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White v. Illinois: The Confrontation Clause and the Supreme Court's Preference for Out-of-Court Statements

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White v. Illinois: The Confrontation Clause and the Supreme Court's Preference for Out-of-Court Statements

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I. INTRODUCTION

The Confrontation Clause, found in the Sixth Amendment to the United States Constitution, provides criminal defendants with the right to confront adverse witnesses.[1] A literal interpretation of the Confron-

1. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the

tation Clause would preclude courts from allowing the admission of all hearsay testimony.[2] The Court has rejected this interpretation, noting that it would render meaningless every exception to the rule against hearsay.[3] Although unwilling to hold that the Confrontation Clause mandates exclusion of all hearsay, the Court has found that the Clause requires the exclusion of some hearsay statements.[4] The Supreme Court has struggled to define the relationship between the exceptions to the rule against hearsay[5] and the limitations that the Confrontation Clause imposes.[6]

In its most recent effort, *White v. Illinois*,[7] the Court held that the Confrontation Clause does not require the prosecution to show that the declarant is unavailable prior to the introduction of hearsay statements under the spontaneous declaration[8] and medical diagnosis exceptions[9] to the hearsay rule. The *White* majority explained that its decision in *United States v. Inadi*[10] limited the unavailability requirement set forth in *Ohio v. Roberts*[11] to out-of-court statements introduced under the former testimony exception to the hearsay rule.[12] In addition, the Court found that the admission of hearsay testimony and the use of

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right . . . to be confronted with witnesses against him. . . ." U.S. Const., Amend. VI.

2. A literal interpretation of the Confrontation Clause would require the physical presence of all adverse witnesses. See *Mattox v. United States*, 156 U.S. 237, 243 (1895); Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. Miami L. Rev. 19, 33 (1985) (reasoning that if a criminal defendant's right to confront adverse witnesses were absolute, a court could not admit any out-of-court statement even if the statement came within one of the exceptions to the rule against hearsay).

3. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). See also *Bourjaily v. United States*, 483 U.S. 171, 182 (1987). For an example of the rule against hearsay, see F.R.E. 802.

4. *Roberts*, 448 U.S. at 63. See also Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 Minn. L. Rev. 665, 665 (1986) (noting that the Supreme Court has held that the Confrontation Clause restricts the use of hearsay evidence in some instances).

5. See, for example, F.R.E. 803 and 804.

6. See generally Graham C. Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. Fla. L. Rev. 207 (1984); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. Rev. 557 (1988).

7. 112 S. Ct. 736 (1992).

8. Under Illinois law, the spontaneous declaration exception applies to "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *White*, 112 S. Ct. at 740 n.1.

9. Illinois law provides that "statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule." *White*, 112 S. Ct. at 740 n.2.

10. 475 U.S. 387 (1986). For discussion of *Inadi*, see notes 27-45 and accompanying text.

11. 448 U.S. 56 (1980).

12. For a discussion of *Roberts* and the unavailability requirement, see notes 13-26 and accompanying text.

child-protective in-court procedures present discrete Sixth Amendment problems.

This Recent Development explores the implications of the *White* decision. Part II reviews some of the Court's past efforts to define the interests that the Confrontation Clause protects and delineate the restrictions that the Clause places on the admission of hearsay statements in criminal trials. Part III discusses the *White* majority's justifications for allowing the admission of the child victim's out-of-court statements, and addresses Justice Thomas's concurring opinion, in which he asserts that the Framers may not have intended for the Confrontation Clause to restrict the admissibility of hearsay evidence in any way. Part IV focuses on the aspects of the *White* decision that illustrate the Court's movement away from its prior interpretation of the Confrontation Clause as preferring face-to-face confrontation. In addition, Part IV considers whether the Court's interpretation of the Confrontation Clause has constitutionalized the hearsay rules, and contemplates what confrontation protections remain available. This Recent Development concludes that under the Court's current reading of the Confrontation Clause, a criminal defendant may have to look beyond the Sixth Amendment for confrontation protections.

II. Legal Background

A. Ohio v. Roberts: *The Unavailability Requirement*

In *Ohio v. Roberts*,[13] the Supreme Court considered whether the trial court properly allowed the admission of an absent witness's preliminary hearing testimony.[14] In upholding the trial court's admission of the testimony, the Court found that the Confrontation Clause restricts the admission of hearsay in two ways.[15] First, consistent with the Framers' preference for face-to-face confrontation, the Sixth Amendment establishes a rule of necessity.[16] The Court found that generally the prosecution can meet this requirement by producing the witness or demonstrating the unavailability of the declarant whose out-of-court statement it wishes to use against the defendant.[17]

If the prosecution establishes that the witness is unavailable, it must then satisfy the second prong of the *Roberts* test by showing that

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13. 448 U.S. 56 (1980).

14. The defendant was charged with forgery, receipt of stolen property, and possession of heroin. His defense for the first two charges was that Anita Isaacs gave him permission to use her father's credit card and checkbook. At the preliminary hearing, Ms. Isaacs denied having given the defendant such permission. Id. at 58.

15. Id. at 65.

16. Id.

17. Id.

the out-of-court statement is trustworthy.[18] The Court delineated two ways in which a court might find that hearsay testimony bears sufficient "indicia of reliability" that its admission is consistent with the Confrontation Clause.[19] First, the prosecution automatically proves trustworthiness if the statement falls within a "firmly rooted hearsay exception."[20] The Court reasoned that certain hearsay exceptions are so well-established in American jurisprudence that the Sixth Amendment does not require independent reliability analysis.[21] Otherwise, a court must exclude the out-of-court statement unless the prosecution can show that it bears "particularized guarantees of trustworthiness."[22]

The *Roberts* Court found that the trial court correctly concluded the absent witness was unavailable,[23] reasoning that the prosecution established that they had made a good-faith effort to produce the declarant.[24] The majority also found that the preliminary hearing testimony of the absent witness bore sufficient indicia of reliability because the defense attorney, at the preliminary hearing, questioned the declarant in a manner consistent with traditional cross-examination.[25] After finding that the prosecution satisfied the Court's two-part test, it held that the admission of the absent witness's former testimony did not violate the defendant's Confrontation Clause rights.[26]

B. United States v. Inadi: *Limiting the Unavailability Requirement*

In *United States v. Inadi*,[27] the Supreme Court limited the scope of *Roberts*. Inadi, who was convicted of various conspiracy charges, objected when the prosecution sought to introduce his alleged co-conspira-

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18. Id.
19. Id. at 65-66. The Court did not define "indicia of reliability."
20. Id. at 66. "Firmly rooted" remains undefined. See note 232 and accompanying text.
21. The Court stated that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' " 448 U.S. at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).
22. Id. at 65-66. The Court did not give examples of what circumstances might provide "particularized guarantees of trustworthiness."
23. Id. at 75. The prosecution made several unsuccessful attempts to produce Ms. Isaacs at trial. Id. at 59-60.
24. Id. at 74. The Court stated that " '[A] witness is not "unavailable" for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.' " Id. (citations omitted) (quoting *Barber v. Page*, 390 U.S. 719, 724-25 (1968)).
25. Id. at 68-73. Defense counsel questioned Ms. Isaacs at length. The defense attorney, however, did not attempt to have her declared hostile and did not request permission to cross-examine her. The majority reasoned that the defense counsel's questioning followed the form of a cross-examination, noting that the questioning was filled with leading questions in order to determine whether tbe declarant was telling the truth. Id. at 71.
26. Id. at 77.
27. 475 U.S. 387 (1986).

tors' taped conversations at his trial. The district court allowed the admission of the tapes under Federal Rule of Evidence 801(d)(2)(E)[28] without requiring the prosecution to show that the co-conspirators were unavailable.[29] The appellate court reversed, reasoning that *Roberts* required the prosecution to show that the declarant was unavailable prior to the introduction of the co-conspirators' out-of-court statements.[30]

The Supreme Court reversed the appellate court's decision, noting that this interpretation of *Roberts* would require a complete revision of the law of evidence.[31] The majority stated that *Roberts* did not mandate such a broad reading of the Confrontation Clause,[32] and cautioned that courts should read the *Roberts* decision narrowly and limit it to its facts.[33] The Court suggested that the application of the *Roberts* unavailability analysis is confined to cases involving the introduction of prior testimony.[34]

The *Inadi* Court gave several reasons for requiring the prosecution to show unavailability prior to the admission of former testimony, but not prior to the admission of co-conspirator statements. The Court reasoned that former testimony is merely a weak substitute for live testimony and rarely possesses independent evidentiary significance.[35] The unavailability requirement ensures that no better form of evidence exists before allowing the admission of the former testimony.[36] The Court distinguished co-conspirator statements from former testimony by determining that the statements provide evidence of independent significance about the conspiracy's context that testimony in court cannot replicate.[37] Under the Court's reasoning, the admission of the co-conspirators' statements at trial actually enhanced the accuracy of the

28. "A statement is not hearsay if the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." F.R.E. 801(d)(2)(E).

29. 475 U.S. at 390-91.

30. Id. at 391.

31. Id. at 392.

32. Id.

33. Id. at 392-93. The Court unequivocally stated that "*Roberts* cannot fairly he read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." Id. at 394.

34. Id.

35. Id.

36. Id. at 394-95.

37. Id. at 395. The Court reasoned that co-conspirators are likely to speak more candidly with each other during the course of their conspiracy than when testifying in court. In addition, the majority noted that the relationships between the co-conspirators may change between the time the statements were made and the time of trial. The co-conspirators have gone from partners in a criminal enterprise to suspects or defendants with potentially damaging information about the others. Declarants who potentially face indictment or trial may have little incentive to aid the prosecution and may be cautious ahout helping their former partners in crime. Id.

truth-seeking process, and thus furthered the purposes of the Confrontation Clause.[38]

The Court added that requiring a showing of unavailability prior to the admission of all out-of-court statements actually would provide little benefit to criminal defendants.[39] In effect, the unavailability rule would not bar the admission of out-of-court statements because the prosecution would either produce the declarant or make the requisite showing of unavailability prior to introducing the statement.[40] An unavailability rule would not exclude any testimony unless the prosecution did not produce an otherwise available witness.[41] Furthermore, it would not produce any additional important evidence because either side could subpoena any helpful witnesses.[42] The Court concluded that requiring a showing of unavailability would unduly burden the prosecution by requiring it to locate all potential witnesses and ensure their availability for trial.[43] Further, it would burden the courts by adding another aspect for appellate review in already complex cases.[44] Based on all these factors, the Court declined to read *Roberts* as imposing a general unavailability rule applicable to all out-of-court statements.[45]

C. Idaho v. Wright: *Applying the* Roberts *Analysis to a Child Sex Abuse Case*

The balance between a defendant's confrontation rights and the admission of out-of-court testimony becomes more complicated in child sex abuse trials.[46] The need for child sex abuse victims' testimony[47] and the potential for psychological harm to child victims from testifying[48] pose special concerns. The Supreme Court recently has explored the Confrontation Clause issues that arise when prosecutors introduce hearsay statements in child sex abuse cases.

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38. Id. at 396.
39. Id.
40. Id.
41. Id.
42. Id. at 396-97. In addition, the Court noted that the Compulsory Process Clause would aid a party in obtaining testimony from out-of-court declarants. Id.
43. Id. at 398-99. The Court's reasoning here is suspect. The Framers intended the Confrontation Clause to protect the rights of criminal defendants, and not to ease the prosecution's burden. See David E. Seidelson, *The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News*, 17 Hofstra L. Rev. 51, 81-82 (1988).
44. 475 U.S. at 398.
45. Id. at 399-400.
46. See generally Graham, 40 U. Miami L. Rev. 19 (cited in note 2).
47. See id.
48. The trauma of testifying may result in great psychological harm to child sex abuse victims. See Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia and the Power and Limits of Textualism*, 48 Wash. & Lee L. Rev. 1323, 1324 (1991).

In *Idaho v. Wright*,[49] the trial court applied Idaho's residual hearsay exception[50] to allow the admission of statements a three-year-old girl made to a pediatrician describing her abuse.[51] The Idaho Supreme Court reversed the defendant's conviction for sexually abusing her daughter,[52] holding that the admission of the daughter's out-of-court statements violated the Confrontation Clause.[53] The United States Supreme Court affirmed.[54]

The *Wright* majority applied the *Roberts* test,[55] first noting the trial court's determination that the three year-old[56] was unable to testify, and then assuming that if the unavailability requirement applied to this case the prosecution had met its evidentiary burden.[57] The Court addressed the reliability prong of the *Roberts* test[58] and found that Idaho's residual hearsay exception was not firmly rooted.[59] As a result, the prosecution had the burden of showing that the circumstances surrounding the hearsay statement rebutted the presumption that the hearsay was unreliable.[60]

The Court found that admission of firmly rooted hearsay statements satisfies the *Roberts* reliability requirement because longstanding judicial and legislative assessments of trustworthiness ensure the reliability of out-of-court statements that fall within certain hearsay excep-

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49. 497 U.S. 805, 110 S. Ct. 3139 (1990).

50. Idaho's residual hearsay exception allows the admission of:

> 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 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.

Idaho R. Evid. 803(24). See *Wright*, 110 S. Ct. at 3144.

51. The trial court determined that the child was not capable of effectively testifying. 110 S. Ct. at 3143.

52. Laura Lee Wright and Robert Giles were convicted of lewd conduct with a minor under sixteen. Giles allegedly had sexual intercourse with Wright's daughter while Wright held her down and covered her mouth. Id.

53. Id. at 3145.

54. Id.

55. See notes 13-22 and accompanying text.

56. The trial involved allegations of sexual abuse concerning Wright's two daughters. Wright's subsequent appeal related only to the conviction involving the younger daughter, who was three years old at the time of the trial. 110 S. Ct. at 3143.

57. Id. at 3147. The Court stated that "we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause." Id.

58. Id. at 3147. See notes 18-24 and accompanying text.

59. The Court reasoned that if it held that the residual hearsay exception was firmly rooted, "virtually every codified hearsay exception would assume constitutional stature." 110 S. Ct. at 3148.

60. Id. at 3150.

tions.[61] The residual hearsay exception, however, allows courts to make ad hoc determinations of whether statements that do not fall within recognized hearsay exceptions nonetheless are reliable enough to justify their admission at trial.[62] The majority reasoned that need for this type of ad hoc analysis illustrates that the residual exception does not share the same history of reliability with firmly rooted exceptions.[63]

The majority declined to set forth a mechanical test for determining when hearsay that is not introduced under a firmly rooted hearsay exception is sufficiently reliable to satisfy the Confrontation Clause.[64] The Court chose a reliability test that allows consideration of the evidence surrounding the making of the out-of-court statement and circumstances that would render the declarant particularly credible.[65] The reliability test is satisfied if the declarant's truthfulness is so evident from the surrounding circumstances that the defendant could gain little from cross-examination.[66] Applying this test to the doctor's hearsay statements at issue in *Wright*, the Court concluded that the three-year-old daughter's out-of-court statements did not possess particularized guarantees of trustworthiness sufficient to justify their admissibility.[67] The Court further held that corroborative evidence, such as medical evidence of injuries consistent with the child's statements, was irrelevant in determining whether she was telling the truth at the time she made the statements.[68]

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61. Id. at 3147.

62. Id.

63. Id. at 3148. The Court stated that "[h]earsay statements admitted under the residual exception, almost by definition, therefore do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception." Id.

64. Id. at 3149. The Court identified several factors trial courts may consider such as spontaneity, tbe declarant's state of mind, and the lack of a motive to fabricate. The Court made clear that these factors were not exclusive. Id. at 3150.

65. Id. at 3148.

66. Id. at 3149. The majority stated tbat the truthfulness of the declarant's statement must be "so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." Id.

67. Id. at 3153.

68. The Court reasoned that the Confrontation Clause required restriction of the admission of hearsay evidence to only those circumstances in which such evidence "possess[ed] indicia of reliability by virtue of its inherent trustwortbiness, not by reference to other evidence at trial." Id. at 3150. The majority found that the Confrontation Clause would not allow the "admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial." Id. In addition, the Court noted that corroborative evidence may foster false conclusions by the jury because such evidence indicates nothing about the identity of an abuser. Allowing corroborative evidence would pose the danger of the jury relying on partial corroboration to conclude that the entire statement was true. Id. at 3151.

D. Coy v. Iowa *and* Maryland v. Craig: *The Necessity Requirement*

The potential psychological trauma associated with requiring child sex abuse victims to testify in the courtroom in the accused's presence has influenced the majority of states to institute special proecdures for testifying child witnesses.[69] The Supreme Court has found that these procedures implicate the Confrontation Clause.[70] In *Coy v. Iowa*[71] and *Maryland v. Craig*,[72] the Court addressed the Confrontation Clause concerns that arise when a child testifies in court aided by the use of protective courtroom measures.

In *Coy v. Iowa*, the Supreme Court held that the placement of a protective screen between a child witness and the defendant[73] violated the Confrontation Clause.[74] The Court acknowledged that some of its prior decisions had placed limits on a criminal defendant's ability to confront witnesses, such as restricting the scope of cross-examination and allowing the admission of certain out-of-court statements.[75] The Court, however, distinguished these limitations by declaring that once a witness appears to testify, the Confrontation Clause guarantees the defendant a face-to-face meeting with the witness.[76] The Court reasoned that mandating a face-to-face encounter with witnesses serves the dual purpose of creating the appearance of fairness[77] and "ensuring the integrity of the factfinding process."[78]

The prosecution's use of a screen to shield the child witness violated the defendant's right to confrontation because that method is not

69. See Wildenthal, 48 Wash. & Lee L. Rev. at 1324 (cited in note 48) (finding that concern about psychogical trauma associated with testifying and the effect of such trauma on the truth-seeking function of a trial lead the majority of the states to establish special procedures for child witnesses). See also *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 3167-68 & nn.2-4 (1990) (listing the numher of states that have established some kind of child-protective courtroom procedure).

70. See notes 71-103 and accompanying text.

71. 487 U.S. 1012 (1988).

72. 110 S. Ct. 3157.

73. Section 910A.14 of the Iowa Code provides that a court may allow a child to testify behind a screen or by closed-circuit television. In *Coy* the lighting and the screen were adjusted so that the witness could not see the defendant but the defendant could see the witness faintly. 487 U.S. at 1014-15.

74. Id. at 1022.

75. Id. at 1016.

76. Id.

77. Id. at 1017, 1019.

78. Id. at 1020 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)). The Court determined that requiring a witness to testify in the defendant's presence enhances the fairness of the judicial proceeding, due to the tensions inherent in facing the accused. The Court stated: "Face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." *Coy*, 487 U.S. at 1020.

firmly rooted in the Court's jurisprudence, and the prosecution did not make a specific showing that the witness needed this protection.[79] The majority left open the question of whether exceptions may exist to a criminal defendant's right to confront trial witnesses face-to-face, noting that if such exceptions exist they would be justified only if necessary to further an important public policy objective.[80]

In *Craig*, the Supreme Court considered the question of whether such exceptions to the face-to-face confrontation right exist.[81] The *Craig* Court determined that under certain circumstances a court may place limitations on a defendant's confrontation rights. In this instance, the Court allowed the prosecution to use a one-way closed circuit television to facilitate the in-court testimony of two child sex abuse victims.[82]

While acknowledging that *Coy* held that the Confrontation Clause protects a criminal defendant's right to face-to-face confrontation of adverse witnesses who appear at trial, the *Craig* Court noted that *Coy* did not hold that this right is absolute.[83] The Court stated that in *Coy* the prosecution had not made an individualized showing that the witnesses needed protection. Thus, the *Coy* Court did not need to decide if there were exceptions, based on the necessity of protecting child witnesses, to a criminal defendant's right to face witnesses who appear before the trier of fact.[84] In *Craig*, the trial court's individualized findings that the child witnesses who testified against the accused needed special protection required the Court to consider the question it left unanswered in *Coy*.[85] The *Craig* Court held that under certain narrow circumstances, a court may deny a criminal defendant the right to face an in-court declarant.[86] A court may only permit the prosecution to use a procedure that prevents physical confrontation at trial if the prosecution satisfies two requirements.[87]

First, the procedure must be necessary to further an important public policy.[88] The Court found that a state's interest in protecting child victims from further trauma was a compelling public policy concern.[89] Under some circumstances, a state's interest in protecting the physical and psychological well-being of a child may outweigh a defend-

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79. Id. at 1020-21.
80. Id. at 1021.
81. 110 S. Ct. at 3163-66.
82. Id. at 3160.
83. Id. at 3163.
84. Id.
85. Id.
86. Id. at 3165.
87. Id. at 3166.
88. Id.
89. Id. at 3167.

ant's right to face in-court accusers.[90] The prosecution can satisfy the necessity requirement only if the trial court has made a case-specific determination[91] that the child witness would suffer more than minimal trauma[92] if required to testify in the defendant's presence.[93]

Second, the procedures must ensure the reliability of evidence.[94] The prosecution satisfies this prong when it employs procedures that subject the evidence to sufficient adversarial testing to preserve "the essence of effective confrontation."[95]

The Court found that the Maryland statute met these two requirements.[96] The prosecution met the necessity requirement by presenting expert testimony that the child witnesses would suffer serious emotional distress and would be unable to communicate if required to testify in the defendant's presence.[97] The *Craig* Court also found that the procedures of the Maryland statute ensured the reliability of the testimony.[98] The Court noted that although Maryland's procedures prevent the defendant from seeing the child witness who testifies at trial, the procedures ensure other elements of the confrontation right.[99] The child witness must be competent and must testify under oath.[100] The defendant has full opportunity to cross-examine the declarant while viewing the demeanor of the witness.[101] In addition, the factfinder can observe the demeanor of the testifying witness.[102] The Court noted that the assurances of reliability present in these circumstances were greater than those required for the admission of hearsay evidence under *Roberts*.[103]

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90. Id.

91. The trial court must hear evidence and determine whether a particular child witness requires the protection that the use of the one-way television affords. Id. at 3169.

92. The Court did not discern precisely what level of trauma was required to meet the necessity requirement. The Court, however, found that the level required by the Maryland statute was sufficient. Id. Maryland authorizes the use of closed-circuit television in cases in which the witness is the alleged victim of child abuse. Md. Cts and Jud. Proc. Code Ann. § 9-102 (1989). Section 9-102 requires that prior to allowing the use of a closed-circuit television, a judge must determine that the child would suffer serious emotional distress as a result of testifying in the courtroom and would be unable to communicate. 110 S. Ct. at 3169.

93. The child must suffer trauma due to the presence of the defendant, not merely trauma associated with the courtroom. A court could remedy the latter situation by having the child testify in the presence of the defendant in more comfortable surroundings. Id.

94. Id. at 3166.

95. Id. at 3170.

96. Id. at 3169.

97. Id. at 3161, 3169.

98. Id. at 3169.

99. Id. at 3166.

100. Id.

101. Id.

102. Id.

103. Id. at 3167. The Court reasoned that if the child was forced to testify in a traumatic setting the truth-seeking goal of the Confrontation Clause might be hindered.

III. What Remains of the Constitutional Preference for Face-to-Face Confrontation?: *White v. Illinois*

White v. Illinois[104] is the Supreme Court's most recent effort to define the balance between the Confrontation Clause and the admission of out-of-court statements. In *White*, the defendant was convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint.[105] The prosecution's case consisted of the testimony of five witnesses who recounted the out-of-court statements of the child victim, S.G.[106] The child did not testify at trial.[107]

Tony DeVore was babysitting in S.G.'s home the night of the assault.[108] DeVore testified that she ran into S.G.'s bedroom after she heard S.G. scream.[109] Devore saw the defendant, Mr. White, leave the bedroom.[110] While S.G. was still very upset, she told DeVore how the defendant had assaulted her.[111] Tammy Grisby, S.G.'s mother, testified that when she arrived home approximately thirty minutes later, S.G. told her substantially the same story.[112] A few minutes later Officer Lewis arrived at the home and questioned S.G.[113] Lewis's testimony was essentially the same as that of DeVore and Grisby.[114] Despite the defendant's objections, the trial court admitted the testimony of DeVore, Grisby, and Lewis under the spontaneous declaration exception to the rule against hearsay.[115]

Cheryl Reents, an emergency room nurse, interviewed S.G. at approximately eight o'clock the next morning.[116] In response to Reents' questions, S.G. recounted the previous night's events.[117] Dr. Michael Meinzen testified that S.G. recited the same facts when he spoke with her to obtain her medical history.[118] The trial court admitted the testimony of Reents and Meinzen under the medical diagnosis exception

104. 112 S. Ct. 736 (1992).
105. Id. at 739.
106. Id. at 739-40.
107. Id. at 739. On two occasions, the prosecution attempted to call S.G. as a witness, but each time she experienced emotional difficulty and did not testify. Id.
108. Id.
109. Id.
110. Id.
111. Devore testified that S.G. said that the defendant choked her, put his hand over her mouth, told her that he would hit her if she screamed, and then he improperly touched her. Id.
112. Grisby testified that S.G. told her that "Randy" put his hand over her mouth, threatened to hit her if she screamed, and then assaulted her. Id. The defendant's name is Randal White.
113. Id.
114. Id.
115. Id. at 740. See note 8 for an explanation of the spontaneous declaration exception.
116. Id. at 739.
117. Id.
118. Id.

and the spontaneous declaration exception to the hearsay rule.[119]

On appeal, in *People v. White*,[120] the defendant challenged the admissibility of the witnesses' statements. The Illinois appellate court found that the trial court correctly admitted the testimony of the five witnesses.[121] The court rejected the defendant's argument that the Confrontation Clause required it to determine that S.G. was unavailable to testify before admitting the hearsay evidence.[122]

A. *The Majority Opinion*

The Supreme Court affirmed the appellate court's holding.[123] The *White* Court limited its analysis to whether the trial court's admission of the hearsay evidence[124] violated the defendant's Confrontation Clause rights and held that admission of the evidence was constitutional.[125]

The United States presented an *amicus curiae* brief,[126] arguing that the prosecution threatens a criminal defendant's Confrontation Clause rights only when it seeks to introduce *ex parte* affidavits[127] without producing the affiants at trial.[128] Because S.G.'s statements were not contained in *ex parte* affidavits, the United States suggested that the Confrontation Clause would not restrict their admission.[129] In dismissing this argument, the Court noted that such a narrow interpretation essentially would abrogate any Confrontation Clause limitations on the admission of out-of-court statements under the hearsay exceptions.[130] The majority concluded that, according to precedent, the United States interpretation of the Confrontation Clause was incorrect.[131]

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119. Id. at 740. See note 9 for the text of the medical diagnosis exception.

120. 555 N.E.2d 1241 (1990).

121. Id. at 1243.

122. Id. at 1251-52. The petitioner argued that *Roberts* required a prior showing of unavailability. For a discussion of the *Roberts* unavailability analysis, see notes 15-24 and accompanying text.

123. 112 S. Ct. 736 (1992).

124. The Court assumed that the testimony properly fell within the applicable hearsay exceptions. Id. at 740 n.4.

125. Id. at 739-40.

126. Id. at 740-41.

127. Id. An *ex parte* affidavit is an out-of-court statement made under circumstances that imply that the affiant made the statement for the purpose of incriminating the defendant. Id. at 741.

128. Id.

129. Id.

130. The Court reasoned that under the position of the United States, the Confrontation Clause would apply only to hearsay contained in the form of an *ex parte* affidavit. Id.

131. The majority stated that the Court has been careful "not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements." Id.

The Court also rejected the defendant's claim that *Roberts* required the party seeking to introduce the hearsay testimony to either produce the declarant at trial or show the declarant's unavailability.[132] The Court found that such a reading of the Confrontation Clause was foreclosed by *Inadi*, in which the Court determined that the unavailability analysis is only applicable when the declarant made the disputed out-of-court statements in a prior judicial proceeding.[133] The Court made clear that its reasoning in *Inadi*, which was formulated in the context of co-conspirator's statements, applied to *White* as well.[134]

The Court first examined the evidentiary rationale for allowing the admission of hearsay evidence under the spontaneous declaration and medical diagnosis hearsay exceptions.[135] Such statements are made in contexts that provide substantial guarantees of trustworthiness, and testimony in court cannot recapture the factors that ensure the reliability of the statements.[136] The Court reasoned that the hearsay statements at issue had substantial probative value simply because they were made out-of-court under circumstances in which fabrication was unlikely.[137] This guarantee of trustworthiness would not be present if the declarant testified in court.[138] The Court further justified the admission of the hearsay testimony by proposing that there would be little benefit to implementing a general unavailability rule,[139] and that such a

(quoting *Idaho v. Wright*, 110 S. Ct. 3139, 3146 (1990)). The Court, however, reasoned that the Confrontation Clause must apply to hearsay, finding that "hearsay rules and the Confrontation Clause are generally designed to protect similar values" and "stem from the same roots." Id. (citations omitted).

132. Id.

133. "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." Id. For a discussion of *Inadi*, see notes 27-45 and accompanying text.

134. 112 S. Ct. at 742-43.

135. Id.

136. With regard to spontaneous declarations, the Court reasoned that statements made "in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom." Id. at 742-43. In the context of statements made for the purpose of medical diagnosis, the Court noted that a statement made "where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony." Id. at 743.

137. Id. at 742.

138. The Court distinguished the hearsay testimony of *White* from the statements made in the preliminary hearing in *Roberts*. The Court reasoned that because the prior statements at issue in *Roberts* were made in the context of a judicial proceeding there was "no threat of lost evidentiary value if the out-of-court statements were replaced with live testimony." Id. at 743.

139. Id. at 742-43. The Court relied on *Inadi* for the proposition that an unavailability rule was likely to produce little benefit. Id. at 742. The Court reasoned that an unavailability rule would not be an absolute bar to out-of-court testimony because the prosecution could introduce the testimony by producing the declarant at trial or after a showing that the declarant is unavaila-

mandate would impose great litigation costs.[140]

The Court concluded that it would be wrong to exclude the hearsay statements under the guise of the Confrontation Clause[141] because these statements had substantial probative value that in-court testimony could not duplicate.[142] The majority set forth the broad proposition that when out-of-court statements possess guarantees of reliability sufficient to fall within a firmly rooted hearsay exception, the Confrontation Clause's demands are satisfied.[143]

The defendant in *White* based his final argument on the *Coy* and *Craig* decisions, asserting that these cases established that a court may permit hearsay testimony relating a child's out-of-court statements only if necessary to protect the child's psychological and physical well-being.[144] The Court distinguished both *Coy* and *Craig*, stating those holdings addressed the Confrontation Clause mandates on the use of special in-court procedures.[145] The majority determined that the question in *Coy* and *Craig* was different from the question of what requirements a court must impose before it allows the introduction of out-of-court statements.[146] The Court found no justification for imposing a necessity requirement prior to admitting testimony through well-recognized hearsay exceptions.[147]

B. Justice Thomas's Concurring Opinion

Justice Thomas, joined by Justice Scalia, filed a separate opinion, concurring in part with the majority opinion and concurring in the judgment.[148] Justice Thomas's premise was that the majority reached the correct decision under the Court's prior Confrontation Clause juris-

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ble. In addition, the Court stated that an unavailability requirement would add little to the truth-determining process because either party could subpoena witnesses and obtain testimony facilitated by evidentiary rules and the Compulsory Process Clause. Id. at 742. For a discussion of *Inadi*, see notes 27-45 and accompanying text.

140. 112 S. Ct. at 743.

141. Id.

142. The Court stated that to keep the hearsay testimony out "would be the height of wrongheadedness" because the purpose of the Confrontation Clause was to promote the "integrity of the factfinding process." Id.

143. Id.

144. Id. For discussion of the *Coy* and *Craig* decisions, see notes 73-103 and accompanying text.

145. 112 S. Ct. at 743-44.

146. Id. at 744.

147. The Court made no attempt to explain why the two questions merit different treatment. Id. The Court stated that "[t]here is thus no basis for importing the 'necessity requirement' announced in those cases into the much different context of out-of-court declarations admitted under the established exceptions to the hearsay rule." Id.

148. Id. at 744-48 (Thomas concurring).

prudence.[149] He asserted, however, that the Court's precedent was inconsistent with the text and history of the Clause.[150] Justice Thomas argued that the Supreme Court had based its prior decisions addressing the relationship between the Confrontation Clause and hearsay on the faulty assumption that any hearsay declarant is a "witness against" a defendant and thus subject to the Clause's mandates.[151] Nothing in the history of the common-law right of confrontation indicated that the Confrontation Clause was intended to apply to hearsay.[152] In addition, Justice Thomas asserted that the text of the Sixth Amendment did not support the Court's standards for evaluating confrontation rights and the admission of hearsay.[153] He reasoned that under the majority's analysis the Confrontation Clause bars only unreliable hearsay, but noted the Clause's language makes no distinction between reliable and unreliable evidence.[154]

Justice Thomas considered several possible interpretations of the Confrontation Clause.[155] He rejected the Wigmore-Harlan view[156] that the Confrontation Clause only gives a defendant the right to confront and cross-examine those witnesses who appear at trial.[157] Rather, Justice Thomas found merit in the approach the United States suggested in its *amicus curiae* brief, that the Confrontation Clause only protects defendants from the admission of *ex parte* affidavits when the affiant

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149. Id. at 744 (Thomas concurring).

150. Id. (Thomas concurring).

151. Id. (Thomas concurring). As examples of cases based on such a faulty assumption, Justice Thomas cited *Ohio v. Roberts*, 448 U.S. 56 (1980); *Lee v. Illinois*, 476 U.S. 530 (1986); and *Idaho v. Wright*, 110 S. Ct. 3139 (1990). Justice Thomas argued that the text and history of the Clause do not support this assumption. 112 S. Ct. at 744 (Thomas concurring).

152. Justice Thomas asserted that prosecution by *ex parte* affidavits, in lieu of courtroom examination of adverse witnesses, was the primary evil that the Confrontation Clause was designed to eradicate. Thus, he reasoned that the confrontation right developed in order to restrict the use of *ex parte* affidavits and not to restrict the admission of hearsay. 112 S. Ct. at 746 (Thomas concurring).

153. Id. at 746-47 (Thomas concurring). Justice Thomas argued that the Confrontation Clause's text and history did not support the application of the *Roberts* test. Id. at 746 (Thomas concurring).

154. Id. (Thomas concurring) Justice Thomas reasoned that under the Court's hearsay analysis the Confrontation Clause would allow the admission of reliable *ex parte* affidavits. He argued that this was not intended by the Sixth Amendment's drafters. Id. at 746-47 (Thomas concurring).

155. Justice Thomas noted that virtually no evidence exists to clarify the Framers' intent in drafting the Confrontation Clause. Id. at 744 (Thomas concurring).

156. For a discussion of the Wigmore approach, see J. Wigmore, *Evidence* § 13.97 at 159 (1974). Justice Harlan adopted Wigmore's interpretation in his concurring opinion in *Dutton v. Evans*, 400 U.S. 74, 94 (1970).

157. *White*, 112 S. Ct. at 744-45 (Thomas concurring). Justice Thomas found that the Wigmore-Harlan approach was at odds with the history surrounding the evolution of the common-law right to confrontation and the Supreme Court's prior cases interpreting the Confrontation Clause. Id. at 745 (Thomas concurring).

does not testify at trial.[158] Justice Thomas interpreted the United States argument to mean that the Confrontation Clause only applies to testimony of in-court declarants or the functional equivalent of in-court testimony, such as affidavits, confessions, or depositions that are prepared in contemplation of legal proceedings.[159] He concluded that this approach was unworkable, however, because courts would have difficulty determining which statements were made in contemplation of legal proceedings.[160] As a result, he reasoned that this line of confrontation inquiry might be inconsistent with the meaning of the Clause.[161]

Justice Thomas proposed a modification of the United States argument, which he believed was consistent with the Confrontation Clause's text and history, as well as with existing precedent.[162] Justice Thomas concluded that a defendant's right to confront witnesses extends to all witnesses who testify at trial. However, the defendant's right to confront witnesses who have made extrajudicial statements is limited to those memorialized in formalized testimonial materials.[163] Justice Thomas argued that this application of the Confrontation Clause would protect best against the type of testimony that prosecutors historically have abused[164] and it would remain consistent with the Court's pre-*Roberts* precedent.[165] In addition, this approach would greatly simplify Confrontation Clause inquiry in the hearsay context[166] and would eliminate the danger of constitutionalizing the hearsay rule.[167] Although not

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158. For a discussion of the United States *ex parte* affidavit argument, see notes 126-31 and accompanying text.

159. 112 S. Ct. at 747 (Thomas concurring).

160. Id. (Thomas concurring). Justice Thomas used S.G.'s statements to the police officer as an example. He reasoned that the statements could be the functional equivalent of in-court testimony, noting that the statements arguably were made in contemplation of legal proceedings. Justice Thomas found that this illustrated that few statements could be categorized as restricted by the Confrontation Clause. Thus, courts might have great difficulty determining to which statements the Clause applies.

161. Id. (Thomas concurring).

162. Id. (Thomas concurring).

163. Id. (Thomas concurring). Formalized testimonial materials include materials "such as affidavits, depositions, prior testimony, or confessions." Id. (Thomas concurring).

164. Justice Thomas reasoned that affidavits, depositions, prior testimony, and confessions were the types of testimonial materials historically abused by the prosecutors in order to deprive criminal defendants of their right to an adversarial proceeding. Id. (Thomas concurring).

165. Id. at 747-48 (Thomas concurring). Justice Thomas noted that the cases prior to *Roberts* involved the admission of prior testimony or confessions. Id. at 748 (Thomas concurring).

166. Id. at 748 (Thomas concurring). Justice Thomas reasoned that the Court would no longer have to focus on which hearsay exceptions were firmly rooted.

167. Justice Thomas stated:

> Neither the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions. Although the Court repeatedly has disavowed any intent to cause that result, . . . I

completely convinced that the Confrontation Clause applies to any form of hearsay, Justice Thomas suggested that the Court should consider this novel interpretation of the Confrontation Clause.[168]

IV. Analysis

The Supreme Court's Confrontation Clause jurisprudence has enunciated a number of interests that the Clause was designed to protect. Among these, the Court has found that the Confrontation Clause was intended to ensure cross-examination[169] and to prevent prosecution by depositions or *ex parte* affidavits in lieu of live testimony,[170] in addition to ensuring the admission of reliable and probative evidence.[171] Commentators also have proposed various interpretations of the Confrontation Clause's intended protections, including requiring the testing of evidence in front of a jury,[172] ensuring an adversarial trial,[173] mandating the production of all available witnesses,[174] and safeguarding the

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fear that our decisions have edged ever further in that direction."
Id. (Thomas concurring).

168. Id. (Thomas concurring).

169. See, for example, *Mattox v. United States*, 156 U.S. 237, 242 (1895) (stating that one purpose of the Confrontation Clause was to preserve the right to cross-examine witnesses); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (stating that the primary right that the Confrontation Clause secures is the right to cross-examine adverse witnesses); *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980) (recognizing the role of cross-examination in protecting the accuracy of the trial process under the Confrontation Clause).

In fact, the *White* Court noted that "[t]he preference for live testimony in the case of statements like those offered in *Roberts* is because of the importance of cross-examination, 'the greatest legal engine ever invented for the discovery of truth.'" 112 S. Ct. at 743 (quoting *California v. Green*, 399 U.S. 149, 158 (1970)). However, the context in which the Court made this statement may indicate that the court found cross-examination important only in cases involving former testimony, such as *Roberts*. This conclusion is supported further by the *Inadi* Court's assertion that it is constitutionally permissible to dispense with cross-examination when the uncross-examined testimony possesses greater evidentiary value than would in-court testimony. See *Inadi*, 475 U.S. at 394-95.

170. *Mattox*, 156 U.S. at 242-43 (announcing that the primary purpose of the Confrontation Clause is to prevent the use of depositions or *ex parte* affidavits in lieu of examining the witnesses face-to-face in front of a jury).

171. *White*, 112 S. Ct. at 743.

172. Jonakait, 35 UCLA L. Rev. at 578 (cited in note 6).

173. Professor Jonakait has argued that the Framers' intent in drafting the Confrontation Clause was to guarantee the accused an adversarial trial. Id. at 585. He reasoned that the Court must look to see if a disputed practice impedes the adversarial process, not whether it promotes accuracy in the truth-determining process. Id. at 586. Under Professor Jonakait's theory, the *White* Court's justifications for admitting the "more reliable" hearsay evidence are misdirected. Pursuant to his theory, the Court should ask not whether the hearsay is sufficiently reliable, but whether its admission is permissible under our adversarial system.

174. Professor Lilly has suggested that the Confrontation Clause is not limited to protecting the adversarial process. Lilly, 36 U. Fla. L. Rev. at 213 (cited in note 6). He reasoned that the Confrontation Clause may have constitutionalized the common-law right of confrontation. Id. At common law, the accused had the right to confront any witness that the prosecution reasonably

fairness of the trial process.[175] The relationship between the Confrontation Clause and the hearsay exceptions continues to be the subject of much debate.

In the line of cases beginning with *Roberts*, the Supreme Court interpreted the Confrontation Clause too narrowly. Although the intended meaning of the Clause is unclear, it must protect more than just a criminal defendant's right to the admission of reliable and probative evidence.[176] Reliability and probativeness are accounted for already by the evidence rules and cannot delineate the outer boundaries of confrontation protection.

Pre-*White*, the Supreme Court protected more than reliability and probativeness by consistently expressing a preference for face-to-face confrontation.[177] The Court always has recognized some instances in which a court might deny a defendant's right to face an accuser without violating the Constitution.[178] The *White* decision, however, represents a synthesis of the Supreme Court's recent holdings that have reduced a criminal defendant's Sixth Amendment right to confront adverse witnesses by moving away from a preference for face-to-face confrontation. The Court's abandonment of this preference disregards other interests

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could produce. Id. In other words, the presence of an available declarant was always preferable, regardless of whether the declarant's statements came within a hearsay exception. Id. The Lilly approach requires the production of available declarants irrespective of whether their statements fall within a hearsay exception.

175. Many scholars believe that the Confrontation Clause originated as a reaction to wrongful convictions obtained through prosecutorial misconduct like that which occurred in the trial of Sir Walter Raleigh. See, for example, Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 Hastings Const. L. Q. 383, 393 (Winter 1990); Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. Fla. L. Rev. 863, 867 (1988). Sir Walter Raleigh was executed as a result of his 1603 trial in which he was convicted of treason, based on a sworn affidavit by Lord Cobham which allegedly was obtained under duress. The prosecution introduced Lord Cobham's affidavit at trial in spite of the fact that he had recanted his affidavit and was available to testify at the trial. Shaviro, 17 Hastings Const. L. Q. at 384. See also John W. Strong, ed., 2 *McCormick on Evidence* § 244 at 90-93 (West, 4th ed. 1992).

176. If the Framers were concerned with preventing the kinds of abuses discussed in note 175, it is reasonable to assume that ensuring the introduction of reliable and probative out-of-court statements was not the Confrontation Clause's only intended objective. The Framers also must have been concerned with limiting the prosecution's introduction of hearsay.

177. See, for example, *California v. Green*, 399 U.S. 149, 157 (1970) (stating that "it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); *Roberts*, 448 U.S. at 63 (noting that "[t]he Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial"); *Wright*, 110 S. Ct. at 3147 (reaffirming the *Roberts* proposition that the Confrontation Clause indicates a preference for face-to-face confrontation). But see *Craig*, 110 S. Ct. at 3165 (citing *Roberts* for the proposition that the Confrontation Clause establishes a preference for face-to-face confrontation, but emphasizing that the preference is not an absolute guarantee of such confrontation).

178. See *Craig*, 110 S. Ct. at 3165; *Inadi*, 475 U.S. at 399-40; *Roberts*, 448 U.S. at 64.

that the Framers may have intended for the Confrontation Clause to safeguard.

A. *Interpreting the Confrontation Clause to Prefer the Admission of Hearsay Statements*

The *White* Court set forth an interpretation of the Confrontation Clause that favors the admission of hearsay statements in certain instances. The Court made its preference for hearsay statements clear in several ways. By declining to read *Coy* and *Craig* as requiring a showing of necessity prior to the admission of hearsay testimony,[179] the Court produced an incentive for prosecutors to introduce hearsay testimony relating child witnesses' out-of-court statements rather than have the children testify via protective in-court procedures. In doing so, the Court indicated that the introduction of hearsay testimony is more consistent with the Confrontation Clause's preference for face-to-face confrontation than is the admission of in-court testimony via child-protective procedures.

A second way in which the Court indicated its preference for hearsay statements was by unequivocally limiting the *Roberts* unavailability requirement to the admission of former testimony. For out-of-court statements admitted under a firmly rooted hearsay exception, the Court interpreted the Confrontation Clause to demand nothing more than the rules of evidence require. After *White*, a prosecutor may introduce firmly rooted hearsay without any additional confrontation analysis, leaving no Sixth Amendment restraints to protect a criminal defendant.

The Court underscored its preference for hearsay statements by clarifying the *Inadi* holding.[180] In *Inadi*, the Court declared that in certain instances hearsay testimony possesses greater evidentiary value than in-court testimony, and thus is more consistent with the goals of the Confrontation Clause.[181] According to the *White* Court, *Inadi* meant that admission of certain out-of-court statements actually is preferable to requiring the witness to testify in court.[182] This preference for certain out-of-court statements creates the incentive for prosecutors to introduce the hearsay statements of all potentially hostile witnesses, including available witnesses, if the hearsay is particularly favorable to the state's case. After *White*, a criminal defendant should expect to face the admission of more hearsay testimony and to have less opportunities to confront adverse witnesses.

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179. See notes 144-47 and accompanying text.

180. See notes 133-34 and accompanying text.

181. *Inadi*, 475 U.S. at 395-96. See also notes 37-38 and accompanying text.

182. *White*, 112 S. Ct. at 742-43. See also notes 137-38 and accompanying text.

1. Confining the Necessity Requirement to the Admission of In-Court Statements Made Pursuant to Child-Protective Procedures

The *White* majority summarily rejected the petitioner's argument that *Coy* and *Craig* established a rule of necessity[183] that the prosecution must meet before a court should admit hearsay evidence in lieu of requiring a child witness to testify.[184] In *Craig*, the Court established that the prosecution must show that the use of special in-court procedures was necessary to protect the child's physical and psychological well-being before a court may allow the procedures' use.[185] In formulating the necessity requirement, the *Coy* and *Craig* Courts displayed a strong preference for face-to-face confrontation. The majority in each of those cases recognized that this right was not absolute, but declined to dispense with a defendant's confrontation right absent a particularized showing of need.[186] In doing so, these Courts placed a premium on a defendant's right to physically confront accusers.

The *White* Court limited the necessity analysis of *Coy* and *Craig* to situations in which a witness testifies via special in-court procedures.[187] The Court found that these Confrontation Clause prerequisites were inapplicable for purposes of the introduction of hearsay statements.[188] The majority in *White* showed greater concern for preserving physical face-to-face confrontation when a child witness testifies in court using special procedures than when the prosecution introduces hearsay evidence.[189] Although the Confrontation Clause does not contain the words "face-to-face," and the meaning of the Clause continues to be the subject of much debate,[190] the Court chose a literal interpretation of a defendant's right to confront adverse witnesses. The Court made a formalistic distinction between the Confrontation Clause analysis that is required in the case of hearsay testimony and that which is required for in-court testimony using procedures designed to protect a child witness. This distinction may be inappropriate in several respects.

Under the *White* Court's approach, the extent of a criminal de-

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183. For a discussion of the necessity requirement, see notes 86-93 and accompanying text.

184. See notes 144-47 and accompanying text. The *White, Coy* and *Craig* decisions only discuss special procedures designed to protect child witnesses. This Recent Development does not address whether the necessity requirement might apply in other contexts.

185. See notes 88-93 and accompanying text.

186. For a discussion of the necessity requirement see notes 86-93 and accompanying text.

187. *White,* 112 S. Ct. at 743-44. See notes 144-47 and accompanying text.

188. 112 S. Ct. at 744. See notes 145-47 and accompanying text.

189. 112 S. Ct. at 744. The majority stated that "[a]s we recognized in *Coy*, the admissibility of hearsay statements raises concerns lying at the periphery of those that the Confrontation Clause is designed to address." Id.

190. See notes 172-76 and accompanying text.

fendant's confrontation right changes depending on whether the declarant is testifying in-court via special procedures or whether the prosecution is introducing the declarant's testimony under a firmly rooted hearsay exception.[191] In the former circumstance the defendant has the right to face adverse witnesses, at least via closed-circuit television; in the latter situation the defendant has no right to confront the declarant at all.[192] The *White* Court never explained why the Confrontation Clause mandates treating out-of-court declarants differently from in-court declarants.[193]

The Court's formalistic distinction between the confrontation protections required for testimony via in-court procedures and those required prior to the admission of hearsay is illogical. The Court, by its own admission in *Craig*, has noted that the protections afforded a criminal defendant when a child witness testifies via special in-court procedures are greater than those required prior to admitting hearsay evidence.[194] Justice O'Connor, writing for the majority, noted that the child-protective procedures in *Craig* embodied three important trial features: oath, cross-examination, and the jury's ability to observe the witness.[195] The Court, therefore, imposes more requirements prior to the use of in-court procedures that provide greater adversarial protection than it does prior to the admission of hearsay. *Craig*'s more functional view of the Confrontation Clause focuses on protecting the defendant's right to an adversarial system. In contrast, *White*'s strict adherence to a formalistic interpretation of the Confrontation Clause requires only the physical confrontation of adverse witnesses who appear in court, not a check on the adversarial process.[196] In light of the confusion regarding the proper meaning of the Confrontation Clause, it

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191. Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 Minn. L. Rev. 623, 630-31 (1992).

192. Id.

193. The Court made conclusory statements that the two lines of analysis were completely separate. *White*, 112 S. Ct. at 744. Professor Scallen has argued that there is no reason to treat in-court witnesses and hearsay declarants differently for purposes of Confrontation Clause analysis. For illustration, she noted that under Federal Rule of Evidence 806 there is no distinction between a hearsay declarant and an in-court declarant for impeachment purposes. Scallen, 76 Minn. L. Rev. at 631 n.35 (cited in note 191).

194. *Craig*, 110 S. Ct. at 3167. See also note 103 and accompanying text.

195. 110 S. Ct. at 3166. Justice O'Connor found that "these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause." Id. at 3167. See notes 99-103 and accompanying text.

196. For a discussion of the Court's functional, as opposed to formalistic, approach to the Confrontation Clause, see Brian L. Schwalb, Note, *Child Abuse Trial and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 Harv. C.R.-C.L. L. Rev. 185, 209-10 (1991).

is unclear that this formalistic distinction is true to the Framers' intentions.[197]

The adversarial checks provided by the in-court procedures not only help ensure the reliability and probativeness of evidence, but also protect other interests. The ability to observe a child's demeanor and the opportunity to cross-examine the child not only allow the factfinder to evaluate the evidence to determine how reliable and probative it is, but at the same time preserve the appearance of fairness in the trial process. These child-protective in-court procedures may be more consistent with the goals of the Confrontation Clause than the admission of hearsay testimony.

By limiting the necessity requirement to testimony via special in-court procedures, the majority in *White* makes it more difficult for a prosecutor to bring an available child witness into court to testify under special procedures than for the prosecutor to introduce hearsay testimony. This creates the incentive for the prosecution to introduce hearsay testimony relating the out-of-court statements of an available child witness because the court will impose fewer requirements.[198] The prosecution may introduce the hearsay statements without any showing of unavailability, as long as they fall within a firmly rooted hearsay exception.[199] If the prosecution wishes to bring the child witness into court and employ special procedures to aid the child's testimony, such as the closed-circuit television used in *Craig*, it first must make a showing of necessity. *White*'s formalistic interpretation of the Confrontation Clause thus may encourage the prosecution to introduce hearsay evidence instead of bringing an available child into court.

2. Limiting the Unavailability Requirement to Former Testimony

In *Idaho v. Wright*,[200] the Court addressed the question of whether the unavailability requirement applied to the admission of a child sex abuse victim's out-of-court statements.[201] The *Wright* Court used the two-step approach set forth in *Roberts*,[202] and stated that "to the extent the unavailability requirement applies in this case" it had been met.[203] The Court left open the question of whether the unavailability require-

197. See notes 169-76 and accompanying text.

198. This incentive would exist only if the child made out-of-court statements that are helpful to the state's case and are admissible under a firmly rooted hearsay exception.

199. For a discussion of the Court's unavailability analysis, see notes 15-24 and accompanying text.

200. 110 S. Ct. 3139 (1990).

201. See notes 55-57 and accompanying text.

202. *Wright*, 110 S. Ct. at 3146. See notes 13-26 and accompanying text for a discussion of *Roberts*.

203. 110 S. Ct. at 3147.

ment applies in the context of out-of-court statements in child sex abuse cases.[204]

The *White* Court unequivocally answered this question,[205] stating that courts should read *Inadi* to limit the *Roberts* unavailability requirement to the introduction of former testimony.[206] In *White*, the Court did not require any showing of unavailability prior to the introduction of the hearsay statements. The Court found that once the prosecution shows that the hearsay statements fall within a firmly rooted hearsay exception, the Confrontation Clause is satisfied without a showing of unavailability.[207]

Under *White*, when hearsay falls within a firmly rooted hearsay exception, the Confrontation Clause affords a criminal defendant no protection above that which the evidence rules offer.[208] For example, the Federal Rules of Evidence already require a showing of unavailability before a party may introduce hearsay evidence under the former testimony exception to the rule against hearsay.[209] Because the Federal Rules of Evidence already require unavailability in the case of former testimony, the Confrontation Clause does not impose any additional barriers to admission. If hearsay statements fall within a firmly rooted hearsay exception that does not require a showing of unavailability, it is clear after *White* that the Confrontation Clause does not either. According to the *White* Court,[210] the requirements of the rules of evidence satisfy the Sixth Amendment's mandates as long as the admission of the out-of-court statement is made through a firmly rooted hearsay exception.[211]

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204. Id. The Court noted, however, that it held in *Inadi* that the unavailability requirement did not apply to incriminating out-of-court statements made by non-testifying co-conspirators. Id. at 3146.

205. *White*, 112 S. Ct. at 743.

206. Id. at 741. See notes 133-34 and accompanying text. Some commentators theorized that *Inadi* seriously restricted the *Roberts* unavailability requirement by limiting the *Roberts* holding to its facts. See, for example, Jonakait, 35 UCLA L. Rev. at 561 (cited in note 6). The *White* Court affirmed this theory. See 112 S. Ct. at 741.

207. 112 S. Ct. at 741-42.

208. Professor Jonakait persuasively argues that, after *Inadi*, the Federal Rules of Evidence in many instances provide a criminal defendant with greater protection than does the Confrontation Clause. See Jonakait, 35 UCLA L. Rev. at 563-74.

209. See FRE 804(a). Former testimony falls under Rule 804 of the Federal Rules of Evidence. This group of hearsay exceptions requires the party seeking the introduction of the evidence to show that the declarant is unavailable. Most state rules of evidence follow the Federal Rules and impose an unavailability requirement for former testimony.

210. 112 S. Ct. at 741-42.

211. In his concurring opinion, Justice Thomas reasoned that neither the language of the Confrontation Clause nor its history indicates that the Framers intended the Clause to apply to hearsay. Id. at 748 (Thomas concurring). He suggested a reading of the Sixth Amendment that would uncouple the Confrontation Clause and the hearsay rules. Id. (Thomas concurring). See also Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403, 496 (1992). Perhpas the *White* majority has uncoupled them by continually reducing the

In addition to providing no protection above that which evidence law affords, the limitation of the unavailability requirement to former testimony again illustrates that the *White* Court did not interpret the Confrontation Clause to provide a safeguard to a defendant's right to an adversarial proceeding.[212] Unlike other hearsay exceptions, former testimony is admissible because the party against whom testimony is now offered had a previous opportunity to cross-examine the witness at the time the testimony was originally given.[213] In many instances, former testimony may be the best alternative to face-to-face confrontation.[214] Former testimony is given in the context of a judicial proceeding and is subject to the procedural checks that the American adversary system provides. These checks not only help ensure the reliability of evidence admitted at trial, but protect other interests as well.[215]

The *White* Court interpreted the Confrontation Clause as a constitutional guarantee of the admission of only reliable and probative evidence against a criminal defendant.[216] Based on this characterization, the majority reasoned that the admission of reliable out-of-court statements does not infringe this constitutional right.[217] Even if the hearsay testimony possesses sufficient guarantees of reliability,[218] it is unclear that the sole purpose of the Confrontation Clause is to ensure the reliability of evidence in a criminal trial.[219]

Sixth Amendment's restrictions on the admission of hearsay. The majority plainly stated that the admissibility of hearsay testimony implicates concerns that are at the periphery of the interests which the Confrontation Clause is designed to protect. 112 S. Ct. at 744. The *White* holding suggests that the hearsay rules provide criminal defendants with sufficient confrontation protections to safeguard these periphery interests. Thus, the *White* Court implicitly may have removed from the Sixth Amendment all restrictions on the admissibility of hearsay statements.

212. For a persuasive argument that the purpose of the Clause is to preserve the American adversary system, see generally Jonakait, 35 UCLA L. Rev. 557 (cited in note 6). See also note 173.

213. See Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. Rev. 1, 17 (1987).

214. This assumption is true only if the defendant had ample opportunity to cross-examine the declarant in the prior judicial proceeding. If the court curtailed the defendant's questioning of tbe adverse witness at the prior proceeding or if the defendant was represented by incompetent counsel, the former testimony may not be very valuable for Confrontation Clause purposes. See Id. at 18-19.

215. See notes 172-76 and 194-95 and accompanying text.

216. See *White*, 112 S. Ct. at 743.

217. Id.

218. See notes 169-76 and accompanying text.

219. See notes 169-76 and accompanying text. The relationship between the Confrontation Clause and the introduction of hearsay evidence is the subject of much debate. The only consensus in this area is that the relationship is obscure. See, for example, Jonakait, 35 UCLA L. Rev. 557 (cited in note 6); Kirkpatrick, 70 Minn. L. Rev. 665 (cited in note 4); Lilly, 36 U. Fla. L. Rev. 207 (cited in note 6).

3. Preferring the Admission of Certain Out-of-Court Statements

Not only did the *White* Court make clear that *Inadi* limited the unavailability requirement to the admission of former testimony, the Court also explained that *Inadi* established the principle that admission of certain out-of-court statements is preferable to obtaining in-court testimony from the witness.[220] The *White* majority stated that the *Inadi* analysis, in the co-conspirator context, applied fully to the facts of *White*.[221] The Court reasoned that the circumstances under which the victim in *White* made the out-of-court statements provided indicators of reliability that in-court testimony could not duplicate.[222] This analysis is flawed in several respects.

The Federal Rules of Evidence allow admission of spontaneous declarations and statements made for the purposes of medical diagnosis based on the assumption that the circumstances under which the statements are made ensure their reliability.[223] Many commentators, however, have questioned the reliability of spontaneous declarations.[224] If these statements are not in fact reliable, then *White*'s justification for their admissibility does not hold true. With respect to statements made for purposes of medical diagnosis, even assuming their reliability, any information the declarant provides regarding the identity of the defendant is not relevant to the declarant's diagnosis or treatment.[225] As a result, the statements concerning the identity of an assailant do not carry the same guarantees of trustworthiness as do statements about the cause of an injury[226] and courts generally exclude them.[227] In *White*, the trial court did not limit the admission of testimony to statements that were necessary for diagnosis or treatment, but rather allowed the admission of testimony made during a medical evaluation concerning the defendant's identity. The Supreme Court then allowed the admission of this hearsay to remain unchecked by the Confrontation Clause.

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220. See notes 133-38 and accompanying text.

221. *White*, 112 S. Ct. at 742. See note 134 and accompanying text.

222. 112 S. Ct. at 743. See notes 135-38 and accompanying text.

223. See F.R.E. 803(2), 803(4). See also Jack B. Weinstein and Margaret A. Berger, 4 *Weinstein's Evidence* §§ 803(2), 803(4) at 803-85 to 803-86, 803-144 (Matthew Bender, 1990).

224. Many commentators do not believe that there is a well reasoned explanation for labeling spontaneous declarations as reliable. See, for example, Scallen, 76 Minn. L. Rev. at 651 (cited in note 191) (suggesting that spontaneous declarations are considered reliable because of tradition rather than reliability in fact); Robert M. Hutchins and Donald Slesinger, *Some Observations on the Law of Evidence*, 28 Colum. L. Rev. 432, 439 (1928); Mason Ladd, *The Hearsay We Admit*, 5 Okla. L. Rev. 271, 286 (1952).

225. See Scallen, 76 Minn. L. Rev. at 651-52 (cited in note 191). Professor Scallen noted that misstating the cause of an injury might result in an incorrect diagnosis or an inappropriate treatment, but statements regarding the identity of the assailant would not.

226. Id. at 652.

227. See id. at 652 n.113.

Under the Court's present Confrontation Clause analysis, if a prosecutor offers an out-of-court statement under a firmly rooted hearsay exception, the admission of the statement is presumptively constitutional.[228] The Court allows this presumption for firmly rooted hearsay exceptions reasoning that every statement admissible under them embodies the "substance of the constitutional protection."[229] In order to assess the validity of this assumption, courts would need to determine whether every statement that falls within a hearsay exception is reliable.[230]

As some commentators have suggested, the firmly rooted hearsay exceptions may not possess sufficient guarantees of reliability[231] and even if they do, the Supreme Court has never defined "firmly rooted."[232] Often courts justify classifying an exception as firmly rooted by noting that the exception has existed for a long time.[233] Another possible indicator is the number of jurisdictions that recognize the hearsay exception.[234] The Court also has considered whether the Federal Rules of Evidence acknowledge the exception.[235] None of these justifications provides an absolute guarantee that the hearsay admitted pursuant to firmly rooted exceptions is reliable.[236] Without a well-reasoned definition for "firmly rooted," the risk exists that a court will give a presumption of constitutionality to evidence that is not necessarily reliable.[237] Therefore, even if the purpose of the Confrontation Clause is ensuring the reliability and probativeness of evidence, allowing—and in some in-

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228. See Goldman, 66 N.C. L. Rev. at 7 (cited in note 213).

229. *Roberts*, 448 U.S. at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)). See also Goldman, 66 N.C. L. Rev. at 7.

230. See Goldman, 66 N.C. L. Rev. at 9.

231. See generally id. See also note 224 and accompanying text; Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Rule of Evidence 803(3)*, 64 Temple L. Rev. 145, 145 (1991) (stating that all hearsay is unreliable).

232. Goldman, 66 N.C. L. Rev. at 7; Lilly, 36 U. Fla. L. Rev. at 228 (cited in note 6).

233. The majority in *White* used this justification to support finding that the exception for spontaneous declarations was firmly rooted. The Court noted that the spontaneous declaration exception was at least two hundred years old. *White*, 112 S. Ct. at 742 n.8. See also *Bourjaily v. United States*, 483 U.S. 171, 183 (1987); Goldman, 66 N.C. L. Rev. at 12.

234. The *White* Court noted that both the exception for spontaneous declarations and the exception for statements made for the purpose of medical diagnosis were recognized in almost four-fifths of the states. 112 S. Ct. at 742 n.8. See also Lilly, 36 U. Fla. L. Rev. at 228.

235. The *White* majority noted that the Federal Rules of Evidence recognize exceptions for spontaneous declarations and statements made for the purpose of medical diagnosis. 112 S. Ct. at 742 n.8.

236. Goldman, 66 N.C. L. Rev. at 11-15.

237. See id. at 15. Professor Goldman reasoned that once an exception is classified as firmly rooted all evidence admitted pursuant to it will possess a presumption of reliability which it may not warrant. In addition, Professor Goldman noted that the reliability of different statements admitted under the same exception may vary. He suggested that a court must test the reliability of each statement using an ad hoc approach. Id. at 45-47.

stances preferring—the admission of firmly rooted hearsay may not serve that goal.

B. Has the Court Constitutionalized the Hearsay Rules?

The Supreme Court's recent Confrontation Clause decisions have liberalized the government's ability to introduce hearsay evidence in criminal prosecutions. *White v. Illinois* is no exception. In *White*, the Supreme Court showed great deference to the hearsay exceptions. In his concurring opinion, Justice Thomas expressed his fear that the Court's recent Confrontation Clause cases have moved toward constitutionalizing the hearsay rules.[238] Many commentators have asserted that the Supreme Court's Confrontation Clause jurisprudence has had this effect.[239] The Court, on several occasions, has noted that the Confrontation Clause and the hearsay rules protect similar interests[240] and stem from the same origins.[241]

The Court, however, has disavowed the contention that it has constitutionalized the hearsay rules.[242] The Court's holding in *Idaho v. Wright* supports this contention. The *Wright* Court found that the residual hearsay exception was not firmly rooted and did not allow the automatic admission of the hearsay testimony. This decision illustrates that not every hearsay exception is firmly rooted and therefore constitutionalized.[243]

Wright, however, does not rule out the possibility that the Supreme Court has constitutionalized the firmly rooted hearsay exceptions. If this interpretation is correct, several results follow. First, once a court finds that testimony falls within a firmly rooted hearsay exception, no Confrontation Clause analysis is required.[244] Thus, by satisfy-

238. *White*, 112 S. Ct. at 748 (Thomas concurring).

239. See, for example, Van Kessel, 67 Notre Dame L. Rev. at 495 (cited in note 211); Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 Minn. L. Rev. 521, 521 (1992); Lilly, 36 U. Fla. L. Rev. at 210 (cited in note 6).

240. 112 S. Ct. at 741. See also *California v. Green*, 399 U.S. 149, 155 (1970) (stating that the "hearsay rules and the Confrontation Clause are generally designed to protect similar interests"); *Roberts*, 448 U.S. at 66; *Wright*, 110 S. Ct. at 3146; Van Kessel, 67 Notre Dame L. Rev. at 495.

241. 112 S. Ct. at 741. See also *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (stating that the Confrontation Clause and the hearsay rules "stem from the same roots").

242. 112 S. Ct. at 741. See also *Wright*, 110 S. Ct. at 3146 (stating that the Court has been careful not to equate the Confrontation Clause and the rules excluding hearsay).

243. The question of whether there are other hearsay exceptions that are not firmly rooted remains open. The Supreme Court recently denied certiorari in a case involving the admission of statements against interest. *People v. Watkins*, 475 N.W.2d 727 (Mich. 1991), *cert. denied*, 112 S. Ct. 933 (1992).

244. At least one court has interpreted *White* in this way. See *United States v. Beckham*, 968 F.2d 47, 51 (D.C. Cir. 1992) (stating that the hearsay exception for adoptive admissions was firmly rooted and, therefore, no independent inquiry under the Confrontation Clause was required

ing the evidence rules, the prosecution also has satisfied the Confrontation Clause because the protections of the two are one and the same with respect to firmly rooted hearsay. This allows the government essentially to ignore the Confrontation Clause for purposes of introducing firmly rooted hearsay.

Another consequence of constitutionalizing the hearsay rules is that the rules are frozen.[245] A legislature may not reduce the protections that the rules of evidence afford without facing constitutional limitations. The rules are no longer merely creations of legislative enactment, but have been elevated to constitutional status.[246] The danger exists that if the Supreme Court is wrong and the firmly rooted hearsay exceptions in fact do not ensure reliability,[247] then the Court has constitutionalized these errors, freezing them into place.

C. What Confrontation Clause Protections Are Still Available to Criminal Defendants?

Child sex abuse cases are tragic and disturbing. *White v. Illinois* underscores the special concerns that are present when the prosecution needs a child's testimony.[248] Although the Court in *White* reached a result that is unobjectionable when considered along with the facts of the case, the holding will have far reaching effects.

The majority did not limit its Confrontation Clause analysis to child sex abuse cases, but announced a blanket policy applicable in all criminal proceedings. The prosecution may introduce hearsay testimony of available witnesses as long as the testimony falls within a firmly rooted exception, despite the fact that the particular case does not present any special concerns, such as those at issue with a child witness. Therefore, *White v. Illinois* will reduce the Confrontation Clause protections for all criminal defendants.

It is not yet clear how much the *White* Court's holding will reduce the protections available to criminal defendants. Perhaps there are other hearsay exceptions, in addition to the residual exceptions, that

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once the court determined that the statements were properly admitted under the hearsay exception).

245. See, for example, Van Kessel, 67 Notre Dame L. Rev. at 495; Imwinkelried, 76 Minn. L. Rev. at 522.

246. See Van Kessel, 67 Notre Dame L. Rev. at 495-97 (stating that the constitutionalization of the hearsay rules prevents reform of the rules of evidence and other aspects of the trial process).

247. This assumes for purposes of argument that the Court is correct in interpreting the goals of the Confrontation Clause as ensuring the admission of reliable and probative evidence.

248. For a discussion of the special concerns relating to child witnesses see Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 Harv. C.R.-C.L. L. Rev. 185 (1991). See also note 48.

are not firmly rooted.[249] If so, the Court may require the prosecution to show that the hearsay bears "particularized guarantees of trustworthiness," thereby providing the criminal defendant with increased Confrontation Clause protections.

In addition, state courts may provide criminal defendants with greater confrontation protection than *White* mandates.[250] State courts are free to reject *White*'s limitations of the unavailability and necessity requirements, and they may provide greater confrontation protections under their state constitutions.[251] After *White*, protection of a criminal defendant's confrontation right may rest with the state courts.

V. Conclusion

The meaning of the Confrontation Clause remains unclear. The *White* Court framed its Confrontation Clause analysis in terms of ensuring the admission of reliable and probative evidence. In so doing, the majority limited its prior safeguards for criminal defendants' confrontation rights. By restricting the necessity requirement of *Coy* and *Craig* to special in-court procedures, the Court found hearsay that was not subject to cross-examination was more consistent with the goals of the Confrontation Clause than in-court testimony under child-protective procedures. The limitation of *Roberts*' unavailability requirement to former testimony again reduced the Confrontation Clause protections available to criminal defendants by imposing fewer requirements on prosecutors seeking to introduce uncross-examined out-of-court statements than testimony that has been subject to some form of cross-examination. The Court underscored this reduction of criminal defendants' confrontation rights by emphasizing that *Inadi* created a

249. Thus far, the residual hearsay exception is the only hearsay exception that the Court has determined was not firmly rooted. See *Wright*, 110 S. Ct. at 3141-42 (1990). See also note 243.

250. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) (urging state courts to protect the individual liberties of citizens under both the Federal and State Constitutions).

251. For an example of a state court extending greater confrontation protection to a criminal defendant, see *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 373-75 (Mass. 1988) (requiring a case-specific finding of unavailability in order to satisfy the confrontation provision of the Massachusetts Constitution). See also *Hart v. State*, 578 N.E.2d 336, 337 (Ind. 1991) (stating that tbe Indiana Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face-to-face"). The Indiana court found fundamental error when the trial court failed to comply with the state constitution's face-to-face provision. The court stated that "[t]he face-to-face requirement of our state constitution is separate and in addition to the confrontation right afforded by the same provision and the Sixth Amendment of the United States Constitution." Id.

Several commentators have suggested that state courts should provide greater confrontation protection under their state constitutions. See, for example, Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 605 (1992); Scallen, 76 Minn. L. Rev. at 653 (cited in note 191).

Sixth Amendment preference for out-of-court statements under certain circumstances. The Court's preference for reliable and probative out-of-court statements ignores other interests that the Framers may have intended for the Confrontation Clause to protect.

The constitutional implications of *White* are potentially great. The Court's further reduction of the Confrontation Clause may have resulted in the constitutionalization of the hearsay rules, or at least the firmly rooted hearsay exceptions. If so, the Court has allowed evidence law to dictate the scope of the Sixth Amendment. The danger exists that the Court may have constitutionalized rules that in fact do not serve the intended goals of the Confrontation Clause.

The *White* decision will have a significant impact on the confrontation rights of all criminal defendants. The Court did not limit its holding to child sex abuse cases, but announced a broad ruling applicable to all criminal defendants. The Court chose a very narrow reading of the protections that the Sixth Amendment was intended to provide. Although the meaning of the Confrontation Clause remains unsettled, it is clear that criminal defendants can no longer look to the Sixth Amendment for signficant confrontation protections.

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