fifth Circuit upheld the admission of an inculpatory laboratory report when the preparer of the report was not cross-examined.

103. *Clarke*, 2 F.3d at 83.

104. *Id.*

actual reliability of the statement. To allow an uncross-examined inculpatory statement to be admitted against the defendant simply because the declarant had no reason to lie makes a mockery of the Confrontation Clause.

In *United States v. Canan*,[105] the Sixth Circuit took a different approach to establishing reliability. During discovery, a witness who was dying of cancer made a videotaped statement under oath.[106] The witness was aware that he would not live very long, and his statements were incriminating to the defendant.[107] In an unusual approach, the admission of the statement was upheld. The court found that particularized guarantees of trustworthiness were established by the facts that the statement was made with the defendant present, the declarant knew he would be dead soon, the declarant had no reason to expect he would not be cross-examined at trial and the statement was consistent with testimony in another case.[108] By considering the consistency of the statement with testimony in other cases, the *Canan* court directly contradicted the *Wright* rule, which does not allow corroborating circumstances to be considered.[109]

Courts currently have a great deal of discretion in deciding what factors to apply when testing the reliability of inculpatory hearsay statements. Unfortunately, the phrase "particularized guarantees of trustworthiness" is so vague that it allows a defendant's Sixth Amendment rights to be defined differently by courts.

In order to preserve the Sixth Amendment right of Confrontation, it is necessary to establish a more consistent framework in which inculpatory hearsay statements will be considered. The current Federal Rules of Evidence do not contain a rule that establishes a standard for measuring particularized guarantees of trustworthiness. Given that Confrontation Clause protection must be afforded to all criminal defendants in State and Federal cases, the Federal Rules of Evidence would be a good place

105. United States v. Canan, 48 F.3d 954 (1995).

106. *Id.* at 964. In *Canan*, the defendant was charged with six counts of various crimes centered on drugs. *Id.* at 958. In the years prior to his arrest, Canan was involved in the drug business with several people, including Kimbler. *Id.* at 957. During a police investigation, a videotaped statement was made of Kimbler which included highly inculpatory statements about Canan. *Id.* at 958. The statements were made under oath and Canan was present without his attorney. *Id.*

107. *Id.* at 958. The trial court went on to say that the reliability of the testimony was bolstered by the fact that the declarant knew he was being taped, he had firsthand knowledge of the fact and he agreed to be truthful. *Id.*

108. *Id.* at 964, 965.

109. *Cf. Idaho v. Wright*, 497 U.S. 805, 823 (1990) (holding that relying on corroborating evidence to bolster the reliability of an inculpatory hearsay statement is improper).

to implement and test a more constitutionally friendly standard.

III. PROPOSAL FOR A NEW RULE

Federal Rule of Evidence 807 is the residual hearsay exception.[110] It allows the admission of hearsay evidence to be admitted against the defendant if the hearsay statement is not covered by a specific hearsay exception and demonstrates "equivalent circumstantial guarantees of trustworthiness."[111] Rule 807 also requires that the statement be "offered to prove a material fact," the statement must have more probative value[112] than any other evidence offered to prove that fact and that admission must meet the purpose of the rules and serve the interests of justice.[113]

Although Rule 807's language appears to protect the Sixth Amendment rights of the accused, it does not offer any guidance to the judge in testing a statement's reliability.[114] The Federal Rules of Evidence also lack guidelines for limiting the lengths a judge can go to find a statement reliable. Since there are no guidelines, too much discretion is in the hands of judges to find an uncross-examined statement reliable enough to satisfy the Sixth Amendment.

In order to protect the accused in a criminal case from unreliable and uncross-examined inculpatory evidence, Congress should amend the Federal Rules of Evidence to include a rule designed to exclude such evidence.

---

110. FED. R. EVID. 807. Rule 807 was added to the rules in 1997 and represents the union of two now-defunct rules. *Id.*

111. FED. R. EVID. 807.

112. FED. R. EVID. 807(A) and FED. R. EVID. 807(B).

113. FED. R. EVID. 807(C).

114. Rule 807 explains that the statement must demonstrate "equivalent circumstantial guarantees of trustworthiness," but it does not offer any guidance for determining what circumstances establish the guarantees. FED. R. EVID. 807. The rule states:

> [a] statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

PROPOSED FEDERAL RULE OF EVIDENCE 802.5

RULE 802.5—INCULPATORY HEARSAY STATEMENTS; ADMISSIBILITY IN CRIMINAL CASES

(a) General provision.

Inculpatory hearsay statement(s) are not admissible against the accused in a criminal case, if the declarant is unavailable[115] to testify, unless (A) the prosecution demonstrates the unavailability of the declarant, and (B) the statement(s) fall(s) within a firmly rooted hearsay exception, or (C) the statement(s) demonstrate(s) particularized guarantees of trustworthiness, by reviewing the facts surrounding the making of the statement(s).[116]

(b) Definitions.

(1) An "inculpatory hearsay statement" is any part of a hearsay statement, as defined by Rule 801,[117] which is made by someone other than the defendant and goes to establish the guilt of the defendant as to any element of the crime accused of.

(2) A declarant is "unavailable" if (A) exempted by ruling of the court on grounds of privilege,[118] or (B) persists in refusing to testify despite a court order to do so,[119] or (C) testifies to lack of memory as to the statement,[120] or (D) is absent from the hearing and the prosecution has been unable to procure the declarant's attendance.[121] A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability to testify, or absence is due to wrongdoing on the part of the accused.[122]

(3) The "firmly rooted hearsay exceptions" shall include Rule 804(b)(1),[123] Rule 804(b)(2),[124] Rule 803(6),[125] Rule 803(8),[126] and

---

115. *See* FED. R. EVID. 804(a) (explaining the position Congress has taken as to what constitutes unavailability for hearsay purposes).

116. *See generally* Idaho v. Wright, 497 U.S. 805, 823 (1990) (holding that the circumstances which surround the making of the statement should be reviewed, but evidence which corroborates the making of the statement should not be considered when measuring reliability).

117. FED. R. EVID. 801. Federal Rule 801(c) states, "hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.*

118. FED. R. EVID. 804(a)(1).

119. FED. R. EVID. 804(a)(2).

120. FED. R. EVID. 804(a)(3).

121. FED. R. EVID. 804(a)(4).

122. FED. R. EVID. 804(a)(5).

123. FED. R. EVID. 804(b)(1). Rule 804(b)(1) is the former testimony

any other hearsay exception that Congress decides to be firmly rooted.

(4) A statement can only demonstrate "particularized guarantees of trustworthiness" if (A) the statement is so reliable that cross-examination of the declarant would be of no utility,[127] and (B) the circumstances surrounding the making of the statement suggest the declarant was being truthful in her statement, and (C) the judge makes a determination under Rule 104[128] that the witness who will repeat the proffered statement lacks any motive to lie.

(5) The facts "surrounding the making of the statement" are those facts that might effect the reliability of the statement at the time it was made. These facts shall not include evidence that corroborates the truth of the statement, such as other evidence, which inculpates the accused.[129]

CONCLUSION

Under the current federal standard by which inculpatory hearsay statements are admitted against the accused in criminal cases, the judge has too much discretion. Since "particularized guarantees of trustworthiness" is such an amorphous term, each judge has the ability to find a statement reliable without much guidance. This is detrimental to the accused. If a judge finds that the presumptively unreliable hearsay statement is admissible, the accused could be convicted of a crime based on uncross-examined testimony. Without a narrower understanding of what rises to the level of particularized guarantees of trustworthiness, a criminal defendant could be stripped of Confrontation Clause protections.[130]

---

exception to the federal rules. *Id.*

124. Ohio v. Roberts, 448 U.S. 56, 66n.8 (1980). Rule 804(b)(2) is the dying declaration exception to hearsay and allows admission of statements made by the declarant when the declarant made those statements believing she would soon be dead. FED. R. EVID. 804(b)(2).

125. FED. R. EVID. 803(6). Rule 803(6) is the business records exception to the federal rules. *Id.*

126. FED. R. EVID. 803(8). Rule 803(8) allows the admission of public records into evidence. *Id.*

127. *Cf.* Idaho v. Wright, 497 U.S. 805, 820 (1990) (holding that statement must be so reliable that cross-examination by the defendant would only be of "marginal utility").

128. FED. R. EVID. 104. Rule 104 is the rule of evidence that guides a judge in ruling on preliminary questions of admissibility. *Id.* When making a Rule 104 determination, a judge is not bound by the Federal Rules of Evidence, except rules of privilege. *Id.*

129. *See Wright*, 497 U.S. at 822 (forbidding the use of corroborating evidence to be used to bolster the reliability of hearsay evidence).

130. *See generally* FED. R. EVID. 807 (Committee Note 2) (citing Myrna S. Raeder's concern during committee hearings for the unclear standards used to

This proposed amendment to the Federal Rules of Evidence would act to help define a more appropriate measure for assessing particularized guarantees of trustworthiness. An amendment like the one proposed would act to reduce the amount of uncross-examined statements admitted into evidence and would be a positive step toward upholding constitutional protections.

A standard should be developed that will allow uncross-examined and inculpatory hearsay statements to be admitted against the defendant only when those statements are truly reliable. Once such a standard is implemented, the Confrontation Clause will be satisfied.

---

determine trustworthiness). Professor Raeder also expressed concern that Rule 807 will allow prosecutors too much freedom to introduce inculpatory hearsay and that this will endanger the Confrontation Clause rights of the accused. *Id.* Writing for ten professors of evidence, she suggests that the residual hearsay rule be tightened to avoid prosecutorial overuse. *Id.*