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Co-Conspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment: The Supreme Court Resolves the Conflict, 20 J. Marshall L. Rev. 597 (1987)

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RECENT DEVELOPMENT

THE CO-CONSPIRATOR EXEMPTION FROM THE HEARSAY RULE AND THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT: THE SUPREME COURT RESOLVES THE CONFLICT?

I. LEGAL BACKGROUND

The Sixth Amendment to the United States Constitution guarantees the protection of personal rights of those accused of crimes.[1] Embodied in this Amendment are such vastly significant rights as trial by jury, compulsory process, and assistance of counsel. The Confrontation Clause, in particular though, is one of the most controversial of all the Sixth Amendment constitutional guarantees.[2]

The Sixth Amendment right of the accused "to be confronted with the witnesses against him" is a fundamental right and an essential element to any fair trial.[3] If read literally, this right would only allow testimonial evidence to be presented through witnesses appearing in court, thus excluding all hearsay evidence. This interpretation, however, was discarded long ago.[4] At the very least, it has

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

2. The Sixth Amendment provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.

Id.

3. In Pointer v. Texas, the Supreme Court held that "the Sixth Amendment's right of an accused to confront the witnesses against him . . . is a fundamental right and is made obligatory on the states by the Fourteenth Amendment." 380 U.S. 400 (1965). *See* Douglas v. Alabama, 380 U.S. 418 (1965) (witness refused to testify on fifth amendment grounds, but the prosecutor "refreshed his memory" by reading an earlier confession implicating the defendant). *See also* Barber v. Page, 390 U.S. 719 (1968) (prosecution had produced preliminary hearing testimony without showing good faith effort to produce declarant at trial); Bruton v. United States, 391 U.S. 123 (1968) (co-defendant's confession had been admitted at joint trial with jury instruction that it was inadmissible as to defendant).

4. The hearsay rule "prohibits the use of a person's assertion, as equivalent to testimony of the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be cross-examined as to the grounds of his assertion and of his qualifications to make it." 5 J. WIGMORE, EVIDENCE § 1364 (3d ed. 1940). At common law, courts developed exceptions to the hearsay rule, admitting out-of-court state-

been recognized that the accused is entitled as of right to inspect witnesses' prior statements in the possession of the state, if those statements pertain to the case, and to use those statements in cross-examination to show inconsistencies, bias, and inaccuracy.[5] The inability to uncover infirmities in the declaration, such as defects in the declarant's perception, sincerity, memory and transmission is a great danger in having no opportunity to cross-examine.

The Confrontation Clause has also been interpreted as protecting broadly-based societal interests as well as individual rights. The right of confrontation becomes effective both as an essential part of an informed defense and in the larger sense of using the criminal justice system to discover the truth rather than to secure convictions.[6] "A fair and enlightened system of justice"[7] ought not deny an accused the opportunity to bring every relevant piece of evidence to bear on the question of guilt or innocence; and, the credibility of the witnesses who testify against him is surely pertinent to this question.[8]

The hearsay rule of the Federal Rules of Evidence ("Rules"), consequently, precludes the admission of most out-of-court statements. Nevertheless, the Rules exempt certain statements from the scope of the federal hearsay rule even though such statements fit squarely within the common law definition. Statements excluded from the hearsay rule include statements of "a co-conspirator of a party during the course and in furtherance of the conspiracy."[9] Since the enactment of the Federal Rules,[10] however, federal courts

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ments when the declarant's presence was immaterial or when he was unavailable to testify at trial. These exceptions permitted the admission of declarations against interest, dying declarations, statements of family history, and former testimony. *See* McCORMICK, McCORMICK ON EVIDENCE § 253 (2d ed. 1972). Federal Rules of Evidence 804(b)(1)-(4) have incorporated these four exceptions.

5. In *Pointer* and *Douglas*, the Supreme Court emphasized that the fundamental aspect of the confrontation requirement is cross-examination. 380 U.S. 400; 380 U.S. 415. As Wigmore suggested, this right to cross-examination is basically the right to have the hearsay rule enforced. WIGMORE, *supra* note 4, § 1397; *see also id.* § 762.

6. *See* Semerjian, *The Right of Confrontation*, 55 A.B.A. J. 152, 154 (1969). *Cf.* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U.L. REV. 279 (1963).

7. Palko v. Connecticut, 302 U.S. 325 (1937).

8. Semerjian, *supra* note 6, at 155.

9. FED. R. EVID. 801(d)(2)(E). The Federal Rules define co-conspirator statements as not hearsay rather than an exception to the hearsay rule. The effect of this interpretation, for the purpose of this article, is noteworthy. The Federal Rules have adopted some traditional exceptions to the hearsay rule, classifying them as non-hearsay, admissible for reasons unrelated to reliability. For instance, admissions of a party and/or his agents are excluded from the hearsay rule not because such statements are reliable but because the nature of the adversary system precludes a party from complaining of his own lack of trustworthiness. *Id.* advisory committee note. *See supra* notes 4-6 and accompanying text. *See also infra* notes 11-15 and accompanying text.

10. The Federal Rules of Evidence were approved on January 2, 1975 and be-

have sharply disagreed over the proper approach to resolve Confrontation Clause objections to evidence admitted under the co-conspirator exemption from the hearsay rule.

At common law, statements of co-conspirators were considered an exception to the hearsay rule. The rationale for the co-conspirator exception allegedly derived from a concept of agency law holding the deed of an agent binding upon the principal when the agent acts within the scope of his authority.[11] The analogy was that a co-conspirator acts as an agent of the defendant, or as a partner in crime, so that the statements of the co-conspirator bind the defendant when such statements further the conspiracy. Each conspirator was deemed to have consented to those acts taken to promote the common objective.[12]

The Advisory Committee nonetheless expressly rejected this "fiction" when formulating the Federal Rules of Evidence.[13] The rationale of trustworthiness underlying most hearsay exceptions was not a consideration in the formulation of Rule 801(d)(2)(E). By segregating the exemption and insulating it from the requirements of the hearsay rule, the drafters noted the inherent distinctions between the co-conspirator exemption and the traditional exceptions.

It is not the agency rationale that justifies the admittance of statements of a non-testifying co-conspirator but rather the great probative need for such an exception. Conspiracy is an unusually secretive form of crime and, by its very nature, difficult to prove. As a result, co-conspirator statements are admitted out of necessity.[14]

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came effective on July 2, 1975. Pub. L. No. 93-595, 1, Jan. 2, 1975, 88 Stat. 1929 (1975).

11. Anderson v. United States, 417 U.S. 211, 218 n.6 (1974).

12. *See* United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827). In *Gooding*, the Court adopted the co-conspirator exception emphasizing the agency rationale; the co-conspirators were involved in an agency relationship and were authorized to speak for one another. *Id.* The declarations of co-conspirators were viewed as a part of the *res gestae*, verbal acts, that are essential to the furtherance of the conspiracy. *Id.* at 469-70; Wiborg v. United States, 163 U.S. 632, 657-58 (1896). *See also* FED. R. EVID. 801(d)(2)(E) advisory committee note. *See generally* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972) (suggesting that the original requirement that a statement refer "to the common object" may have been a "limiting notion" necessarily added to the "res gestae" exception, ensuring that inferences regarding the content of statements be made only as to the general nature of the effort in which the declarant and others proved to be conspirators were involved).

13. FED. R. EVID. 801(d)(2)(E) advisory committee note.

14. Courts have not freely admitted that co-conspirator statements are admitted out of necessity, but some authors do. *See* Levie, *Hearsay and Conspiracy—A Reexamination of the Co-Conspirator Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1163-66 (1954); Note, *Reconciling the Conflict Between the Co-Conspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1307 (1985). *See also* Recent Development, *Evolution of the Co-Conspirator Exception to the Hearsay Rule in the Federal Courts*, 16 NEW ENG. L. REV. 617, 619-20 (1981).

And although no formally acknowledged policy supported it, the Advisory Committee recommended the exception.[15]

Accordingly, in *Ohio v. Roberts*,[16] the Supreme Court established an approach to Confrontation Clause cases. That case involved the admissibility of a transcript of a witness's testimony given at a preliminary hearing where only defense counsel had called and questioned the witness. The Court stated that an inquiry into the reliability of the offered statement is required "once a witness is shown to be unavailable."[17] The Court relied on earlier decisions examining the relationship between the Confrontation Clause and the many hearsay exceptions to support its recognition of an established "rule of necessity" requiring that the prosecutor demonstrate the unavailability of any unproduced declarants.[18] The Court said, "[i]n sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable."[19]

The history of the Confrontation Clause jurisprudence found in Supreme Court decisions describes the approach the Court adopted as reflecting "the Framers' preference for face-to-face accusation."[20] The *Roberts* Court explicitly commanded that prosecutors either produce out-of-court declarants or demonstrate their unavailability. *Roberts* recognized that whenever the prosecution seeks to convict a

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15. FED. R. EVID. 801(d)(2)(E) advisory committee note. *See* Note, *supra* note 14.

16. 448 U.S. 56 (1980).

17. *Id.* at 65.

18. *Id.* "Necessity" is a term of art essentially referring to the unavailability of the absent declarant's testimony for cross-examination. Note, *supra* note 14, at n.29. The unavailability requirement, until now, has been read rather broadly. *Id.* The applicable standard covered more than just the inability to secure the witness' physical presence in court; the standard was whether the original statement was available for cross-examination. *See, e.g.*, J. WIGMORE, *supra* note 4, § 1402.

19. *Roberts*, 448 U.S. at 56. The *Roberts* Court did observe an exception to the general rule in Dutton v. Evans, 400 U.S. 74 (1970), finding the "utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness." 448 U.S. at 65 n.7. This result, however, in no way reflected the Court's judgment that the very nature of the co-conspirator hearsay makes it immune from the availability requirement. It was the harmless error analysis that was the basis of the Court's decision. *Dutton*, 400 U.S. at 74. The Court stated the hearsay came in through brief testimony, "of peripheral significance at most," of one of twenty witnesses who testified for the prosecution. *Id.*

20. The Confrontation Clause operates as a "preferential rule." *Dutton*, 400 U.S. at 95 (Harlan, J., concurring). It imposes a preference for live testimony in open court, under oath, and subject to cross-examination. One example of this rule is Barber v. Page, 390 U.S. 719 (1968), where the Supreme Court prohibited the prosecution from introducing incriminating, prior recorded testimony, because the prosecution had not shown the witness to be unavailable to present the evidence in the better form of live testimony at trial. Absent the showing of unavailability of a witness, the Confrontation Clause obligates the government to present its evidence in the preferred form of live testimony, under oath, and subject to cross-examination. Weston, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979).

defendant on hearsay, the "confrontation and cross-examination of the declarant in open court are the most trusted guarantors of the reliability that is the primary concern of the Confrontation Clause."[21] However, because of the vagueness of the Federal Rules and the federal courts' varying approaches to the admission of co-conspirator statements, the Supreme Court, in *United States v. Inadi*,[22] found it necessary to reevaluate *Roberts*.

II. The Inadi Opinion

Defendant Joseph Inadi appealed his conviction of charges arising out of a conspiracy to manufacture and distribute narcotics.[23] Part of the evidence against him consisted of taped conversations between various participants in the conspiracy.[24] Inadi objected to the admission of certain recorded statements of co-conspirators on Confrontation Clause grounds, contending that they were inadmissible absent a showing that the declarant was unavailable.[25]

On appeal, the Third Circuit Court of Appeals reversed and remanded holding that the district court erred in admitting certain out-of-court statements of non-testifying co-conspirators as substantive evidence against the accused, where the government had not shown the declarants to be unavailable to testify in court.[26] The court decided that the Confrontation Clause established an independent requirement that the government, as a condition to the admission of out-of-court statements, demonstrate the unavailability of the declarant.[27] The court derived this "unavailability rule" from *Ohio v. Roberts*,[28] and found no reason to create a special exception for co-conspirator statements.[29] The United States Supreme Court reversed the decision of the court of appeals.[30] The Court held the Confrontation Clause does not require a showing of unavailability as a condition to the admission of out-of-court statements of non-testi-

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21. *Roberts*, 448 U.S. at 65.
22. United States v. Inadi, 106 S. Ct. 1121 (1986).
23. United States v. Inadi, 748 F.2d 812 (3d Cir. 1984). Inadi was convicted following a jury trial in the United States District Court for the Eastern District of Pennsylvania of conspiring to manufacture and distribute methamphetamine and four related narcotics charges.
24. *Id.* at 815. The government lawfully intercepted and recorded five telephone conversations between various participants in the conspiracy. These taped conversations were played for the jury at trial. The conversations dealt with various aspects of the conspiracy, including planned meetings and speculation about who had taken a missing tray of methamphetamine from one of the co-conspirator's house and who had set up one of the co-conspirators for a stop and search. *Id.*
25. *Id.* at 818.
26. *Id.*
27. *Id.*
28. 448 U.S. 56 (1980).
29. United States v. Inadi, 748 F.2d 812 (3d Cir. 1984).
30. United States v. Inadi, 106 S.Ct. 1121 (1986).

fying co-conspirators, when those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E).[31]

Although acknowledging that the *Roberts* Court established an "unavailability rule," the *Inadi* Court expressly denied the interpretation in *Roberts* that all out-of-court statements were inadmissible without a showing of unavailability.[32] The *Inadi* Court determined that the Confrontation Clause analysis in *Roberts* focused on those factors[33] that come into play only when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial. According to the Court, *Roberts* simply reaffirmed the long-standing rule that applies the unavailability analysis to prior testimony.[34]

Comparing the trustworthiness of co-conspirators' out-of-court statements and former testimony, the Court recognized the importance of cross-examination and the opportunity to view the declarant's demeanor in court.[35] However, when applying the "unavailability rule," the Court distinguished the two types of statements. Noting that former testimony is often only a weaker substitute for live testimony and seldom has any independent evidentiary significance of its own,[36] the Court found that if the declarant is unavailable, then no "better" evidence exists.[37] The former testimony may, therefore, be admitted in place of the live testimony on point.[38]

On the other hand, the Court found that co-conspirators' out-of-court statements possess circumstantial guarantees of reliability equivalent to the guarantees of reliability provided under the recognized hearsay exceptions. Co-conspirators are more likely to speak differently to one another when furthering their illegal aims than when they are testifying on the witness stand. The Court stated that co-conspirator statements derive much of their value from the fact that they are made in a context very different than trial,[39] and such statements are "irreplaceable as substantive evidence."[40] The Court further stated that it is unlikely that live testimony could ever recapture the evidentiary significance of statements made during the

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31. *Id.*

32. *Inadi*, 106 S.Ct. at 1125 (*Roberts* neither stands "for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause.").

33. *Id. See* FED. R. EVID. 804(b)(1). The *Roberts* Court examined the long line of Confrontation Clause cases involving prior testimony. *See, e.g.*, Mancusi v. Stubbs, 408 U.S. 204 (1972); California v. Green, 399 U.S. 149 (1970).

34. *Inadi*, 106 S.Ct. at 1126.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1127.

40. *Id.*

conspiracy.[41] Finally, the Court held that the benefits of an unavailability rule were slight in a conspiracy situation, while the burden was great. The Court stated that the rule places a significant burden on the prosecution to specifically identify each declarant, locate those defendants, and then endeavor to ensure their continuing availability to trial.[42]

The dissent, in addition to asserting that co-conspirator statements must still satisfy the "indicia of reliability" requirement that the Confrontation Clause demands,[43] contended that the majority misconstrued both the meaning of the *Roberts* decision and the theory of the Confrontation Clause. Citing the Court's statement in *Roberts* of the rule of unavailability, the dissent argued that the Court nowhere indicated the decision was limited to former testimony cases.[44] On the contrary, the Court stated that the rule applied generally, "including [in] cases where prior examination has occurred."[45] The *Roberts* Court never mentioned that its analysis was confined only to prior testimony.

The dissent agreed that conspirators are likely to speak differently when talking to each other "in furtherance" of their illegal aims than when they are testifying on the witness stand, but astutely noted that these differences are not merely those of diction and demeanor. The dissent observed that a statement truly made in furtherance of a conspiracy cannot possibly be a guarantee of its reliability due to the fact that even the most casual of conversations often appear to have many ambiguous statements.[46] The dissent stated that a co-conspirator declarant's appearance in court eliminates the ambiguity from which neither side has a right to profit.[47] Furthermore, the dissent emphasized that the Framers of the Constitution expressed a preference for live testimony, demanding the most trustworthy evidence available be used, even when the challenged statement appears to be trustworthy. Obtaining the declarant so the trier of fact will be better able to assess his credibility more accurately promotes the interests of both the defendant and the judicial system in the truth-determining process.[48] Cross-examination forces the declarant to clarify ambiguous phrases and codes.[49] The

41. *Id.*
42. *Id.* at 1128.
43. *Id.* at 1129.
44. *Id.* at 1130 ("sweeping language" found in *Roberts* in no way limited that decision to any particular variety of out-of-court statements).
45. *Roberts*, 448 U.S. at 65.
46. *Inadi*, 106 S.Ct. at 1131-32 (quoting Levie, *supra* note 14).
47. *Id.*
48. *Id. See generally* Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH. L. REV. 67, 72-73 (1969) (citing Blackstone's opinion of confrontation and the First Continental Congress' consideration of trial by jury).
49. *Inadi*, 106 S.Ct. at 1132-33.

dissent noted that whatever truth may be contained in the out-of-court statement, a declarant's affirmation, denial, or additionally produced information can only be beneficial to supplement the statement.[50]

Although the dissent recognized that the Supreme Court has developed exceptions to the confrontation rule, it nonetheless suggested that the majority imposed a significant burden upon the defendant by requiring him to identify the declarants.[51] Forcing him to exercise his right to the compulsory process, the defendant risks bolstering in the eyes of the jury the very conspiracy allegations he wishes to rebut.[52] The dissent concluded that the defendant's right to compulsory process to justify a decision depriving him of a critical aspect of his Confrontation Clause right cannot be supported.

III. COMMENT

The *Inadi* decision has determined that the need for the traditional guarantee of reliability is not as critical in cases involving extrajudicial statements of co-conspirators as it is in cases involving prior testimony of a non-testifying declarant or confessions of an accomplice. The *Inadi* Court subordinated a defendant's constitutional interest in subjecting a co-conspirator's statement to cross-examination at trial to considerations of prosecutorial efficiency.[53] Unlike the traditional hearsay exceptions, the co-conspirator exemption from the hearsay rule permits the admission of statements that, by their very nature, cannot be deemed to be inherently reliable.[54] Indeed, the prosecution needs such evidence; but, necessity bears little relevance, if any, to the reliability of the statements.[55] Consequently, the Confrontation Clause mandates that the prosecution demonstrate the unavailability of the co-conspirator declarant before it is allowed to use such statements against the defendant.

In *Inadi*, the Supreme Court ineffectively applied the Confrontation Clause. The Sixth Amendment operates to bar the admission of a declarant's out-of-court statement when that declarant is not available to give his incriminating evidence in the form of live testi-

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50. *Id.*
51. *Id. See supra* note 28 and accompanying text.
52. *Inadi*, 106 S.Ct. at 1133-35.
53. *Id.*
54. As one author has explained:

> The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has. It is no victory for common sense to make belief that criminals are notorious for their veracity the basis of law.

Levie, *supra* note 14, at 1165-66. *See also supra* note 9 and accompanying text.
55. *See generally* Note, *supra* note 14.

mony in open court, under oath, and subject to cross-examination.[56] If the declarant is not available to testify in person, then he is not a "witness against" the defendant within the meaning of the Confrontation Clause and his out-of-court declaration will be admissible.[57] The *Inadi* Court, therefore, should only have allowed the prosecution to use the declarant's hearsay statement if it had shown that the declarant was unavailable and considered not to be a "witness against" the defendant. Because the Confrontation Clause indicates a preference for live testimony, the Court should have enforced the clause until the prosecution showed that the live testimony was not available and that the state was not responsible for its absence.

In light of the fact that the prosecution's need for the evidence justifies the co-conspirator exemption, it is only appropriate then to require the prosecution demonstrate that the evidence is actually needed.[58] To satisfy this necessity requirement, the *Inadi* Court should have required the prosecution to show the witness was not available despite good faith efforts it may have undertaken prior to trial to locate and present that witness.[59] The prosecution must demonstrate it has fulfilled this good faith duty.[60] By meeting this burden, the defendant will be assured protection from "careless or short-sighted actions of prosecutors who could have obtained the presence of declarants had they acted properly."[61]

Applying the unavailability requirement to Federal Rule of Evidence 801(d)(2)(E) expresses a preference for live testimony. It serves to promote the policy of obtaining the most reliable evidence available. This requirement is consistent with the spirit of the Constitution. Moreover, the defendant would be assured an opportunity to cross-examine his accusers and the fact-finders would be able to evaluate the witness' demeanor. This provides the defendant with a threshold level of protection. The requirement of unavailability pre-

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56. *See* Semerjian, *supra* note 6.

57. Weston, *supra* note 20, at 1190 (citing California v. Green, 399 U.S. 149, 179-83 (1970) (Harlan, J., concurring)).

58. Note, *supra* note 14, at 1313.

59. *Roberts*, 448 U.S. at 74.

60. *See Barber*, 390 U.S. at 723-25 (state's failure to use available mechanisms for obtaining declarant fell short of its constitutionally-mandated duty to make a good faith effort to secure his presence at trial); *cf.* Mancusi v. Stubbs, 408 U.S. 204 (1972). *See, e.g.*, FED. R. EVID. 801(d)(2)(E) advisory committee note; Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. CHI. L. REV. 530, 537-40 (1958).

61. Note, *supra* note 14, at 1312 n.119.

vents prosecution by *ex parte* affidavits,[62] the very goal the Confrontation Clause seeks to attain.[63]

Cheryl A. Kaplan

62. In 1603, Sir Walter Raleigh was on trial for treason. A crucial element of the evidence against him consisted of the statements of a declarant, Cobham, implicating Raleigh in a plot to seize the throne. Raleigh was led to believe that Cobham had retracted his story and attempted to call him as a witness. The court did not allow Cobham to be called and, subsequently, Sir Walter was convicted. For a discussion of the conceptual framework underlying the Confrontation Clause, see Graham, *infra* note 63.

63. *See* Graham, *The Right of Confrontation and the Hearsay Rule, Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 99-101 (1972).