Land & Water Law Review

Volume 17 | Issue 2 Article 13

1982

Evidence - Constitutional Law - The Confrontation Clause and the Catch-All Exception to the Hearsay Doctrine - Hopkinson v. State

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EVIDENCE—CONSTITUTIONAL LAW—The Confrontation Clause and the Catch-all Exception to the Hearsay Doctrine. Hopkinson v. State, 632 P.2d 79 (Wyo. 1981).

In the early morning hours of Sunday, August 7, 1977, a bomb in the home of attorney Vincent Vehar exploded, killing him, his wife and son while they slept.[1] Almost two years later, and two days before the scheduled opening of the grand jury's investigation into the Vehar bombing, Jeff Green's tortured and mutilated body was discovered near a rest stop on Interstate Highway 80.[2] Following a grand jury investigation, Mark Hopkinson was charged with first-degree murder in all four of these deaths.[3] Hopkinson and Vehar had been adversaries in two civil cases, and Hopkinson was Green's employer.[4]

At trial, the state called thirty-seven witnesses to the stand, including Green's former attorney.[5] The prosecutor and the attorney read into the record portions of Green's testimony at an earlier trial in which one Hysell was charged with murder.[6] Green's testimony implicated Hopkinson in a plan to murder Vehar and established Green's fear of Hopkinson.[7] Hopkinson was not a defendant in the Hysell trial and, of course, did not cross-examine Green.

Green's sister was also a witness for the state.[8] She testified that Green had told her of threats Hopkinson had made to Green and of Hopkinson's hatred for Vehar.[9] Four witnesses testified as to statements Vehar had made in which he had expressed fear for his safety because of threats from Hopkinson.[10] Hopkinson was convicted on four counts of first-degree murder and sentenced to death for the Green murder and life imprisonment for the Vehar killings.[11]

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1. Hopkinson v. State, 632 P.2d 79, 95 (Wyo. 1981) [hereinafter cited in text as *Hopkinson*].
2. *Id.* at 96-97. Brief for Appellee at 10, Hopkinson v. State, 632 P.2d 79 (Wyo. 1981).
3. Hopkinson v. State, *supra* note 1, at 97.
4. *Id.* at 93-94.
5. Brief for Appellant at 4-8, Hopkinson v. State, 632 P.2d 79 (Wyo, 1981).
6. Hopkinson v. State, *supra* note 1, at 134, 135.
7. *Id.* at 95, 134.
8. Brief for Appellent, *supra* note 5, at 7.
9. Hopkinson v. State, *supra* note 1, at 136.
10. *Id.* at 128.
11. *Id.* at 97.

On appeal to the Wyoming Supreme Court, Hopkinson challenged the out-of-court statements of Green and Vehar as inadmissible hearsay.[12] The court held the statements to be admissible under the catch-all exception to the hearsay doctrine, Rule 804(b)(6) of the Wyoming Rules of Evidence.[13] Further, the court held that admission of the statements did not infringe upon Hopkinson's right to confront witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution[14] and Article I, Section 10 of the Wyoming Constitution.[15] Since the court had never before interpreted Rule 804(b)(6),[16] it announced as its purpose the establishment of "a test which [would] be applied in ad hoc fashion and [would] exclude all evidence either barred by the hearsay rule or the Confrontation Clause, or both."[17] The court then developed and applied a six-part test in determining that the hearsay statements of the victims were properly admitted.[18]

This note will examine the major United States Supreme Court decisions which have interpreted the Confrontation Clause and comment on current theories of the clause derived therefrom. The history and purpose of Rule 804(b)(6) will be examined briefly, and several circuit court decisions which have analyzed the rule as it relates to the Sixth Amendment will be reviewed. Finally, the note will show that the Hopkinson test, while providing guidance for Rule 804(b)(6) application, departs from the funda-

12. *Id.* at 127-28. Appellant raised nineteen issues on appeal, including the hearsay issue. *Id.* at 92. Rule 802 of the Wyoming Rules of Evidence provides, "Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court of Wyoming or by statute." Rule 801 (c) of the Wyoming Rules of Evidence defines hearsay: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."
13. Hopkinson v. State, *supra* note 1, at 133-36.
14. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."
15. Article I, Section 10 of the Wyoming Constitution states: "In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him . . . ." Hopkinson v. State, *supra* note 1, at 132-36.
16. Hopkinson v. State, *supra* note 1, at 130.
17. *Id.* at 132.
18. *Id.* at 130-36.

mental requirements of the Confrontation Clause as interpreted by the United States Supreme Court.

THE CONFRONTATION CLAUSE

The United States Supreme Court Decisions

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[19] The Supreme Court first had occasion to consider the Confrontation Clause in 1895[20] in *Mattox v. United States*.[21] Mattox was tried twice for the crime of murder. At his second trial, transcripts of the testimony of two witnesses, who had been fully cross examined under oath at the first trial but had since died, were introduced into evidence.[22] In holding the transcripts to be admissible, the Court stated in an oft-quoted passage:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeaner upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[23]

Even though these safeguards provided by the physical presence of a witness are essential to any trial, the Court determined that such protections "must occasionally give way to considerations of public policy and the necessities of the case."[24] The modern era of Confrontation Clause

19. *See generally* 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 418 (1980).
20. Note, *The Right to Confrontation: One Step Beyond Bruton*, 56 NEB. L. REV. 936 (1977).
21. 156 U.S. 237 (1895).
22. *Id.* at 240.
23. *Id.* at 242-43.
24. *Id.* at 243.

analysis began in 1965[25] with *Pointer v. Texas*,[26] a case in which the Supreme Court held the Sixth Amendment right of confrontation to be a "fundamental right," applicable to the states under the Fourteenth Amendment.[27] The prosecution in *Pointer* had offered into evidence a transcript of the victim's testimony given at the preliminary hearing in which Pointer had not been represented by counsel. The victim had left the state and was unavailable at trial.[28] Since in the absence of counsel Pointer had not had a complete and adequate opportunity to cross-examine the victim at the hearing, the Court held the Sixth Amendment barred admission of the transcript.[29]

Three years later in *Barber v. Page*, the Court found the Confrontation Clause to bar admission of a preliminary hearing transcript where the declarant was incarcerated out of state and the State had made no effort to obtain him for trial.[30] "The right to confrontation is basically a trial right," the Court declared. "It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."[31]

The absence of opportunity to cross-examine the declarant was again crucial in *Bruton v. United States*,[32] where the defendant and one Evans were tried together for armed postal robbery. A postal inspector was permitted to testify as to an oral confession made to him by Evans.[33] The Court determined that the confession added substantial support to the government's case[34] against both defendants, even though the trial judge had instructed the jury to disregard the confession as far as Bruton was concerned.[35]

25. 4 D. LOUISELL & C. MUELLER, *supra* note 19, at 133-50. The authors identify nine major decisions handed down by the United States Supreme Court since 1965. These decisions include, in addition to those discussed in the text, Douglas v. Alabama, 380 U.S. 415 (1965), and Nelson v. O'Neil, 402 U.S. 622 (1971). *Id.*
26. 380 U.S. 400 (1965) [hereinafter cited in text as *Pointer*].
27. *Id.* at 403.
28. *Id.* at 401.
29. *Id.* at 407.
30. 390 U.S. 719 (1968) [hereinafter cited in text as *Barber*].
31. *Id.* at 725.
32. 391 U.S. 123 (1968).
33. *Id.* at 124.
34. *Id.* at 127-28.
35. *Id.* at 125.

Since Evans himself did not testify, the content of the confession was not subject to cross-examination, and Bruton's right to confront witnesses against him was denied.[36]

The next major case was *California v. Green*, decided in 1970.[37] At issue were two separate pieces of evidence—the preliminary hearing testimony of one Porter that Green was his marijuana supplier, and Porter's similar but unsworn statement to Police Officer Wade. At the preliminary hearing, Green's attorney subjected Porter to extensive cross-examination. At trial, however, Porter claimed inability to remember any of the transactions to which he had testified, which prompted the prosecutor to read portions of his earlier testimony to "refresh his memory."[38] The Court found that Porter's preliminary hearing statement had been given under safeguards typically associated with a trial, and unlike *Barber*, the State had produced the witness. Therefore, admission of the preliminary hearing transcript did not violate the Confrontation Clause.[39]

The admissibility of Porter's statement to Police Officer Wade, which had never been tested by cross-examination, was a different matter. The Court remanded the case to determine whether Porter's inability to remember the underlying transactions so affected Green's right to cross-examine that he was deprived of his Sixth Amendment right of confrontation.[40] It appears that the opportunity to meaningfully cross-examine the declarant and not the reliability of Police Officer Wade's statement, was essential to avoid offending the Confrontation Clause.

Dutton v. Evans, a four-one-four decision handed down shortly after *Green*, represents an anomaly in this line of Confrontation Clause cases.[41] In *Evans*, the prosecution had a "solid" case which included the eye-witness testimony of an alleged accomplice who described in detail the killing of

36. *Id.* at 128.
37. 399 U.S. 149 (1970).
38. *Id.* at 151-52.
39. *Id.* at 165.
40. *Id.* at 168-69.
41. 400 U.S. 74 (1970).

three police officers and Evans' participation on that killing. The State called nineteen other witnesses, one of whom was a man named Shaw. Shaw testified that a fellow inmate, upon returning to the penitentiary after arraignment on charges of murdering the police officers, had made the statement, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."[42] The admissibility of this single sentence was challenged on appeal.

First, the plurality decided that Shaw's testimony was not in any sense "crucial" to the state's case or "devastating" to the defendant. Shaw's testimony was characterized as "of peripheral significance at most."[43] The Court determined that Evans' right of confrontation was not abridged and bolstered its conclusion by listing five "indicia of reliability" inherent in the inmate's out-of-court statement.[44] This decision may be characterized as an anomaly because no reference was made to the availability of the declarant,[45] and only passing attention was paid to the defendant's lack of opportunity to cross-examine.[46] Instead, the decision rests on a finding that the hearsay was not crucial to the prosecution and was reliable.

In *Mancusi v. Stubbs*, the availability of the declarant was again the focal point of the decision.[47] In 1954, Stubbs had been convicted of murder and kidnapping, primarily as a result of the testimony of one of the kidnapping victims. Ten years later he was awarded a retrial on the ground that he had been denied effective assistance of counsel.[48] The victim's earlier testimony was read into the record, since he had moved out of the country.[49] Stubbs argued

42. *Id.* at 77.
43. *Id.* at 87.
44. *Id.* at 88-89. The five "indicia of reliability" found by the plurality were (1) the statement contained no assertion about a past fact, (2) the declarant's participation in the murder was established by other evidence, (3) no real possibility of faulty recollection existed, (4) the declarant's statement was spontaneous and (5) against penal interest. *Id.*
45. Justice Marshall in a dissenting opinion stated that the declarant was available to the state and may well have been a willing witness. *Id.* at 102.
46. The plurality found the possibility unreal that cross-examination could have shown the declarant's statement to be unreliable. *Id.* at 89.
47. 408 U.S. 204 (1972).
48. *Id.* at 207-09. The finding of ineffective counsel was based on the fact that counsel had been appointed only four days before trial. *Id.* at 209.
49. *Id.* at 209.

that introduction of the prior testimony deprived him of his confrontation right for two reasons: (1) the State did not make a reasonable effort to produce the witness,[50] and (2) he was denied an adequate opportunity for cross-examination at the previous trial by reason of ineffective counsel.[51]

The Court found the witness to be unavailable for purposes of the Confrontation Clause, since the State was powerless to compel the appearance of one residing in a foreign country.[52] Before the Court was willing to say that Stubb's right to confront witnesses had not been denied, it considered the adequacy of the cross-examination at the first trial. The Court found the 1954 proceeding to be a trial of a serious felony on the merits in which Stubbs was represented by counsel who conducted effective cross-examination of the witnesses.[53] Consequently, it was held that Stubb's rights under the Confrontation Clause were preserved.

Ohio v. Roberts represents the Supreme Court's most recent pronouncement on the Confrontation Clause.[54] This case involved the admission into evidence of the prior preliminary hearing testimony of an unlocated witness. The witness had been a defense witness whose testimony had been unhelpful to the defendant. The defense attorney, had not asked to have the witness declared hostile nor had he requested permission to cross-examine her at the preliminary hearing.[55]

The Court held that the state had done all that was necessary to produce the witness when it sent five subpoenas to her last known address.[56] The Court then went on

50. *Id.* at 211.
51. *Id.* at 214.
52. *Id.* at 212.
53. *Id.* at 213-14. The Court found cross-examination to have been adequate in the first trial for three reasons: (1) the habeas judge based his reversal decision on a *per se* rule of ineffective counsel; (2) the Tennessee Supreme Court expressly determined when Stubbs appealed his 1964 conviction that cross-examination in the 1954 trial had been adequate; and (3) counsel at retrial did not suggest any material line of cross-examination that was not, to some extent, advanced in the first trial. *Id.* at 213-15.
54. 448 U.S. 56 (1980).
55. *Id.* at 58.
56. *Id.* at 59-60, 75.

to equate, for the first time, the Confrontation Clause with evidentiary rules:

> [Where there is a showing that a witness is unavailable,] his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[57]

What Do the Decisions Mean?

Most commentators agree that the Supreme Court cases present no clear and comprehensive theory of the Confrontation Clause upon which the lower courts can rely for guidance.[58] One suggested rule for applying the confrontation doctrine focuses on the impact of the evidence against the accused and the availability of the witness to testify at trial.[59] Under this theory, a court faced with a confrontation issue must ask two questions: (1) Was the challenged statement made by a "witness against" the accused? (2) If so, do circumstances exist which excuse an absence of cross-examination of this witness at trial?

This theory starts with the premise that, absent waiver or excusing circumstances, the Sixth Amendment requires a witness against the defendant to be present at trial, under oath and subject to full and effective cross-examination.[60]

57. *Id.* at 66.
58. 4 D. LOUISELL & C. MUELLER, *supra* note 19, at 133; Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 125 (1972) [hereinafter cited as Graham, *The Right of Confrontation*]; Western, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 568 (1978); Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151, 183 (1978) [hereinafter cited as Graham, *The Confrontation Clause*]; Baker, *The Right to Confrontation, The Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529, 532 (1974).
59. Graham, *The Right of Confrontation, supra* note 58, at 128, 138-40. For an expanded variation of this theory, see 4 D. LOUISELL & C. MUELLER, *supra* note 19, at 150-67.
60. Graham, *The Right of Confrontation, supra* note 58, at 134-35. Graham elaborates upon this premise as follows:
> One might argue that just as some of the hearsay exceptions are justified on the theory that some other force may provide an adequate substitute for cross-examination, so one could claim that the confrontation requirement is satisfied by a sense of imme-

Not all witnesses relied upon by the prosecution are considered "witnesses against" the accused, however. If a particular person's contribution makes him a principal witness, then he is a "witness against" and must be confronted absent excuse or waiver. On the other hand, a declarant such as the inmate in *Evans*,[61] whose testimony is considered peripherally significant, need not be produced at trial under the Confrontation Clause.

Once an individual is deemed a "witness against" the defendant, he is required to testify at trial unless circumstances exist which excuse an absence of cross-examination. The Court's decisions have limited excusing circumstances to death,[62] permanent absence from the country,[63] memory lapse,[64] and situations in which reasonable effort by the prosecution has failed to produce the witness.[65] A claim of the privilege against self-incrimination by a witness may also excuse confrontation at trial, although the Court has not directly ruled on this contingency.[66]

Finally, the Confrontation Clause limits the type of hearsay which may be admitted, when a witness against the accused is unavailable, to previously confronted statements. No Supreme Court decision has approved the use of an out-of-court statement which produces significant impact against the accused's position unless that statement has been subjected to cross-examination by the accused

diately impending death, the fact that the statement is against interest, or that it was made in the course of business. These arguments are, however, patent fictions; none of the factors supposed to give some classes of hearsay a special reliability have ever been empirically demonstrated to have the effects on accuracy attributed to them, and some actually have been proved to negate rather than enhance reliability. Since this justification for the use of hearsay did not develop until later, it is doubtful that the drafters of the Sixth Amendment envisaged confrontation being satisfied by anything other than cross-examination in the presence of the jury.

Id. at 136.

61. Dutton v. Evans, *supra* note 41.
62. Mattox v. United States, *supra* note 21, at 243-44.
63. Mancusi v. Stubbs, *supra* note 47, at 212.
64. California v. Green, *supra* note 37, at 167-68.
65. Ohio v. Roberts, *supra* note 54, at 75.
66. 4 D. LOUISELL & C. MUELLER, *supra* note 19, at 161-62. *See also* Douglas v. Alabama, *supra* note 25, and Bruton v. United States, *supra* note 32 (unconfronted confessions are inadmissible under the Confrontation Clause where declarant asserts claim of privilege against self-incrimination).

either at a preliminary hearing or previous trial.[67] The Court has refused to allow arguably reliable but unconfronted hearsay merely because the witness was unavailable at trial.[68]

Several scholars regard the confrontation doctrine as a rule of preference for evidence in the best possible form,[69] a view which has been adopted by a number of lower courts.[70] According to this theory, once the state has made a good faith effort to produce a witness, it has fully satisfied its obligation under the Sixth Amendment. Any restraint on the reliability of the hearsay statement of the unavailable witness falls within the aegis of the Due Process Clause.

As indicated above, the Supreme Court cases do not support this rule. The Court has consistently engaged in a two-tier analysis in these confrontation decisions. Once a witness has been shown to be unavailable, the Court has proceeded to examine the challenged statement to determine whether it has been subjected to prior cross-examination.

THE CATCH-ALL EXCEPTION TO THE HEARSAY DOCTRINE

Rule 801(c) of the Federal and Wyoming Rules of Evidence defines hearsay[71] and Rule 802 bars its admission at trial.[72] Thus, an out of court statement which is classified as hearsay must fall within one of the exceptions to the hearsay rule it if is to be admitted into evidence. Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence, and the identical Rules 803(24) and 804(b)(6) of

67. Graham, *The Right of Confrontation*, *supra* note 58, at 140 n.195; 4 D. LOUISELL & C. MUELLER, *supra* note 19, at 154.
68. *See* Pointer v. Texas, *supra* note 26, at 407 (preliminary hearing transcript); Bruton v. United States, *supra* note 32, at 137 (confession); Douglas v. Alabama, *supra* note 25, at 419-20 (confession); California v. Green, *supra* note 37, at 168-69 (corroborated statement to police officer).
69. *See* Western, *supra* note 58, at 597-601; Baker, *supra* note 58, at 545; Graham, *The Confrontation Clause*, *supra* note 58, at 195.
70. *See infra* text accompanying notes 78-102.
71. FED. R. EVID. 801(c) is identical to WYO. R. EVID. 801(c). *See* rule quoted *supra* note 12. The Federal Rules of Evidence were adopted in 1975. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES at iv (West 1979). The Wyoming Rules of Evidence were adopted in 1978. WYO. R. EVID., Order, In the Matter of Adoption.
72. FED. R. EVID. 802 is identical to WYO. R. EVID. 802. *See* rule quoted *supra* note 12.

the Wyoming Rules of Evidence,[73] are two such exceptions which have been called the residual or catch-all exceptions because they provide for the admission of hearsay statements which are not covered by the traditional hearsay exceptions.[74] The Advisory Committee appointed to formulate the rules of evidence[75] viewed the catch-all provisions as a means of handling new and unanticipated situations which demonstrate a trustworthiness equivalent to that of the specifically stated exceptions. These provisions, it was felt, would allow for growth and development of the law of hearsay evidence.[76] Congress anticipated that the residual rules would be used only rarely, but were necessary for those situations not covered by the traditional exceptions in which the evidence was reliable and its admissibility appropriate.[77]

Circuit Court opinions reveal some confusion as to whether, because of its trustworthy requirement, evidence which satisfies Rule 804(b)(5) automatically satisfies the Confrontation Clause. In *United States v. West*, the Fourth Circuit found the grand jury testimony of one Brown, a subsequently murdered witness for the state, to meet the requirements of both Rule 804(b)(5) and the Confrontation Clause despite the witness's criminal record and an absence

73. FED. R. EVID. 803(24) and 804(b)(5) and WYO. R. EVID. 803(24) and 804(b)(6) provide:

> The following are not excluded by the hearsay rule . . . Other exceptions. 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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 803(24) applies when the witness is available and Rule 804(b)(5) or 804(b)(6) when the witness is unavailable.

74. *See generally* 4 D. LOUISELL & C. MUELLER, *supra* note 19, §§ 472, 491.
75. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, *supra* note 71, at iv. The committee was appointed by Chief Justice Earl Warren in March, 1965. *Id.*
76. *Id.* at 136.
77. S. REP. NO. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7066.

of cross-examination.[78] The court focused exclusively on the trustworthiness of the testimony. Constant surveillance of Brown by the Drug Enforcement Administration, tapes of his conversations with the defendant, and immediate transcription and verification of his statements corroborated his grand jury testimony. Moreover, the court found that Brown had an incentive to be honest and accurate in his statements to avoid further imprisonment.[79]

The court noted its obligation under the Confrontation Clause to make a separate determination as to the reliability of the grand jury testimony and the ability of the jury to judge the statement's trustworthiness. The court found that the circumstances which suffice to meet the requirements of Rule 804(b)(5) also satisfy the requirements of the Confrontation Clause.[80] Judge Widener in an eloquent dissent expressed his belief that the "majority's treatment of the confrontation clause . . . reduce[d] the constitutional provision to the status of a mere rule of evidence when, in fact, the clause was intended to regulate the procedure of a criminal trial by compelling the presence of the accuser before the jury and the defendant".[81] The important question is not, according to the dissent, whether the statement is accurate, but whether there has been adequate confrontation.[82]

In *United States v. Garner*, the Fourth Circuit again found the declarant's grand jury testimony to possess sufficient indicia of reliability to satisfy the Constitution and the rules of evidence.[83] Here, many of the details of the testimony were corroborated by another witness as well as by documentary evidence.[84] Justices Stewart and Marshall, dissenting from a denial of certiorari,[85] expressed grave doubts about the admissibility of grand jury testimony under either Rule 804(b)(5) or the Sixth Amendment.

78. 574 F.2d 1131 (4th Cir. 1978) [hereinafter cited in text as *West*].
79. *Id.* at 1135.
80. *Id.* at 1136-38.
81. *Id.* at 1139.
82. *Id.*
83. 574 F.2d 1141 (4th Cir. 1978) [hereinafter cited in text as *Garner*].
84. *Id.* at 1144-46.
85. United States v. Garner, 439 U.S. 936 (1978).

They reasoned that because grand jury investigations are not adversary proceedings where the witness is cross-examined and weaknesses in his story exposed, the reliability of such testimony is questionable.[86]

The Third Circuit in *United States v. Bailey* had before it the admissibility of an unsworn statement made to FBI agents by one of a pair of bank robbers.[87] The defendant objected that the notice and trustworthiness requirements of Rule 804(b)(5) had not been met.[88] The court held that the notice requirements was satisfied when the proponent of the evidence was without fault in failing to provide pre-trial information and the court granted a continuance.[89]

On the question of trustworthiness, the court ruled that a single corroborating piece of circumstantial evidence was insufficient. The trustworthiness of a statement should be based on more than corroborating facts. The circumstances under which the statement was made and the propensity of the declarant to tell the truth are also important considerations. Since Rule 804(b)(5) is triggered only when there is a need for the evidence, the court reasoned that it would make little sense to evaluate admissibility by looking only to the corroborating evidence.[90]

Although the court was not required to reach the constitutional issue, it expressed reservations as to the validity of the unsworn statements in view of the absence of cross-examination, the questionable reliability of the statement, and the importance of the statement to Bailey's conviction.[91]

The Eighth Circuit first addressed the issue of the admissibility of grand jury testimony in *United States v. Carlson*.[92] Based upon the grand jury testimony of one Tindall, Carlson was charged with distributing cocaine. When Tindall refused to testify at trial, apparently due to

86. *Id.* at 938.
87. 581 F.2d 341 (3rd Cir. 1978) [hereinafter cited in text as *Bailey*].
88. *Id.* at 347-50.
89. *Id.* at 348.
90. *Id.* at 349.
91. *Id.* at 350-51.
92. 547 F.2d 1346 (8th Cir. 1976) [hereinafter cited in text as *Carlson*].

fear of reprisal from Carlson, his prior testimony was admitted into evidence.[93]

The court first considered the trustworthiness requirement of Rule 804(b)(5) and found strong indications of reliability in Tindall's testimony. He was under oath, had participated in the underlying transaction, and had never recanted. The court also found there was substantial need for this testimony since Tindall was the only individual who could testify as to this particular transaction.[94]

The court found the testimony satisfied the materiality requirement of the rule since it was relevant to show intent, knowledge, a common scheme, and absence of mistake or accident.[95] The probative requirement was met since there appeared to be no source other than Tindall for this information.[96]

Although Carlson received no formal pretrial notice, the court did not allow this fact to bar admission of the testimony. The prosecution was excused from this requirement since it was unaware until the evening before trial that Tindall might not testify. Moreover, Carlson could have sought a continuance had he needed additional preparation time.[97]

The court did not reach the question whether receiving grand jury testimony under Rule 804(b)(5) denied Carlson his constitutional right to confront a witness against him. Rather, the court determined that Carlson had waived his confrontation right by his own misconduct in intimidating Tindall into refusing to testify.[98]

In contrast, the Tenth Circuit Court of Appeals in *United States v. Balano* held that the admission of grand jury testimony into evidence is an impermissible violation of a defendant's confrontation rights.[99] The court adopted

93. *Id.* at 1351-53.
94. *Id.* at 1354.
95. *Id.*
96. *Id.* at 1355.
97. *Id.*
98. *Id.* at 1359-60.
99. 618 F.2d 624, 627 (10th Cir. 1979).

the dissenting position in *United States v. West*,[100] and declared the Confrontation Clause to be concerned with more than the basic accuracy of hearsay statements. "[Grand jury testimony] is the equivalent of an *ex parte* deposition, it [is] not redeemed by a court appearance of [the declarant] and it [is] secured through a procedure that has become the arm of the 'examining magistrate'".[101] The court emphasized the importance that the Supreme Court has placed on cross-examination as a protector of confrontation values.[102]

THE HOPKINSON CASE

In *Hopkinson*, testimony relating to statements made by the murder victims to acquaintances and in a prior court proceeding was challenged by the defendant as inadmissible hearsay.[103] The State conceded the statements to be hearsay, but argued they were admissible under one of two exceptions to the hearsay rule, namely Rule 803(3)[104] or the catch-all exception Rule 804(b)(6).[105] The trial court admitted the evidence under Rule 803(3) for the limited purpose of showing the victims' states of mind just prior to death.[106] The Wyoming Supreme Court determined that the statements were inadmissible as 803(3) exceptions because the mental states of Vehar and Green were not relevant, since Hopkinson's defense was not based on suicide or any other theory which put the victims' mental states in issue.[107] The court ruled, however, that it must affirm on the hearsay issue if an adequate basis could be found to support the trial court's admission.[108]

The court found the challenged statements to be admissible under Rule 804(b)(6), relying upon four federal

100. United States v. West, *supra* note 78, at 1138-41.
101. United States v. Balano, *supra* note 99, at 627.
102. *Id.* at 628.
103. Hopkinson v. State, *supra* note 1, at 127-28, 134-35.
104. WYO. R. EVID. 803(3) provides: "The following are not excluded by the hearsay rule . . . [a] statement of the declarant's then existing state of mind, emotion . . . ."
105. Hopkinson v. State, *supra* note 1, at 128-29.
106. *Id.* at 128.
107. *Id.* at 130.
108. *Id.* (citing Sanville v. State, 593 P.2d 1340, 1345 (Wyo. 1979), which held that "the admission of evidence is within the sound discretion of the trial court and absent a clear abuse of discretion will not be disturbed").

cases which had construed the identically worded Federal Rule 804(b)(5).[109] The first of these was a civil case, *Furtado v. Bishop*, in which an attorney's affidavit was held admissible under the catch-all exception.[110] The court also relied on the reasoning in three criminal cases, *United States v. Carlson*[111] *United States v. West*,[112] and *United States v. Bailey*,[113] all discussed in the preceding section of this note.

The court then derived a test for determining the admissibility of hearsay under Rule 804(b)(6), based on these cited cases and the court's reading of the rule:

1) The declarant must be unavailable.
2) The adverse party must either have been given pretrial notice or a sufficient opportunity to prepare for and contest the admission of the hearsay.
3) The truth of the matter asserted must be evidence of a material fact.
4) The hearsay statement must be more probative than any other evidence which could be procured through reasonable efforts.
5) The statement must be supported by circumstantial guarantees of trustworthiness; this may be established either through other corroborating evidence or by considering the motivation and/or behavior pattern of the declarant.[114]

Although the defendant did not challenge the out-of-court statements of Vehar and Green on constitutional grounds, the court nevertheless incorporated into the test an additional limitation imposed by the Confrontation Clauses of both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Wyoming Constitution.[115] The court cited *California v. Green*[116] for

109. *Id.* at 130-31.
110. 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).
111. *See supra* notes 92-98 and accompanying text.
112. *See supra* note 78 and accompanying text.
113. *See supra* notes 87-91 and accompanying text.
114. Hopkinson v. State, *supra* note 1, at 131-32.
115. *Id.* at 132.

the proposition that the values of the Confrontation Clause and the hearsay rule are not the same.[117] The court then outlined the basic purposes of the Clause as being to afford the accused the right to cross-examine the witness, to permit the jury to observe the demeanor of the witness, and to bar convictions based solely on *ex parte* affidavits.[118] The court cited *Mattox v. United States*[119] and *Ohio v. Roberts*[120] as authority for admitting the prior statements of witnesses under "certain limited circumstances."[121] The court found the limited circumstances to be defined best in *Mancusi v. Stubbs*[122] as those circumstances which provide "indicia of reliability" and which "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[123]

The court concluded that before hearsay may be admitted under Rule 804(b)(6), the Confrontation Clause further requires the prosecutor to establish "that there exists sufficient background information concerning the circumstances under which the hearsay statement was made to provide the jury with an adequate basis to evaluate its veracity."[124]

Application of Test to Statements by Vehar

The court then applied the six-part test to statements attributed to Vehar:

1) No dispute existed as to the unavailability of Mr. Vehar.

2) Although pretrial notice of the specific hearsay statements was not provided in all cases, the names of the witnesses and sufficient information as to their likely testimony provided the defense opportunity to prepare for the introduction of the evidence. The court noted that the defendant never argued surprise.

116. California v. Green, *supra* note 37.
117. Hopkinson v. State, *supra* note 1, at 132.
118. *Id.* (citing United States v. Balano, *supra* note 99, Mattox v. United States, *supra* note 21, and California v. Green, *supra* note 37).
119. Mattox v. United States, *supra* note 21.
120. Ohio v. Roberts, *supra* note 54.
121. Hopkinson v. State, *supra* note 1, at 132.
122. Mancusi v. Stubbs, *supra* note 47.
123. Hopkinson v. State, *supra* note 1, at 132.
124. *Id.* at 132-33.

3) Evidence of threats made by Hopkinson was found to be material to the State's position that Hopkinson followed through on his threats.
4) Since Vehar was the only witness to the threats, the hearsay statements were more probative than any other evidence of the fact that such threats were made.
5) The hearsay was corroborated by other evidence as well as consistent with the behavioral pattern of Vehar. A complaint filed and signed by Vehar in a civil suit corroborated some of the statements. Further, all of the statements attributed to Vehar were consistent and he had planned to testify under oath at the civil suit as to the truth of his statements.
6) The prosecution provided extensive background information which satisfied the requirements of the Confrontation Clause. The history of two civil suits in which Vehar and Hopkinson were adversaries had been detailed with evidence of Vehar's character.[125]

Application of Test to Statements by Green

The court had no difficulty in finding the transcript of Green's testimony at the Hysell trial to be properly admitted under its test. The defense had pretrial notice that the transcript would be offered into evidence. Matters asserted in the testimony—that Hopkinson planned to falsely implicate Hysell in a murder and that Hopkinson threatened Green—were, if true, "quite material and relevant," as well as probative since "they were admissions made by Hopkinson."[126] The court noted that this testimony was trustworthy since Green was under oath at the time it was made, it was corroborated by other evidence, and his behavior confirmed the truth of his testimony. Finally, as required by component six, the confrontation element of the test, the jury was provided information as to Green's character, his behavior at the time he testified, and his relationship with Hopkinson "to adequately weigh the credence to be given the testimony."[127]

125. *Id.* at 133-34.
126. *Id.* at 134.
127. *Id.*

Similarly, the testimony of Green's sister as to statements made by Green easily passed the test:

> (1) and (2) Green was unavailable and the defense had pretrial notice of his sister's testimony.
>
> (3) Green's assertions to his sister concerning Hopkinson's threats, the Hysell murder scheme, and Hopkinson's hatred of Vehar were "relevant and material."
>
> (4) The statements were probative since they involved Green's knowledge as a participant or as the sole witness to Hopkinson's threats.
>
> (5) Corroborating evidence as well as Green's behavioral pattern provided adequate guarantees of trustworthiness.
>
> (6) The jury received sufficient background information to evaluate Green's story.[128]

A CLOSER LOOK AT THE HOPKINSON TEST

Rule 804(b)(6) Segment

The Wyoming Supreme Court perceived the need for a standard by which to judge the admissibility of hearsay evidence in criminal cases where the requirements of both Rule 804(b)(6) and the Confrontation Clause must be satisfied. The court began to develop a standard by enumerating the specific provisions of Rule 804(b)(6) as the first four components of its test. These provisions concern the unavailability of the witness, notice to the defense, and the materiality and probative value of the evidence. An examination of the manner in which the court applied these provisions to the challenged evidence in the case serves to flesh out the test components and illustrate the weight to be given each.

Notice Component: It appears that adequate notice will be important in the Wyoming courts. However, the court refrained from applying a rigid pre-trial notice requirement consistent with the letter of the rule and took a more

128. *Id.* at 135-36.

flexible approach, favored by the *West*[129] and *Bailey*[130] courts. So long as the defendant has time to prepare for the admission of the evidence, the notice requirement will be met.

Materiality Component: Consistent with the majority of federal courts,[131] as typified by *Carlson*[132], the Wyoming court did not consider this requirement to be a significant obstacle to the receipt of hearsay. Presumably the court will make an initial determination of relevancy, as it did when it disallowed the hearsay to show state of mind, and then not belabor the point in an attempt to show materiality. The mechanical manner in which the court applied this component of the test supports this conclusion.

Probative Component: This requirement was also deemed to be satisfied with no real discussion. Clearly, the hearsay will be sufficiently probative when the declarant was the only source of information or a participant in the underlying transaction.

Trustworthiness Component: The heart of Rule 804 (b) (6) is the trustworthiness requirement incorporated as the fifth component of the *Hopkinson* test. A hearsay statement, to be admissible under Rule 804(b) (6), must possess circumstantial guarantees of trustworthiness. The problem has been in ascertaining what factors guarantee that a statement is trustworthy. The *Hopkinson* test specifies that either corroborating evidence, or motivation and/or behavior of the declarant may be used to establish trustworthiness. These broad guidelines would appear to be designed to answer the concern voiced in *Bailey*[133] that there may be little or no corroborating evidence when the hearsay statement is most needed.[134]

129. United States v. West, *supra* note 78.
130. United States v. Bailey, *supra* note 87.
131. 4 D. LOUISELL & C. MUELLER, *supra* note 19, § 491, at 1202.
132. United States v. Carlson, *supra* note 92.
133. United States v. Bailey, *supra* note 87.
134. In cases where corroborating evidence is inadequate, a court would be forced to exclude the hearsay unless permitted to look to factors such as incentive of the declarant to tell the truth. The court in United States v. West, *supra* note 78, was able to rely on extensive corroborating evidence as well as behavioral/motivational factors to substantiate the reliability of grand jury testimony. Such extensive support is desirable, but not always available.

The flexible approach approved by the *Hopkinson* court is consistent with that of the Eighth Circuit Court of Appeals in *Carlson*.[135] In that case the court looked to factors other than corroborating evidence as indicia of reliability.

The catch-all exceptions to the hearsay rule were enacted as a means of reform—to provide a vehicle for treating new and unanticipated situations. This purpose would be defeated if the courts imposed excessively stringent requirments on admissibility under these exceptions. Thus, the *Hopkinson* court's flexible approach to a determination of trustworthniess provides room for growth and development of the law of evidence as contemplated by Rules 803 (24) and 804(b)(6).

The rules of evidence, of course, apply to both civil and criminal cases. However, in criminal trials, the rules must operate within the confines of the Sixth Amendment and other constitutional mandates designed to protect the accused.

Confrontation Clause Segment

The final component of *Hopkinson* test purports to satisfy the Confrontation Clause requirements of both the United States and Wyoming Constitutions. When a witness is unavailable, component six requires the prosecutor to establish "that there exists sufficient background information concerning the circumstances under which the hearsay statement was made to provide the jury wtih an adequate basis to evaluate its veracity."[136] This requirement of broad background information does not address the basic purposes of the Confrontation Clause which are to afford the accused the right to cross-examine the witness, to permit the jury to observe the demeanor of the witness, and to bar convictions based on *ex parte* affidavits. Although the *Hopkinson* court noted these concerns of the confrontation doctrine at the beginning of its analysis, it failed to adequately pay heed to them in developing its test.

135. United States v. Carlson, *supra* note 92.
136. Hopkinson v. State, *supra* note 1, at 133.

The holdings in the United States Supreme Court cases indicate that a totally unconfronted statement by a principal witness violates the Confrontation Clause. "Confrontation" is the critical aspect of the clause which establishes the Sixth Amendment as more than merely a constitutionalization of the hearsay doctrine. The *Hopkinson* test focuses on the ability of the jury to evaluate the evidence in light of the surrounding circumstances, but disregards the right of the accused to have the statement evaluated with the safeguards of cross-examination and demeanor observation. Broad background information cannot and should not substitute for the physical presence of a crucial witness.

Although the fundamental aspects of the confrontation doctrine are neglected, the *Hopkinson* test does question (1) whether a witness against the accused made the challenged statement and (2) whether circumstances exist which excuse an absence of cross examination.[137] Component three (the materiality requirement), in combination with component four (the probative requirement), arguably deal with the potential impact of an out-of-court statement to determine whether a declarant qualifies as a "witness against" the accused. This interpretation has merit in that it saves the materiality requirement from being a meaningless reiteration of the relevancy doctrine and also gives added force to the probative provision. Thus, a statement which is material, in the sense that it is important to the State's case, and at the same time is more probative than any other evidence which could be procured, would tend to be a strong statement by a principal, as opposed to a peripheral, witness. The facts of the case support this contention. Both victims related threats made by Hopkinson, statements which the court found to be material and probative. This evidence undoubtedly strengthened the State's case, as the jury would be inclined to believe that the man who threatened to kill the victims actually did so. Certainly Vehar and Green were "witnesses against" Hopkinson.

137. *See supra* note 59.

The test is triggered by the unavailability of a declarant to testify at trial, thus assuring that circumstances exist which excuse an absence of cross-examination. Presumably a witness is unavailable when any of the contingencies specified in Rule 804(a)[138] is met. Under the facts of the case, both Vehar and Green were deceased, obviously excusing their direct testimony at trial.

Thus, Vehar and Green were unavailable, principal witnesses whose testimony had considerable impact against the accused. Their statements which were admitted into evidence, however, were remarks to acquaintances or testimony from an earlier trial which had never been subjected to cross-examination by the defendant. Conceding that the statements were sufficiently trustworthy to be admitted under the catch-all exception to the hearsay doctrine, their admission, nevertheless, denied the accused his constitutional right of confrontation.

The *Hopkinson* court recognized that the Confrontation Clause is more than a rule of preference for direct testimony. The court's test takes into consideration the unavailability of the witness and the potential impact of his statement against the accused. However, the test succumbs to the dicta of the most recent Supreme Court decision, in that it denigrates the explicit rights of the defendant under the Sixth Amendment in favor of a liberalization of the rules of evidence deemed to be necessary in "the workaday world of conducting criminal trials."[139]

The Confrontation Clause of the Wyoming Constitution is available, however, as an alternative means of preserving

138. WYO. R. EVID. 804(a) provides:
Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant: (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or (3) Testifies to a lack of memory of the subject matter of his statement; or (4) Is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity; or (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

139. Ohio v. Roberts, *supra* note 54, at 66.

confrontation values. The Wyoming Court has not been reluctant in the past to look to the state constitution as a means of protecting rights it deems to be fundamental.[140] Missouri serves as an example of one state which has held that unconfronted hearsay is forbidden by the state constitution.[141]

CONCLUSION

The Wyoming Supreme Court has developed a six-part test designed to determine the admissibility of hearsay statements in criminal trials under Rule 804(b)(6). The first portion of the test is, for the most part, a reiteration of the catch-all evidence rule and is subject to mechanical application. The flexible notice requirement, which focuses on assuring the defense adequate opportunity to prepare for hearsay, precludes the stifling of evidence for technical noncompliance with the rule. The most valuable contribution of this portion of the test is the clarification as to how trustworthiness—the most essential and illusive requirement of the rule—is to be determined.

The test fails as a tool for the evaluation of hearsay evidence in criminal cases. While the availability of the witness and the significance of his statement to the state's case are properly considered, the test neglects to address the crucial requirement of the Confrontation Clause—confrontation.

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140. *See* Washakie County School District Number One v. Herschler, 606 P.2d 310 (Wyo. 1980); Comment, *Wyoming's Equal Protection Clause Mandates Fiscal Neutrality in School Funding*, 16 LAND & WATER L. REV. 691, 699 (1981).

141. State v. Newell, 462 S.W.2d 794 (Mo. 1971).