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The Procedural Dimension of Confrontation Doctrine

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When does the confrontation clause permit prosecution use of hearsay evidence? The Supreme Court addressed that question in three cases in 1986. In each of the three cases, the holding was consistent with the confrontation doctrine the Court had developed in its prior opinions. The analysis in the first case, *United States v. Inadi*,[1] was likewise consistent with past doctrine. However, three opinions in the other two cases proposed a radically new approach to confronta-

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1. 106 S. Ct. 1121 (1986).

tion doctrine. In *Lee v. Illinois*,[2] both the majority and dissenting opinions assumed that the only important dimension of confrontation doctrine was the reliability of the content of the hearsay. In *New Mexico v. Earnest*,[3] the per curiam opinion did no more than remand the case for reconsideration in light of *Lee*, but a concurring opinion by four Justices implied that the issue on remand should be whether the State could show the content of the hearsay was reliable.

This Article will analyze the implications of the Court's narrow concern with only the reliability of the content of the hearsay. The opinions in *Lee* and *Earnest* have suddenly, and for the first time, opened the door for the revival of trial by affidavit, even though none of the opinions mentioned that result and none suggests that the Court actually intends that result. In fact, the Court is not yet committed to that result, but then why did the Court employ a new approach to confrontation doctrine that could produce that result? The most likely explanation begins with the continuing disagreement among the justices on even the basic propositions of confrontation doctrine. Various theories described in the Court's opinions during the last two decades have produced an apparently inconsistent body of precedent. The result has been confusion, instead of the clear and stable doctrine needed by the lawyers and judges who must apply the confrontation clause in the courtroom. In *Lee* and *Earnest* the Court was again attempting to fill the void, by proposing a new hypothesis for organizing confrontation doctrine.

Confrontation doctrine will be neither clarified nor stabilized if the primary dimension is the reliability of the content of the hearsay. In practice, the Court's hypothesis will not bring clarity because the lower courts were given almost no guidance for evaluating the reliability of the content of the hearsay. The theory of confrontation will not be stabilized because the Court's hypothesis does not accurately describe the results of all the Court's own previous opinions. As a result, either confrontation doctrine will substantially change to follow the Court's hypothesis, or it will have to become even more complex in order to remain consistent with past opinions. The error that will result from focussing only on the content of the hearsay could cut either way. For some fact situations a defendant could be denied the right of confrontation and convicted in the equivalent of a trial by affidavit. On other facts an unnecessary test of reliability will exclude prosecution evidence that does not violate the Court's longstanding definition of the right of confrontation.

The puzzle of confrontation doctrine must still be solved, but the Court's hypothesis is not the correct place to start. The Court's error

2. 106 S. Ct. 2056 (1986).
3. 106 S. Ct. 2734 (1986).

was not just the choice of reliability of content as the critical dimension. The error was more basic, in its failure to analyze the underlying assumption that there should be only one global theory of confrontation with one primary dimension. Why assume that there must be a single theory to define the limits on prosecution use of all kinds of hearsay? Judges and commentators have tried to define such a theory, but after all the effort of two decades there is still no consensus. This strongly suggests it is time to concede that the idea of confrontation is too complex to reduce to a single dimension. The persistence of the puzzle also suggests the need to seek a solution that has not been tried before. What other structure can be used to organize the Court's precedent?

Part I of this Article will explain why there must be at least one more dimension of confrontation doctrine, a procedural dimension for the manner by which the hearsay was created. Part II will present an alternative structure that describes confrontation doctrine with six parallel rules instead of one global theory. Part III will test these two ideas, considering why they provide a solid foundation for extrapolating rules of confrontation for fact situations the Court has not yet considered.

I. HEARSAY CREATED IN THE PROCESS OF PROSECUTION

A. Why There Must Be Another Dimension

The Court's narrow focus in *Lee* and *Earnest* on the reliability of the content of the hearsay completely overlooked the procedural dimension that has always been an integral, but implicit, part of confrontation doctrine. Almost a century ago the Court identified a major purpose of the confrontation clause as the prevention of trial by affidavit,[4] a theme often repeated in later opinions.[5] The procedural dimension was based on an unstated assumption that the right of confrontation restricted the ability of the government to create and use hearsay as a substitute for live testimony. The confrontation clause in the sixth amendment was a limit on the procedure the government could use to prosecute, similar to the fourth and fifth amendment limits on the procedure the government can use to gather evidence.

The procedural dimension has long defined an important distinction in confrontation doctrine because some use of hearsay by the prosecution does not resemble trial by affidavit. The use of hearsay most closely resembles trial by affidavit when the hearsay is created by the government in the investigation or prosecution of the crime. The 1986 opinions ignored that distinction about the procedure by

4. Mattox v. United States, 156 U.S. 237, 242 (1895).

5. *E.g.*, California v. Green, 399 U.S. 149, 156-57 (1970); Barber v. Page, 390 U.S. 719, 721 (1968); Douglas v. Alabama, 380 U.S. 415, 418-19 (1965).

which the hearsay was created, even though the hearsay in both *Lee* and *Earnest* was created when the police interrogated accomplices of the defendants. The prosecution's use of the specific hearsay was not approved in either case, but the opinions suggest that content alone could provide sufficient indicia of reliability, even for hearsay created in the process of prosecution. None of the opinions recognized how this focus on reliability of content alone could revive the equivalent of trial by affidavit. The procedural dimension was simply not discussed because the Court ignored what its own opinions had defined as essential parameters for any theory of confrontation doctrine.

In *Ohio v. Roberts*,[6] Justice Blackmun identified a key problem that complicates the attempt to describe confrontation doctrine. While the Court needs to develop the doctrine slowly, in "the common law tradition, . . . building on past decisions, drawing on new experience, and responding to changing conditions,"[7] the doctrine is most often applied by trial judges who have a "need for certainty in the workaday world of conducting criminal trials."[8] For trial court application, confrontation theory must be reduced to a workable set of relatively clear rules for a majority of situations. For further development of the constitutional doctrine by the Court, there must be room to adapt the theory to new kinds of hearsay or new dangers from prosecution use of hearsay, but the adaptation must not require overruling prior decisions. The Court also apparently wants to avoid transforming every hearsay issue in every federal and state prosecution into a major issue of constitutional interpretation. *Roberts* emphasized that no simple theory of confrontation would meet all these conditions, a caution well illustrated by the analysis in *Roberts* itself.

Notwithstanding its own caution, the opinion in *Roberts* described a two dimension structure for confrontation doctrine with limits on prosecution use of hearsay defined by rules of availability and indicia of reliability.[9] If the two dimensions were intended to define a global theory of confrontation, they did not meet the stated requirements of *Roberts* itself for a doctrinal structure that would provide clarity, consistency, and stability with room for flexibility. The announced rule of necessity is too broad to be applied literally because requiring production of all available declarants would suddenly eliminate many hearsay exceptions from the prosecution arsenal and run completely counter to the structure of the Federal Rules of Evidence. The second dimension for indicia of reliability is too ambiguous for routine application in a trial court. Sufficient indicia were not defined in *Roberts*, nor did the opinion make clear whether the indicia applied to the gen-

6. 448 U.S. 56 (1980).
7. *Id.* at 64.
8. *Id.* at 66.
9. *Id.* at 65-66.

eral type of hearsay or the specific hearsay in each case. Case by case evaluation of specific facts preserves complete flexibility, but there will be little certainty or clarity if each trial judge is required to make an individual evaluation of the reliability of the hearsay evidence in each case. *Roberts* did not give clear directions to trial judges facing different fact situations, but the Court provided no further guidance until 1986.

Of the three 1986 opinions, *Inadi*[10] provides the most valuable clue for solving the puzzle of confrontation, even though it is the one opinion that expressly did not declare a theory of confrontation. The issue in *Inadi* was whether the Third Circuit[11] had correctly concluded that the availability dimension of *Roberts* applied to coconspirator hearsay. The Supreme Court's approach in *Inadi*, to set *Roberts* aside as a narrow opinion on specific facts,[12] means that *Roberts* did not establish a global structure of confrontation. At the same time, *Inadi* also implicitly reaffirmed some of the language Justice Blackmun had used in *Roberts* to describe confrontation doctrine in general. Justice Blackmun had explicitly declared the Court's intention to continue building on past decisions and not map a theory of confrontation that would resolve all hearsay issues. His opinion had reviewed the extensive literature but did not endorse any specific approach. Justice Blackmun had described the result in *Roberts* as a continuation of the Court's middle course, of excluding some but not all hearsay under the confrontation clause, and cautioned that a century of cases would not be lightly overruled. *Inadi* reiterated those themes and suggested that there were specific lines of cases, with the results of the cases more reliable precedent than the theories that might have been proposed.[13]

It is clearly wrong to assume that all possible dimensions of confrontation doctrine have been expressly mentioned in the Court's opinions. Common law development is possible only if the Court is free to employ dimensions it has not previously cataloged. What the Court's opinions do suggest are some parameters for those dimensions. Any dimension of confrontation doctrine ought to provide clarity, consistency, and stability with room for flexibility. Any dimension should be consistent with the Court's past decisions so that precedent is not undercut. Any dimension should be consistent with the confrontation policies the Court has recognized. Finally, any dimension should lead to accurate and useful answers about prosecution use of hearsay on facts the Court has not considered. To paraphrase Justice Blackmun in *Lee*, confrontation doctrine must be consistent "with theory and

10. United States v. Inadi, 106 S. Ct. 1121 (1986).
11. United States v. Inadi, 748 F.2d 812 (3d Cir. 1984).
12. United States v. Inadi, 106 S. Ct. 1121, 1125-26 (1986).
13. *Id.*

pronounced principles [but not] disregard the significant realities that so often characterize a criminal case."[14] A dimension for whether the hearsay was created by the government in the prosecution of the crime satisfies the parameters, clarifies confrontation doctrine, and provides accurate answers to some difficult questions. In contrast, the Court's hypothesis that reliability of the content of the hearsay is the dominant dimension does not satisfy the Court's own parameters. The reason for this difference is not hard to find. The procedural dimension has been implicit in confrontation doctrine for centuries, while the Court's hypothesis was first articulated in 1986.

B. The Historical Evidence

The current consensus traces the confrontation clause to objections to the method of prosecution used in the trial of Sir Walter Raleigh.[15] A single case, four centuries old, cannot fully define modern confrontation doctrine, but Raleigh's case is valuable because it is also a classic hypothetical. The chief evidence against Raleigh was a sworn written statement of Lord Cobham, a statement made to royal commissioners who interrogated Cobham in the tower where he was jailed. The accusatory statement may have been coerced; its reliability was certainly undercut because Cobham retracted the statement and then recalled the retraction. Even though Raleigh demanded that Cobham be produced, Cobham was never called as a witness. The perceived evil of Raleigh's prosecution is most often labelled as trial by affidavit because the prosecutor used the written statement instead of Cobham's testimony.

If modern confrontation doctrine should bar any repeat of Lord Coke's method of prosecuting Sir Raleigh, what was the unfairness that should not be repeated? Excluding all hearsay is clearly not a viable interpretation. The Court has consistently refused to hold that the confrontation clause prohibits all prosecution use of hearsay.[16] What was specifically wrong with the use of Lord Cobham's accusatory statement that would not also be wrong with prosecution use of any hearsay? Other commentators have constructed theories of confrontation that identify various distinguishing features. Cobham was certainly a principal witness in the prosecution's case,[17] the defendant clearly wanted a chance to confront the accuser,[18] and a repudiation

14. Lee v. Illinois, 106 S. Ct. 2056, 2066 (1986)(Blackmun, J., dissenting).

15. *See* Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 208-10 (1984); Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100-01 (1972).

16. *E.g.*, Ohio v. Roberts, 448 U.S. 56, 62-63 (1980).

17. *See* Graham, *supra* note 15, at 129.

18. *See* Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1206-07 (1979).

would have undercut the apparent reliability of the conviction.[19] None of those interpretations can be declared wrong on the strength of Raleigh's case alone; there is simply too little contemporary evidence to establish a single interpretation of the confrontation clause. But those interpretations inevitably lead to theories of confrontation that are not easily applied in the trial courtroom.

Do the two dimensions of *Roberts* adequately identify the unfairness in the prosecution of Raleigh? Cobham's statement was not obviously reliable, and apparently the declarant was available. But it is hard to accept that the use of the statement would have appeared to be a fair method of prosecution if death had made Cobham unavailable. Similarly, would its use have been that much more acceptable if there had been less evidence of coercion, and there had been enough indicia of reliability from the self-incriminating contents of the statement and other consistent evidence to convince the trial judge the statement was probably true? *Lee* may suggest that an accomplice's confession could be used if the trial judge found indicia of reliability of the content of the hearsay, but Raleigh's demand was to confront his accuser, not to have the evidence survive a judicial balancing test. Similarly, the facts in *Lee* are a reminder that judges may have more experience than jurors at evaluating the reliability of hearsay, but again Raleigh's demand was to confront Cobham before the factfinder, not to substitute a more experienced factfinder.

In *Inadi* the dissenting Justices suggested that the unfairness in the prosecution of Raleigh was prosecution use of the "deposition of an alleged accomplice who had since recanted."[20] Three factors were included in that description, but the dissent implied the real unfairness was using the statements of accomplices, what it labelled the "boasts, faulty recollections, and coded or ambiguous utterances of outlaws."[21] The majority ignored two of the three factors, and responded only to the argument against accomplice testimony, by declaring that coconspirator statements during the conspiracy were as good or better than trial testimony because they were contemporaneous with the crime. But did the dissent focus on the essential unfairness in the prosecution of Raleigh? Raleigh's conviction would still have appeared unfair if Cobham had not been an accomplice but a bystander witness whose affidavit from the tower described observing Raleigh's preparation for a treasonous attack. Raleigh's demand was to confront the witness, not that he be convicted only by the testimony of nonaccomplices.

History alone is an inadequate basis for interpreting the "faded

19. *See* Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1372-75 (1985).
20. 106 S. Ct. 1121, 1135 (Marshall, J., dissenting).
21. *Id.*

parchment"[22] of the confrontation clause, but the Court has sought an interpretation that is consistent with the known historical evidence while permitting some adaptation to the modern world.[23] If a primary object of the confrontation clause was preventing criminal prosecution by deposition or ex parte affidavit, then the procedure used by the government should not appear to be trial by affidavit. The description of Raleigh's trial as unfair trial by affidavit identifies what may be the most obvious attribute of Cobham's statement—it was prepared by the government for use in the prosecution of Raleigh. That does not make government creation of the hearsay the only factor in confrontation analysis, but it does explain why it should be a significant dimension.

C. The Process of Prosecution

The ultimate effect of confrontation doctrine may be most apparent when a prosecutor is not permitted to introduce hearsay evidence at trial, but the structure of confrontation doctrine must describe its effect on the entire process of prosecution. The reduction of confrontation to the single dimension of reliability of the content of the hearsay is the inevitable result of a focus on the trial alone. Then it is easy to assume that the prosecutor at trial is an autonomous litigator who must prove a case with the evidence that is available at the time of trial. The opinion by Justice Brennan in *Lee* illustrates how easily even experienced judges can be misled by this erroneous focus on the trial. *Lee* suggests that the goal is to have "the accused and accuser engage in an open and even contest in a public trial."[24] *Lee* also implies that a prosecutor could use hearsay after a judicial finding that the content of the hearsay is reliable, perhaps based on the extent the defendant's confession interlocks with a codefendant's confession. The next section will discuss how *Lee* misconstrued the Court's precedent on interlocking confessions. For now it will suffice to observe the implicit lesson of *Lee* for interrogating police officers—if the police can create the right kind of hearsay by coordinating two confessions, then the prosecutor will not have to use live witnesses for the trial of either defendant. Instead of an open and even contest, the effect of the hypothesis in *Lee* would be a show trial in which the prosecutor could prove the essential elements of the crime with evidence prepared in secret.

The focus on the time of trial leads to the wrong answer when considering hearsay created in the process of prosecution because it produces irrelevant questions. The argument, always implicit and never discussed, follows these lines: why should the government have to

22. California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring).
23. *E.g.*, Ohio v. Roberts, 448 U.S. 56, 62-63 (1980).
24. Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986).

forego the second-best alternative, of using hearsay evidence to prosecute, just because there was no confrontation when the hearsay was created? Because it is now too late to allow actual confrontation of an unavailable witness at trial, can't the defendant's rights be protected by the trial judge's evaluation of reliability? These questions are irrelevant because the critical time is not only the time the evidence is offered by the prosecutor, but also the time the hearsay is created by the government for the prosecution. The focus on the time of trial allows the government to select a method of prosecution that creates hearsay prior to trial without any chance for confrontation.

The dimension for availability of the declarant does not eliminate the error of allowing the government to create hearsay for prosecution of a crime. If unavailability permits the government to use any kind of hearsay, as long as its content appears reliable to the trial judge, then the risk that unavailability will destroy the chance of confrontation falls entirely on the defendant. Why should the defendant be singularly subject to that risk when, for hearsay created in the process of prosecution, it is the government that selects the procedure for prosecution? The government can select procedures that both preserve testimony and permit confrontation, but the reliability dimension alone weakens the incentive to do so.

In federal court the outer limit of confrontation doctrine is frequently tested by prosecution use of grand jury testimony. The difference between grand jury testimony and preliminary hearing testimony illustrates why confrontation doctrine cannot narrowly focus on the trial courtroom. In those states where there is a judicial determination of probable cause after a preliminary hearing, the defendant will have an opportunity to cross-examine the prosecution witnesses who testify at the preliminary hearing. That cross-examination may not be the ideal equivalent of cross-examination at trial, but at least there is a form of confrontation that the Court has held is sufficient if the prosecutor is then unable to obtain live testimony at trial.[25] If the defendant waives the preliminary hearing or the prosecutor does not call a known witness there will of course be no confrontation or cross-examination, but there will also be no formally recorded hearsay declarations. In federal court, or those states where the grand jury indictment is used, there is no chance to cross-examine or confront the witness before the grand jury. If the prosecutor can create grand jury testimony and use it when the witness becomes unavailable, then the government's choice of that method of prosecution eliminates the defendant's opportunity to confront some hearsay declarants.

Any requirement of live witnesses makes effective prosecution of

25. Ohio v. Roberts, 448 U.S. 56, 70-73, 75-77 (1980).

crime more difficult. In every prosecution there is some chance a witness will die, forget, or refuse to testify because of fear or intimidation before trial. If the defendant causes the unavailability of the testimony it may be fair to reject the demand for confrontation, but the defendant is not always the cause. If testimony becomes unavailable, but not because of the defendant's actions, and the prosecutor has done nothing beyond presenting the testimony to the grand jury, the defendant could escape conviction. It may at first appear that the use of the grand jury transcript is essential for effective prosecution, even if the resulting procedure appears to be trial by affidavit using evidence remarkably similar to Lord Cobham's confession. The error has been the failure to address the implicit assumption that it is too late for any other solution that will protect the legitimate need to prosecute offenses. A state prosecutor proceeding by information and judicial determination of probable cause faces the same risks but can continue the prosecution using the preliminary hearing testimony.

There is a clear reason for applying a more rigorous rule of confrontation for the grand jury testimony, because it is hearsay created in the prosecution of the crime. The government defines the method of prosecution, and the prosecutor is only one part of the entire government process of prosecution. Use of the grand jury may be constitutionally required in federal court and in some state courts, but that does not bar the creation of additional procedures like a preliminary hearing or depositions where there is a need to preserve testimony and protect the right of confrontation. The risk of witness intimidation is not an argument for permitting use of grand jury testimony or other hearsay created in the process of prosecution without affording any chance of confrontation. Rather, it is an argument for creation of some alternative procedure that will minimize the chance that a prosecution will have to be abandoned if a witness dies or eventually refuses to testify, but at the same time will allow a meaningful form of confrontation for hearsay created during the process of prosecution.

Grand jury testimony is only one example of why the search for a proper balance between the legitimate need for effective criminal prosecution and the defendant's constitutional rights must consider how confrontation doctrine affects the entire process of prosecution. Police interrogation, as in *Lee* and *Earnest*, may appear to present an entirely different fact pattern, but on closer examination the similarities are more significant. A prosecutor creates a transcript of prior testimony when an accomplice or witness testifies before the grand jury. A police officer creates a written statement or tape recording when an accomplice or witness is interrogated in the police station. The major difference between grand jury testimony and police interrogation is only a matter of specialization among those responsible for the investigation and prosecution of crime. Both methods of creating

hearsay exclude any chance of confrontation when the declarations are made. Successful prosecution becomes more difficult when either hearsay declarant refuses to repeat the accusations at trial. To remain consistent, confrontation doctrine must consider both the prosecutor and police officer as part of the entire process of prosecution.

D. Structure of the Federal Rules of Evidence

Restoring the dimension for the procedure by which the hearsay was created would neither upset the stability of confrontation doctrine nor convert every hearsay issue into a constitutional question. Federal prosecutors must often use the residual exceptions to introduce hearsay created in the process of prosecution, such as grand jury testimony, because the historical suspicion of government created hearsay is inherent in the structure of the Federal Rules of Evidence. The specific exceptions exclude the possibility of prosecution use of the kinds of hearsay typically created by the government in the prosecution of the crime. While the Court has assumed that the confrontation clause should not be a mirror image of the hearsay rules, there has been no suggestion it intends to abandon the structure of the Federal Rules. The drafters of the current Rules were well aware of the competing policy arguments and had to work within the limits established by the Court's early confrontation decisions. In addition, the Court did accept the basic structure when the Rules were first adopted.[26]

Most of the specific exceptions in Rule 803 permit the prosecutor to use the hearsay even if the declarant is available. Whether an excited utterance, a declaration of state of mind, or a business record, the hearsay that falls within these exceptions is not hearsay created during the prosecution of the crime. In contrast, for the types of hearsay usually created by the government in the prosecution of a crime, the Rules do not permit a prosecutor to use the specific exceptions. The largest category not available to the prosecutor is the hearsay exception in Rule 803(8) for public records of law enforcement agencies and factual investigations of all government agencies. Similarly, a prosecutor may not use the less common exception for previous convictions under Rule 803(22). The prosecutor is not denied the use of all hearsay created by the government. For example, the prosecutor may use non-law enforcement public records under Rule 803(8)(B), a kind of hearsay that is not usually created for the prosecution of a crime.

The specific exceptions in Rule 804 also distinguish hearsay created in the prosecution of the crime, even if these rules do not explicitly state the specific restrictions on the prosecutor found in Rule 803. Even unavailability of the declarant is not enough to allow the prose-

26. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972), *suspended by* Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973).

cutor to use the exception in Rule 804(b)(1) for prior testimony, which in a criminal case will usually have been created earlier in the prosecution of the case. An opportunity for confrontation when the testimony was given is required before the prosecutor can use it. The prosecutor may use a dying declaration under Rule 804(b)(2), but the common image of a dying declaration is a statement to bystanders or to the police without prior arrangement before the formal process of investigation has begun. For declarations against interest, the language of Rule 804(b)(3) provides little guidance. Use of such hearsay to exculpate the defendant got more attention than use by the prosecutor to inculpate;[27] as a result the confrontation issue was simply left to the courts to resolve.[28] There is one relevant suggestion in the Advisory Committee Note. The Committee disclaimed any intention to resolve the confrontation issue and observed that the Court's decisions had limited a prosecutor's ability to use the exception, but it did argue that there might be times a prosecutor could use the exception. The Note contrasted a statement while in police custody, to be excluded, and the same statement to an acquaintance, to be admitted.[29]

Finally, the Rule 801(d) exclusions follow the same implicit structure. The prosecution may well have been involved in the creation of the three kinds of Rule 801(d)(1) hearsay—prior inconsistent and consistent statements and identifications—but that hearsay is admissible only if there is a chance for cross-examination at trial, and that should satisfy the requirement of confrontation. The hearsay within the Rule 801(d)(2) exclusions, including statements of the defendant and statements of coconspirators in furtherance of the conspiracy, are usually created without involvement by the government, and the evidence rules permit the prosecutor to use such hearsay without further conditions.

Perfect consistency between hearsay rules and confrontation doctrine would be unrealistic to expect and unwise to implement. Even if certain hearsay exceptions in the Federal Rules of Evidence are limited by the confrontation clause, they can still be proper for civil litigation. Even if the residual exceptions should not be routinely and easily available for prosecution use of hearsay created in the prosecution of the crime, there may yet be situations where confrontation doctrine should permit use of such hearsay. But any structure of confrontation doctrine that does not include a dimension for the pro-

27. *See* Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851 (1981).

28. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804(b)(3)[03] (1985); 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 489 (1980).

29. FED. R. EVID. 804(b)(3) advisory committee note (originally FED. R. EVID. 804(b)(4) advisory committee note, 56 F.R.D. 183, 327-28 (1972)).

cedure by which the hearsay was created will be substantially inconsistent with the structure of the Federal Rules of Evidence. That is bound to produce confusion as trial lawyers and trial judges try to learn where they are similar or dissimilar.

E. Balancing Effective Prosecution and Defendant's Rights

The broader focus that includes the entire process of prosecution shows how it is possible to develop the structure of confrontation doctrine to permit prosecution use of some hearsay while guarding against any procedure that replicates trial by affidavit. It is too late for corrective action when the evidence is offered at trial. The more important times are earlier—when the hearsay is created and when the government begins the process of prosecution. Much ordinary hearsay is created without government involvement before the investigation of the crime even begins. An excited utterance or present sense impression, a statement for medical treatment, a declaration of state of mind, or even business records are usually created in situations where neither the police nor the prosecutor are creating hearsay for the purpose of prosecution. For such hearsay the government cannot provide an immediate opportunity for confrontation, so it may be appropriate to treat a prosecutor at trial more like any other trial lawyer. A confrontation rule that distinguished other hearsay from hearsay created in the process of prosecution and applied a less rigorous test would not be inconsistent with the available history or the Court's decisions.

The dimension for the procedure by which the hearsay was created better meets the requirements for both clarity and flexibility than other theories proposed to complete the structure of confrontation doctrine. Before the focus on reliability generated by *Roberts*, Justice Harlan had suggested that confrontation requires calling only available witnesses.[30] His rule is too broad on some facts and too narrow on others. It would allow prosecution use of the ex parte affidavits of deceased witnesses with no opportunity to cross-examine but deny prosecution use of most of the hearsay exceptions in Rule 803. Neither result fits all the Court's opinions. Commentators have proposed various confrontation theories with refined definitions of "witnesses against" the defendant. Professor Kenneth Graham has suggested that confrontation doctrine should limit prosecution use of hearsay of a declarant who is a "principal witness" against the defendant.[31] Professor Westen has suggested that confrontation doctrine should limit prosecution use of hearsay statements of a witness "whom the prosecution can reasonably expect the defendant to wish

30. California v. Green, 399 U.S. 149, 172-74 (1970) (Harlan, J., concurring).
31. Graham, *supra* note 15, at 129.

to cross-examine."[32] Professor Michael Graham has suggested that confrontation doctrine should prevent prosecution use of hearsay statements of an "accusatory" witness.[33] All three refinements try to fit the results of the Court's opinions by proposing a test that would never be workable in the daily routine of criminal prosecutions in state and federal trial courts. In addition, none will easily accommodate the *Inadi* result.

Restoring the procedural dimension for hearsay created in the process of prosecution will increase the clarity of confrontation doctrine because it does provide a workable test for trial court judges. Whether the hearsay was created in the process of prosecution will be clear in the substantial majority of cases, even if certain fact situations will require closer analysis. The courts will be able to gradually refine the definition of when hearsay has been created by the government in the process of prosecution. The procedural dimension can be made explicit without destroying the stability of confrontation doctrine because it has been an implicit dimension in the Court's decisions. It will neither cripple effective prosecution nor freeze the ongoing common law development of confrontation doctrine, as long as it is kept a significant but not global dimension of confrontation doctrine. The next section describes how the procedural dimension fits the structure of confrontation doctrine, and how it helps define the outer limits of the rules of confrontation.

II. THE STRUCTURE OF CONFRONTATION DOCTRINE

A. The Established Rules

This Article proposes that confrontation doctrine should be described by a structure of parallel rules, rather than one by global theory. This structure will best accommodate the procedural dimension and most accurately incorporate the results of all the Court's decisions. In this structure each rule describes a distinct fact situation that is sufficient to allow prosecution use of hearsay. The following structure provides the foundation for a coherent description of confrontation doctrine because it describes the rules the Court has established for prosecution use of hearsay evidence.

> Rule 1. [*Trial Confrontation*] A prior statement may be used by the prosecutor if the defendant has an adequate opportunity to cross-examine the declarant at trial.
>
> Rule 2. [*Prior Confrontation*] Testimony under oath from a prior proceeding may be used by the prosecutor if the defendant had an adequate opportunity to cross-examine the declar-

32. Westen, *supra* note 18, at 1207.

33. Graham, *The Confrontation Clause, The Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151, 192 (1978).

ant at the time the hearsay was created, and the declarant is unavailable at trial despite the prosecutor's reasonable efforts to make the declarant available for cross-examination at trial.

Rule 3. [*Waiver*] Actual confrontation is not required if the defendant waives the right of confrontation.

Rule 4. [*Nonhearsay Purpose*] A prior statement may be used for a valid nonhearsay purpose, but in a jury trial there must be a good reason to conclude the jury will not also use the statement for a hearsay purpose.

Rule 5. [*Dying Declaration*] Neither confrontation when the statement was made nor confrontation at trial is required if the statement is a dying declaration.

Rule 6. [*Coconspirator Statement*] Neither confrontation when the statement was made nor confrontation at trial is required if the statement was made by a coconspirator within the scope and in furtherance of the conspiracy.

Looking for an undeclared structure in the Court's opinions is a speculative venture at best, particularly when the Justices hold disparate views of confrontation, none has ever suggested such a structure, and the Court has rejected every other theory that has been proposed. The accuracy of the proposed structure can be neither proven nor disproven by citation of precedent. Its accuracy depends on how well it matches the results of the Court's opinions. Its value is the way it clarifies the established rules of confrontation doctrine. This Article certainly does not suggest the Court itself is following this structure. To the contrary, it argues that the Court's failure to recognize the structure established by its own opinions has prolonged the puzzle of confrontation doctrine and caused the disappearance of the procedural dimension.

The proposed structure provides a fresh direction by clarifying some critical and perplexing issues of confrontation doctrine. The conditions for prosecution use of hearsay in the six rules make clear that reliability of the content of the hearsay has not been the primary dimension of confrontation doctrine. The six rules also show how the manner in which the hearsay was created has been an implicit dimension of confrontation doctrine. Hearsay created in the process of prosecution can be used by a prosecutor, but only if some procedure provided the equivalent to the normal direct and cross-examination, under the first two rules, or if there is no reason to require any equivalent procedure, under the second two rules. The last two rules permit prosecution use of hearsay without any procedural equivalent to confrontation at trial, but those rules apply only to types of hearsay that are not typically created by the government in the prosecution of the crime.

The proposed structure is concededly not a complete theory of con-

frontation. It describes the results of the Court's opinions, and the Court has considered only a few fact situations. Even so, the six rules eliminate much of the confusion by showing an internally consistent organization of the Court's opinions that provides clear guidance for the typical fact situations the Court has considered. The structure also provides a foundation for extrapolating rules for the fact situations the Court has not yet considered. It shows how the Court can consider specific situations, one case at a time, and avoid the fruitless quest for one global theory. Where appropriate, each of the six rules can be more extensively defined. Other factual situations may fit within the established rules because the Court's few opinions have not yet clearly marked the outer boundaries of each rule. There is also room to define completely new rules for other kinds of hearsay. For example, the Court has not yet considered whether or how the right of confrontation limits prosecution use of many types of hearsay, like business records or declarations of state of mind.

The structure described by the six rules also shows that the Court's latest hypothesis is contrary to the Court's own precedent. For hearsay created by the government in the process of prosecution, reliability of the content alone has never been a sufficient condition for prosecution use of the hearsay. The absence of any procedural dimension would allow the government to create hearsay for the purpose of prosecution, using a procedure that avoided confrontation, and likewise avoid any chance of confrontation at trial by showing the reliability of the content of the hearsay that it had created. That would revive the very trial by affidavit the Court has long assumed was barred by the sixth amendment. In contrast, the constraints imposed by the confrontation clause may well be less severe for hearsay not created by the government in the process of prosecution. Once the Court abandons the assumption that all hearsay is equivalent under one global theory of confrontation, it will have the flexibility that is essential to create workable rules for other kinds of hearsay not created in the process of prosecution.

The Supreme Court has considered prosecution use of hearsay in only six fact situations, so only six rules can be stated with any confidence. Given the lack of consensus among commentators on any organizational scheme, it is important to present a basic description of how the opinions support each rule. Although the discussion will review the facts of the Court's leading cases in sufficient detail to explain how the proposed structure fits the results of the opinions, I will assume the reader is familiar with the facts, as excellent descriptions of the facts are available elsewhere.[34] The six rules can be understood without a separate definition of hearsay, but the definition of hearsay in

34. *E.g.*, 4 D. LOUISELL & C. MUELLER, *supra* note 28, at 133-50.

the Federal Rules of Evidence may not be accurate for every application of confrontation doctrine.

1. Trial Confrontation

California v. Green[35] is still one of the Court's leading confrontation opinions and the key opinion that establishes the rule that a prosecutor can use hearsay if the defendant is given an opportunity to confront the declarant at trial. In *Green* the prosecutor introduced two hearsay statements in order to convict the defendant of furnishing marijuana to a minor. First the minor told a police officer he got the marijuana from Green, and then, at the preliminary hearing, the minor testified he got it from Green. At the preliminary hearing Green was extensively cross-examined by defense counsel. When the minor was called as a witness at trial, he was evasive and uncooperative and refused to name Green as his supplier. The prosecutor then used the minor's preliminary hearing testimony both to refresh his memory and as a prior inconsistent statement; under California law that hearsay was also admissible for the truth of the assertions. The police officer also testified about the minor's oral statements that had named Green as his supplier.

The opinion in *Green* presented two reasons for holding that the prosecutor's use of the two hearsay statements did not violate the confrontation clause. One reason, confrontation when the hearsay statement was made, applied only to the preliminary hearing testimony and will be considered under the second rule for prior confrontation. The other reason that supports this first rule, confrontation at trial, applied to both hearsay statements. In Part II of *Green*, the Court held that prosecution use of the prior statements did not violate the right of confrontation if the declarant testified and was subject to cross-examination at trial, whether or not there had been an opportunity to cross-examine when the statements were made.[36] For the preliminary hearing testimony the Court did not have to decide whether the trial confrontation was adequate because that use was upheld on the alternative theory. For the statement to the police officer, the Court could not determine from the record whether the trial confrontation was adequate because the declarant claimed a lack of memory at trial. In Part IV of *Green* the Court reaffirmed that adequate confrontation at trial would permit prosecution use of the hearsay; the Court remanded the case to allow the state court to determine whether the limited cross-examination of the minor about the oral statement to the police officer was adequate confrontation at trial.[37]

35. 399 U.S. 149 (1970).
36. *Id.* at 164.
37. *Id.* at 168-70.

The analysis in Part II of *Green* illustrates an alternative dimension to both the two dimensions of *Roberts* and the hypothesis of *Lee*. The Court did not mention any requirement that the prosecutor show indicia of reliability of the content of the hearsay; it appears from the opinion that there were no indicia of reliability independent of the hearsay. The Court considered the chance to cross-examine at trial sufficient to protect the defendant's confrontation rights. Unavailability was obviously moot. Instead, actual availability of the declarant for cross-examination at trial was the only dimension the prosecutor had to satisfy, an illustration of the consistent assumption that each of the six rules is a sufficient condition for prosecution use of hearsay. The hearsay had been created by the government in the prosecution of the crime but that dimension did not have to be addressed because the defendant was able to confront the declarant at trial.

The Court applied this trial confrontation rule again in *Nelson v. O'Neil*,[38] an opinion that also developed the fourth rule for nonhearsay use of prior statements. O'Neil was convicted in a joint trial in which the jury heard a police officer testify that an accomplice had implicated O'Neil. The accomplice took the stand and denied making the statement; O'Neil had the opportunity to cross-examine the accomplice but did not. The jury was given a limiting instruction to consider the accomplice's statement only against the accomplice. The Court had previously held such a limiting instruction inadequate in *Bruton v. United States*,[39] but it still affirmed O'Neil's conviction. In *O'Neil* the Court held that even if the jury had ignored the limiting instruction and used the statement for a hearsay purpose, there would be no confrontation violation because the defendant was not denied the opportunity for full and effective cross-examination of the declarant at trial.[40] Again the first rule was assumed to be a sufficient condition, even though the facts might suggest a different result under another rule.

Both *Green* and *O'Neil* make clear that there must be a meaningful opportunity to cross-examine at trial, a test that requires more than the physical presence of the declarant. In *Green* the Court remanded in Part IV for a factual determination of that issue because the declarant's lack of memory made cross-examination difficult but not necessarily impossible.[41] In *O'Neil* the Court made that determination on the record and held that the opportunity to cross-examine was sufficient for confrontation even though the witness denied making the statement.[42] The record showed that in direct testimony the declarant

38. 402 U.S. 622 (1971).
39. 391 U.S. 123, 137 (1968).
40. Nelson v. O'Neil, 402 U.S. 622, 628-30 (1971).
41. California v. Green, 399 U.S. 149, 168-70 (1970).
42. Nelson v. O'Neil, 402 U.S. 622, 628-30 (1971).

both denied making the inculpatory statement at all and went on to exculpate O'Neil. The opportunity to cross-examine was sufficient because there was no suggestion of how cross-examination could have achieved anything more than a complete denial and exculpation. Because O'Neil's counsel did not actually cross-examine, the facts in *O'Neil* also reaffirm that it is only the opportunity to cross examine at trial that is critical.

It is not yet clear if the first rule permits a prosecutor to use any and every kind of hearsay if there is an adequate opportunity to cross-examine at trial. Where the declarant is a witness at trial the most common kind of hearsay offered will be a prior inconsistent statement. The facts of *Green* and express language in Part IV of *Green* clearly establish that any prior inconsistent statement can be used, without regard to the circumstances under which it was made.[43] For prior inconsistent statements the Federal Rules of Evidence are narrower, allowing substantive use only of those made under oath.[44] This more restrictive evidence requirement leaves little room for any confrontation issue. There is more room for an issue if the prior statement is not inconsistent, either because the witness gives consistent testimony at trial or because the hearsay statement is offered instead of any live testimony of a witness who is on the stand subject to cross-examination. Hearsay rules limit routine prosecution use of the prior declarations of most trial witnesses but some can be admitted as a prior consistent statement, a prior identification, past recollection recorded, or under the residual exceptions. A definitive rule cannot be stated because the Court has not considered the issue.

The Court has held that trial confrontation is sufficient only in cases involving prior inconsistent statements. The opinion in *Green* contains broad statements that it is sufficient if the "declarant is not absent, but is present to testify and to submit to cross-examination,"[45] but the holding is narrower and focussed on inconsistency.[46] In *O'Neil* the opinion contains the broad statement that it is sufficient "so long as the declarant can be cross-examined on the witness stand at trial,"[47] but the conclusion focusses more narrowly on the inconsistency of the prior statement.[48] The hearsay rules have made it unnecessary for the Court to clearly mark the outer boundary of this rule, although the Court's language suggests that this rule applies to any hearsay. The hearsay rules also insure that lower court judges will not often have to find the exact boundaries. If the hearsay rules change or if a new type

43. California v. Green, 399 U.S. 149, 151-53, 168 (1970).
44. FED. R. EVID. 801(d)(1)(A).
45. California v. Green, 399 U.S. 149, 162 (1970).
46. *Id.* at 164.
47. Nelson v. O'Neil, 402 U.S. 622, 626 (1971).
48. *Id.* at 629-30.

of hearsay infringes the right of confrontation in a manner not yet foreseen, the Court will have an opportunity to refine this rule. *Roberts* emphasized the gradual development of confrontation doctrine without overruling prior decisions. That is an approach the Court could follow under this rule. The Court would not have to overrule *Green* because it could narrow the factual application of *Green* and create a new rule for certain other facts.

2. Prior Confrontation

The Court has permitted prosecution use of prior testimony only where there was both a formal opportunity to confront the declarant when the hearsay statement was made and an affirmative effort by the prosecutor to make the declarant available for cross examination at trial. This is the rule the Court addressed most recently in *Roberts*.[49] It has much narrower conditions than the first rule, which applies to all kinds of hearsay, because this second rule applies only to prior testimony given at a former trial or at a preliminary hearing or similar proceeding.

The basic parameters of this rule were established in two of the Court's earliest confrontation opinions. In the first, *Mattox v. United States*,[50] the defendant had been convicted of murder at a second trial, held after the first conviction had been reversed. Two witnesses from the first trial had died by the time of the second trial, so the prosecutor introduced the testimony given by those two witnesses at the first trial. Both witnesses had been cross-examined at the first trial. The Court sustained the use of the hearsay and rejected the confrontation objection.[51] Because the witnesses were dead and clearly unavailable and there had been an adequate opportunity for cross-examination when the hearsay declaration was made, *Mattox* permitted prosecution use of the hearsay. In contrast, neither factor was present in the Court's next opinion, and the Court held that use of the hearsay was a violation of the right of confrontation. *Kirby v. United States*[52] was a prosecution for receiving stolen federal property. In order to prove that the property had been stolen, the prosecutor introduced the record of conviction of the alleged thieves. The Court reversed the conviction because the use of the hearsay record of another proceeding denied Kirby the right to confrontation. There was no evidence the witnesses were unavailable, and the defendant had not had an opportunity to cross-examine the declarant at the time the statement was made.

In the modern era of confrontation several opinions have refined

49. Ohio v. Roberts, 448 U.S. 56 (1980).
50. 156 U.S. 237 (1895).
51. *Id.* at 240-44.
52. 174 U.S. 47 (1899).

the prior confrontation rule with further definition of what facts are sufficient to establish the declarant is unavailable. Unavailability has been defined as more than physical absence from the courtroom or even from the jurisdiction. In *Barber v. Page*,[53] the state prosecutor in Oklahoma established that the witness was in a federal prison in Texas but made no effort to obtain his presence at trial. The trial court allowed the prosecutor to use the preliminary hearing testimony of the absent witness. The Court noted that *Mattox* had established an exception allowing use of the prior testimony of an unavailable witness, but held that a witness is not unavailable unless the prosecutor makes a good faith effort to obtain the presence of the witness at trial, even if the witness is absent from the jurisdiction. The later holdings in *Mancusi v. Stubbs*[54] and *Roberts*[55] have shown how a prosecutor can satisfy the test for whether the efforts to obtain a witness were adequate. In *Stubbs* the prosecutor was unsuccessful because the witness was in Sweden, unwilling to return for a trial and beyond the reach of process from a Tennessee court. In *Roberts* the Court held that a witness was unavailable if the prosecution failed to locate the witness after a diligent search.

The Court has also provided further definition of whether the defendant had an adequate opportunity to cross-examine when the hearsay statement was made. In *Pointer v. Texas*[56] the victim had left the state before the trial. The prosecutor introduced the victim's prior testimony given at the preliminary hearing, where the defendant had not been represented by counsel. The Court noted that the prior testimony exception had been established in *Mattox* but held that use of the testimony violated the right of confrontation because the defendant had not been represented by counsel at the preliminary hearing when the testimony was given. In *Roberts* the Court established three things—one, that the opportunity was adequate if the defendant was represented by counsel, even if the defendant had a different counsel at trial; two, that nominally direct examination of the witness at the preliminary hearing could suffice, if counsel's opportunity to explore the testimony was substantially similar to cross-examination; and three, that the more limited motive to cross-examine at a preliminary hearing did not mean that the opportunity to cros-examine was inadequate.[57] Most recently, the Court noted in *Lee* that there had to be an opportunity to cross-examine on the content of the hearsay, not just on the voluntariness of the statement.[58]

53. 390 U.S. 719 (1968).
54. 408 U.S. 204 (1972).
55. Ohio v. Roberts, 448 U.S. 56 (1980).
56. 380 U.S. 400 (1965).
57. Ohio v. Roberts, 448 U.S. 56, 70-73 (1980).
58. Lee v. Illinois, 106 S. Ct. 2056, 2065 n.6 (1986).

In the years between *Pointer* and *Roberts* the Court established an important distinction. Under the trial confrontation rule there must be adequate opportunity for actual cross-examination at trial, but under the prior confrontation rule the prosecutor is obligated only to obtain the physical presence of the witness at trial. The opportunity for confrontation when the hearsay statement was made reduces the prosecutor's obligation. The Court first addressed this issue in *Douglas v. Alabama*,[59] where the witness was physically present at the trial but asserted the privilege against self-incrimination and could not be cross-examined. The hearsay statement was a confession to the police, so there had been no opportunity to cross-examine when it was made. The prosecutor introduced the statement "[u]nder the guise of cross-examination to refresh . . . recollection,"[60] but the opinion concluded the jury would interpret it as the equivalent of direct testimony. The Court held that only actual cross-examination at trial would allow effective confrontation; physical presence of the witness did not permit the prosecutor to use hearsay never subject to cross-examination. Of course, actual cross-examination in *Douglas* would have allowed direct use of the hearsay, as the Court would later hold in Part II of *Green*.

In contrast to the requirement of actual cross-examination in *Douglas*, the Court held in Part III of *Green* that physical presence of the witness at trial was enough to allow use of hearsay if there had been an opportunity to cross-examine when the statement was made.[61] *Green's* accuser was physically present at trial but claimed a loss of memory that limited the effectiveness of cross-examination about both the statement to the police officer and the testimony at the preliminary hearing. The Court permitted use of the prior testimony because there had been an adequate opportunity to cross-examine the witness at the preliminary hearing. The Court remanded in Part IV of *Green* only on the statement to the police officer; that hearsay was outside this second rule because there was no opportunity to cross-examine when the statement was made to the police officer.

The statement of this rule accurately describes the outer boundaries established by the facts of the Court's opinions. Can this rule be expanded to permit a prosecutor to use hearsay by showing the defendant had a substitute for the opportunity to cross-examine through counsel when the hearsay was made? Can this rule be modified to permit a prosecutor to use hearsay after a less vigorous effort to produce the declarant at trial? While the Court's latest hypothesis suggests that an alternative to cross-examination might make the hearsay reliable, the facts in the Supreme Court opinions on prior testimony suggest no substitute for confrontation when the hearsay was made.

59. 380 U.S. 415 (1965).
60. *Id.* at 416.
61. California v. Green, 399 U.S. 149, 166-68 (1970).

While commentators have argued that *Dutton* may relax the prosecutor's obligation to produce some hearsay declarants,[62] the Court has never mentioned that possibility when discussing prior testimony. However, it should also be clear that a prosecutor can use prior testimony without satisfying this rule if the facts fit within one of the other rules.

3. Waiver

This is the oldest of the rules, articulated over a century ago in an almost forgotten opinion. *Reynolds v. United States*[63] involved a prosecution for bigamy in the Territory of Utah; the missing witness was the defendant's second wife. A subpoena for her appearance as a witness had been unserved because she could not be found. The Court found there was sufficient evidence that the defendant was responsible for her absence and upheld the prosecution use of testimony the defendant's second wife had given in a former trial on a different indictment. The facts in *Reynolds* would also fit the rule for prior confrontation because the hearsay was prior testimony created with a chance to cross-examine, and the prosecution had made an effort to produce the declarant, but the Court's discussion focussed on waiver:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. . . . If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.[64]

The language in *Reynolds* is broad enough to cover a wide variety of fact situations, and in the next century after *Reynolds* the Court rarely considered the waiver rule in a hearsay case. As a result one major issue that has been left unclear is the standard for finding waiver. Does a waiver of the right of confrontation have to meet the classic standard of "an intentional relinquishment or abandonment of a known right or privilege?"[65] If so, then a prosecutor might have to show that the defendant threatened, killed, or secreted a potential witness for the purpose of preventing their testimony at trial. If that classic standard is not the only ground for finding waiver, then it might be enough for the prosecutor to prove the witness is unavailable because of the defendant's wrongful act, without having to prove that

62. *E.g.*, Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 682-89 (1986). *See also* 4 J. WEINSTEIN & M. BERGER, *supra* note 28, 800[04], at 800-25 to 800-31.

63. 98 U.S. 145 (1878).

64. *Id.* at 158.

65. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

the purpose was to prevent the witness from testifying. The few opinions that touch on the issue suggest that the classic standard of waiver will always be sufficient to allow prosecution use of hearsay, but they do not establish that it is the only standard.

In *Barber*[66] the state argued that the prosecutor could use the preliminary hearing testimony of the witness, who was absent from the state in a federal prison, because the defendant had waived the right of confrontation by failing to confront the declarant at the preliminary hearing. The Court applied the classic standard for waiver and held that the failure to cross-examine was not a waiver; the defendant did not know either that the witness would be absent or that the state would make no effort to produce him at trial. In *Douglas*[67] the Court rejected the waiver argument without addressing the question of the applicable standard. The Court implied that prosecution use of the hearsay might have been justified if the defendant had procured the refusal to testify, but did not explore the issue because there was no evidence of the defendant's involvement. As a result the Court did not discuss whether the prosecutor had to show that the defendant had purposefully made the declarant unavailable as a witness.

There has been a similar application of the classic standard for waiver on facts other than the prosecution use of hearsay. In its opinions establishing the constitutional standards for validity of a guilty plea, the Court has identified the right to confront accusers as one of the constitutional rights waived by the guilty plea and required that the record demonstrate an effective waiver by the defendant under the classic standard.[68] The Court has also held that a defendant's disruptive conduct in court can result in loss of the right to be present at trial to confront live witnesses if the conduct prevents carrying on the trial.[69] Again the Court relied on the classic standard and approved removal from the courtroom only if the disruptive conduct continued after the defendant was warned by the trial judge.

Precedent on guilty pleas and disruptive conduct can be helpful on the issue of prosecution use of hearsay, but the Supreme Court is not committed to employing only the classic standard of waiver for prosecution use of hearsay. There is a significant factual difference the Court has not had occasion to consider. A trial judge can refuse to accept a guilty plea until the defendant understands what is being waived, and a trial judge can give a warning before removing a disruptive defendant from the courtroom. However, if a hearsay declarant has been murdered by the defendant, at trial it is too late to make sure

66. Barber v. Page, 390 U.S. 719 (1968).
67. Douglas v. Alabama, 380 U.S. 415 (1965).
68. Boykin v. Alabama, 395 U.S. 238, 243 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969); Brookhart v. Janis, 384 U.S. 1, 3-4 (1966).
69. Illinois v. Allen, 397 U.S. 337, 342-43 (1970).

the defendant understood before the murder that the wrongful act would waive the right of confrontation. This element of the waiver rule will have to be refined by the Court as it seeks a balance between effective prosecution and the right of confrontation.

A second issue that has not been considered since *Reynolds* is whether waiver permits prosecution use of any kind of hearsay. If not, which kinds of hearsay can be used? In *Reynolds* the hearsay was prior testimony from the trial of the same defendant on a similar charge. If the waiver rule were to be limited to those facts it would be no more than a redundant subset of the prior confrontation rule. Waiver is identified here as a separate rule because it is more likely the Court will follow the broad language in *Reynolds* and not limit the rule to its narrow facts. Beyond that, the Court's opinions give few clues to the kinds of hearsay that can be used. Simply incorporating the hearsay rules as the test for "competent evidence . . . supplied in some lawful way"[70] would redefine the problem without solving it. Most often prosecutors want to use grand jury testimony or confessions to the police which are admissible only under the residual hearsay exceptions. This element of the rule will remain uncertain until the Court has another occasion to discuss the waiver rule.

4. Nonhearsay Purpose

Although each of the other five rules applies when the prosecution offers a statement for a hearsay purpose, this rule applies when the prosecution offers a statement for only a nonhearsay purpose. Whether there is a right of confrontation depends on whether the jury might use the statement as both hearsay and nonhearsay. Most of this doctrine has been developed in cases that involve prosecution use of a confession by an accomplice to the police. The topic is broadly labelled the *Bruton* doctrine, but the rule actually began three years earlier.[71]

In *Douglas*, the defendant's accomplice had confessed to law enforcement officers and implicated the defendant; at trial the accomplice invoked the privilege against self-incrimination and refused to testify. The prosecutor read the accomplice's confession before the jury in an attempt to refresh the accomplice's memory. There was no opportunity to cross-examine because the accomplice refused to answer any questions. The Court found a confrontation violation because the manner of reading the confession was the equivalent of introducing it as evidence against the defendant. There was a substantial risk the jury had used the accomplice's statement for a hearsay purpose.

70. Reynolds v. United States, 98 U.S. 145, 158 (1878).
71. Douglas v. Alabama, 380 U.S. 415 (1965).

In *Bruton*[72] the Court held that the confrontation clause could limit the ability of the prosecutor to introduce an out-of-court statement, even if the statement was not offered against the defendant for a hearsay purpose. Bruton and an accomplice were convicted in a joint trial; Bruton had not confessed, but the accomplice had made two oral confessions. The accomplice's confession was introduced as evidence against only the accomplice. It also implicated Bruton, but it was hearsay as to Bruton, and the trial judge instructed the jury that the accomplice's statement could not be considered in determining Bruton's guilt. The Supreme Court held that the introduction of the accomplice's statement in the joint trial, in theory against the accomplice alone, violated Bruton's right of confrontation. Bruton had no chance to confront the accomplice at trial because the defendant did not testify, and the Court held there was a substantial chance the jury would use the accomplice's confession for a hearsay purpose by considering it against Bruton.

As the *Bruton* rule has been refined by the Court it has become clear that it protects the defendant against the risk that the jury will misuse a statement for a hearsay purpose without a chance for confrontation. It does not limit hearsay use of an accomplice's confession if there is confrontation at trial. In *O'Neil*[73] the prosecutor introduced the codefendant's confession that implicated O'Neil; the jury was instructed not to consider it against O'Neil because it was hearsay as to him. Later in the trial, the facts diverged from those in *Bruton* because O'Neil's codefendant took the stand and testified. That gave O'Neil the opportunity to cross-examine, an opportunity that Bruton had been denied. The Court held that this opportunity for cross-examination at trial would always be sufficient to protect the right of confrontation, making it unnecessary to consider whether the jury might have failed to obey the limiting instruction. Obviously, the prosecutor ran a risk by using the codefendant's confession in the joint trial because there would have been a *Bruton* violation if the accomplice had chosen not to testify.

In *Parker v. Randolph*[74] the *Bruton* doctrine was further refined by more carefully considering the probability that the jury will follow a limiting instruction. Randolph had been convicted in a joint trial in which the jury heard confessions of accomplices who did not testify and were not subject to cross-examination. The jury was given the limiting instruction that *Bruton* had held inadequate to prevent improper use of the confessions for a hearsay purpose, but the Court upheld the conviction. The other evidence in the case appears to have been the critical difference because the prosecutor also introduced

72. Bruton v. United States, 391 U.S. 123 (1968).
73. Nelson v. O'Neil, 402 U.S. 622 (1971).
74. 442 U.S. 62 (1979).

Randolph's own incriminating statements. A four judge plurality found no violation of *Bruton* where there were "interlocking inculpatory confessions."[75] The plurality opinion did not overrule *Bruton* and did not hold that the jury could consider any confession against a different defendant; Justice Blackmun in concurrence and the three dissenting Justices did not do so either. The *Randolph* plurality held that the interlocking character of the confessions was important for determining whether the jury would follow the limiting instruction because that depends on the balance of admissible evidence and potential hearsay. Prior to the Court's return to the issue in 1987 in *Cruz*,[76] the best interpretation of *Randolph* was that if there is enough other evidence to provide assurance that the jury will follow the limiting instruction, then the defendant is not deprived of the right of confrontation because the statement will not be considered as hearsay against the defendant.

The recent opinion in *Tennessee v. Street*[77] demonstrates that the *Bruton* rule does not prevent use of a statement for a valid nonhearsay purpose. At Street's trial for murder the prosecutor introduced Street's confession to the sheriff. Street testified he had not participated in the crime and claimed his confession had been coerced. Street explained that his confession contained so many details because the sheriff had told him to say the same thing as his accomplice had said in an earlier confession. In rebuttal, the sheriff testified that there had been no coercion and read the accomplice's confession to the jury for the purpose of showing that Street's confession had details not in the accomplice's confession. The Court held that this use of the accomplice's confession did not violate the confrontation clause, because it was offered for the valid, nonhearsay purpose of rebutting Street's claim of coercion. The prosecutor's specific use of the out-of-court statement to rebut and the jury instruction limiting the use of the statement to the rebuttal purpose were the critical factors.

The Court's consistent position throughout the *Bruton* line of cases has been that without confrontation or the equivalent the jury could not consider the incriminating confession of one defendant against another. That consistency makes the implication in Justice Brennan's opinion in *Lee* particularly startling. The State of Illinois had argued that the codefendant's confession could be found reliable in content for several reasons—because it did not seek to shift blame to Lee, because it had been found to be voluntary and not coerced, because it did not appear to be an effort to curry favor with the police by confessing to a crime the confessor did not commit, and, finally, because it inter-

75. *Id.* at 67.

76. Cruz v. New York, 107 S. Ct. 1714 (1987).

77. 471 U.S. 409 (1985).

locked with Lee's on all significant details.[78] The State's brief noted that Justice Stevens had raised the possibility in *Randolph* that interlocking facts might make a confession reliable and admissible hearsay,[79] but the brief conceded that the Court had never held that. The majority opinion by Justice Brennan did not examine the underlying thesis of the State's argument that reliability could be based on the content of the hearsay. Instead, the majority opinion held only that Lee's confession was not sufficiently interlocking to be reliable. The novel reinterpretation of *Randolph* was a direct result of Justice Brennan's effort to force all the Court's precedent into the mold of reliability of content of the hearsay in order to reduce confrontation doctrine to one global dimension:

> If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies are not insignificant, the codefendant's confession may not be admitted.[80]

The converse proposition, implied by a first reading of *Lee*, is that where the other confession is substantiated by the defendant's own, it may be admitted against a defendant even though the defendant is unable to confront the hearsay declarant. The contrast with the narrow holding of *Randolph* is obvious if the scenario is changed by assuming separate rather than joint trials. Under *Randolph* the confession of an accomplice could not be introduced if the defendant were tried alone, even if completely interlocking, because without a joint trial the nonhearsay purpose would be absent. Under the rule implied in *Lee*, the confession could be introduced even in a separate trial because the interlocking nature would make its content reliable and therefore admissible without confrontation. It is not clear that Justice Brennan, who dissented entirely from the interlocking confession theory in *Randolph*,[81] intended to make such a substantial redefinition of *Randolph* in *Lee*. Even Justice Blackmun's dissenting opinion in *Lee* interpreted *Randolph* more narrowly.[82] While the actual holding in *Lee* did not alter the rule based on the *Bruton* line of cases because it did not affirm the admission of the hearsay, it graphically illustrates the need for a clear structure of confrontation doctrine.

78. Brief for the State of Illinois, Lee v. Illinois, 106 S. Ct. 2056 (1986) (LEXIS, Genfed library, Briefs file).

79. Parker v. Randolph, 442 U.S. 62, 87 (1979) (Stevens, J., dissenting).

80. Lee v. Illinois, 106 S. Ct. 2056, 2064-65 (1986).

81. Parker v. Randolph, 442 U.S. 62, 81 (1979) (Stevens, J., dissenting, joined by Brennan & Marshall, JJ.).

82. Lee v. Illinois, 106 S. Ct. 2056, 2066, 2070 n.8 (1986) (Blackmun, J., dissenting).

Under this rule, determining whether the jury will use the statement for a hearsay purpose is an important step in identifying whether the defendant has a right of confrontation. The rule is also not fully defined; the Court itself has expressly noted that the definition of hearsay under the Federal Rules of Evidence may not always be the definition used for confrontation doctrine.[83] The Court still retains the flexibility to articulate a confrontation definition of hearsay if unusual facts show the two definitions should diverge. Even if that should be required some day, right now the lower courts have a clear rule for the large number of cases where a confession by one defendant implicates a codefendant in a joint trial. The Court can also continue to refine the *Burton* rule without reopening the whole subject of confrontation, as it did most recently when it upheld the use of a redacted confession in *Richardson v. Marsh*.[84]

5. Dying Declaration

This rule is among the oldest, but it is also the least well defined because it is based only on dictum in one of the Court's early confrontation opinions. In *Mattox*[85] the Court upheld prosecution use of prior testimony of an unavailable witness with an analogy to the admissibility of a dying declaration. The Court's citation was to an earlier opinion from a prior appeal of the same case,[86] in which the Court had held that a defendant could introduce an exculpatory dying declaration. The consensus interpretation of the dictum supports the conclusion that a prosecutor may introduce a dying declaration even if there is no confrontation of the declarant, at least if the declarant died after making the declaration.

The Court has shown no intention to abandon the dictum of *Mattox*, but its age limits the ability to define the outer limits of this rule with confidence. Since *Mattox*, the Federal Rules of Evidence have expanded the hearsay exception to allow a prosecutor to use the dying declaration of a declarant who survives the expected death, if the declarant is unavailable for a different reason and the hearsay is relevant in a prosecution for homicide of some other victim.[87] In the future the Court may establish that the broader definition should be used for confrontation doctrine. The Court may even establish that the rule should be expanded to include other kinds of hearsay. Until the Court does so after considering new facts, this rule states what the Court has actually established.

83. *E.g.*, Lee v. Illinois, 106 S. Ct. 2056, 2063-64 n.4 (1986); Dutton v. Evans, 400 U.S. 74, 86 (1970).
84. 55 U.S.L.W. 4509 (1987).
85. Mattox v. United States, 156 U.S. 237 (1895).
86. Mattox v. United States, 146 U.S. 140 (1892).
87. FED. R. EVID. 804(a), (b)(2).

6. Coconspirator Statement

This is the most recent rule because it was not articulated by the Court until *Inadi*.[88] The assertion in *Inadi* that the Court was revisiting its resolution of the question in *Dutton v. Evans*[89] is an interesting description of *Dutton*. The plurality and concurring opinions in *Dutton* have been difficult to interpret because none of them clearly explain the reason for the holding. Now that *Inadi* has suggested that *Dutton* be read as a holding on the specific facts of coconspirator statements,[90] this section will consider *Dutton* only within this specific rule. This Article will later consider the broader question of how to integrate the *Dutton* holding into the general structure of confrontation doctrine.[91]

In *Dutton* the incriminating hearsay used by the state prosecutor was a statement made by the defendant's accomplice to a fellow inmate while the accomplice and fellow inmate were in a federal penitentiary. The statement could be interpreted as implicating Dutton, but the report of the hearsay was suspect, its probative value was slight, and the weight given the hearsay was probably minor. Still, the Georgia courts upheld admission of the hearsay and affirmed the conviction on the ground that the hearsay was within the coconspirator exception. The classification of the statement as a coconspirator declaration went far beyond the definition in the Federal Rules of Evidence and most state rules because it did not appear to be in furtherance of the conspiracy. In a subsequent habeas corpus action the Fifth Circuit found that the prosecutor's use of the hearsay was a violation of the right of confrontation. The Supreme Court reversed and found no denial of confrontation. The plurality opinion mentioned the Georgia hearsay exception for coconspirator declarations in its recitation of the history of the case,[92] but not in its discussion of the reasons for concluding there was no violation of the right of confrontation.[93] After *Inadi* it may be most accurate to consider *Dutton* as primarily an illustration of the rule for coconspirator declarations that was not articulated until *Inadi*.

In *Inadi*[94] the prosecutor introduced coconspirator statements that had been intercepted and recorded by the police. Of the four declarants, two testified, but two did not. One declarant did not testify after asserting his fifth amendment privilege, and one failed to appear at trial after being subpoenaed. The narrow issue framed by the Court

88. United States v. Inadi, 106 S. Ct. 1121 (1986).
89. 400 U.S. 74 (1970).
90. United States v. Inadi, 106 S. Ct. 1121, 1129 (1986).
91. *See infra* text accompanying notes 104-10.
92. Dutton v. Evans, 400 U.S. 74, 78 (1970).
93. *Id.* at 87-90.
94. United States v. Inadi, 106 S. Ct. 1121 (1986).

was whether the prosecution had to establish that the testimony of an absent witness was unavailable before using the intercepted statement.[95] The Court's analysis went beyond the issue of unavailability with a discussion relevant to the broader issue of whether confrontation doctrine should limit routine use of the coconspirator exclusion by the prosecutor.[96] Even though the dissenting opinion argued that the Court had left open the separate issue of whether the hearsay had to be reliable,[97] the majority argument for distinguishing coconspirator statements from other kinds of hearsay was general rather than focussed on the specific facts of *Inadi*.

The scope of this rule is suggested by the concluding observations in *Inadi*. *Inadi* repeated the statement from *Dutton* that "we do not question the validity of the co-conspirator exception applied in the federal courts."[98] The majority then declared that "we continue to affirm the validity of the use of co-conspirator statements."[99] *Inadi* appears to be a prime example of the Court's common law development of confrontation doctrine. The original holding in *Dutton* has not been undercut, but the precedential value of *Dutton* has been narrowed by suggesting the primary issue there had been the coconspirator rule. None of the various factors discussed in *Dutton* was declared to be irrelevant to the development of confrontation doctrine, but none were important to the analysis in *Inadi*.

The proposed statement of the coconspirator rule does not implicitly favor the prosecution, as may first appear. It simply reflects that the Court's opinions have not established any further requirements a prosecutor must meet. This rule, as all the rules, meets the announced parameters of *Roberts*—capable of ready and accurate application by trial judges while allowing refinement of the doctrine as new fact situations show new problems. Absent some additional facts the Court has neither defined nor excluded, a prosecutor would have to satisfy only the hearsay rules to use the statement of a coconspirator. The Court did not decide in *Inadi* whether the prosecutor has to show the coconspirator declaration is reliable. The Court may reach that issue in a different pending case that also involves coconspirator hearsay.[100]

B. Boundaries of the Rules

While the Court's opinions allow the six rules to be defined with

95. *Id.* at 1123.
96. *Id.* at 1126-27.
97. *Id.* at 1129 (Marshall, J., dissenting).
98. *Id.* (quoting Dutton v. Evans, 400 U.S. 74, 80 (1970)).
99. *Id.*
100. United States v. Bourjaily, 781 F.2d 539 (6th Cir. 1986), *cert. granted*, 107 S. Ct. 268 (1986).

varying degrees of completeness, the opinions do not directly address two important questions. Is any rule by itself a sufficient condition for prosecution use of hearsay? Is at least one of the rules a necessary condition, or may a prosecutor use hearsay if the facts fit none of the six rules? Answers to both questions must begin with the Court's assertion that it is proceeding one case at a time.

The pattern in the Court's opinions shows that any rule is by itself a sufficient condition. Once a particular rule has been defined, the succeeding opinions may refine the requirements, but they do so within the structure of the particular rule. For example, for the second rule on prior confrontation, the Court has successively defined the level of effort required of the prosecutor to produce the declarant. For the fourth rule on use of the statement for a nonhearsay purpose, the Court has several times refined the analysis of when a jury will probably use the statement only for a nonhearsay purpose. Defining a sufficient rule and then refining the rule best serves the two goals identified in *Roberts*. It provides the Court with an opportunity for flexible development of each rule to meet new conditions but provides trial judges with the clear guidance needed for common kinds of hearsay offered by a prosecutor.

It is also clear that the six rules do not exhaust all the possible fact situations where a prosecutor may use hearsay. If they were exhaustive, the Court would have lost much of its ability to proceed one case at time because there would be no room to adapt to a new factual situation. For fact situations that fit none of the six rules there are two ways the structure can be extrapolated. First, the conditions in each of the six rules can be more extensively defined; for example, later cases may provide more illustrations of adequate confrontation at trial under the first rule or additional illustrations of valid nonhearsay purposes under the fourth rule. This would simply continue the common law development of each rule. Second, completely new rules can also be defined to permit prosecution use of other kinds of hearsay.

The dimension for the procedure by which the hearsay was created identifies a critical distinction about the kind of new rules that might be possible. While it does not completely exclude the possibility of a new rule for hearsay created in the prosecution of the crime, there are no obvious candidates for such a new rule. That is largely because the Court has already given extensive, and almost exclusive, attention to hearsay created in the prosecution of the crime. For such hearsay the common law development is most likely to be refinement of the first four rules because those rules already define the most common alternatives to normal direct and cross-examination. For other hearsay, not created for prosecution of the crime, many new rules are possible. The Court has only considered two other kinds of hearsay, the coconspirator exclusion and the dying declaration; confident extrapolation

of the structure for other hearsay must await further decisions from the Court.

C. Where Does "Reliability of Content" Fit in the Structure?

Restoring the procedural dimension for hearsay created in the process of prosecution shows why reliability of content cannot be sufficient to allow prosecution use of all kinds of hearsay. For hearsay created in the process of prosecution, reliability of content without a procedural dimension would permit the revival of trial by affidavit. The structure of confrontation doctrine shows that it is not necessary to run that risk nor is it necessary to add a new level of complexity in confrontation doctrine in an attempt to avoid the risk. The first four rules accurately describe all the fact situations in which the Court has held a prosecutor may use hearsay created by the government in the process of prosecution. Fortunately, the Court's hypothesis has not yet produced a holding that reliability of content alone is sufficient for prosecution use of all kinds of hearsay.

In *Lee* the actual holding was that the hearsay was not admissible against the defendant.[101] The Court held there was error in Lee's trial and remanded only for further consideration of whether the error was harmless in light of other evidence of guilt. The majority and dissenting opinions in *Lee* create the strong impression that both authors were satisfied to decide the case on the basis of the State's specific arguments without fully examining the State's definition of the issue. For example, the State's argument assumed that the two dimensions of *Roberts* were applicable to a confession of a codefendant, even though *Roberts* involved testimony at a pretrial hearing. Only three months previously, the *Inadi* opinion had described *Roberts* as no more than a "resolution of the issue the Court said it was examining,"[102] but neither opinion in *Lee* even considered how *Inadi's* narrowing interpretation of *Roberts* might have undercut the State's definition of the issue. As a result, *Lee* should not be read as a conscious redefinition of confrontation doctrine. *Lee* is a case where the Court backed into accepting a hypothesis that is inconsistent with the parameters it had defined in *Roberts* and *Inadi*, only because it saw no other structure in its confrontation opinions.

The disappearance of the dimension for the procedure by which the hearsay was created had an obvious effect on the way the opinions in *Lee* interpreted *Roberts*. The indicia of reliability in *Roberts* had not been based on the content of the hearsay, but both opinions in *Lee* simply assumed that indicia of reliability could be found from any source. In fact, the *Roberts* opinion focussed only on the procedure by

101. Lee v. Illinois, 106 S. Ct. 2056, 2065 (1986).
102. United States v. Inadi, 106 S. Ct. 1121, 1125 (1986).

which the hearsay was created, not the content of the hearsay. The Court expressly compared the procedure in *Roberts* to the facts of *Green* and rejected the argument that it should look at the content of the hearsay by noting that it likewise did not examine the content of the hearsay in *Green*. The Court declared in *Roberts*:

> In sum, we perceive no reason to resolve the reliability issue differently here than the Court did in *Green*. "Since there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity, the transcript . . . bore sufficient 'indicia of reliability' and afforded "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." "[103]

Why did the opinions in *Lee* ignore this self-described limitation of *Roberts*? The Court forgot about the implicit procedural dimension and wrongly assumed that *Roberts* had established that any indicia of reliability, procedural or content, could suffice.

While *Roberts* can be set aside in the search for precedent that supports the hypothesis in *Lee*, how about *Dutton*?[104] Did the holding in *Dutton* establish that the government could create hearsay in the process of prosecution and then use it at trial by showing the content of the hearsay was true? A careful reading of *Dutton* suggests why the opinion does not apply to hearsay created in the process of prosecution. The troubles with *Dutton* are well known, including the absence of a majority opinion, the failure of the plurality to articulate a clear test, and Justice Harlan's suggestion of a general theory of confrontation that was an explicit retreat from his position earlier in the same year in *Green*. *Dutton* is difficult to interpret because the Court itself failed to recognize how the facts were substantially different from the facts in all prior confrontation opinions. In all the cases preceding *Dutton* the hearsay had been created by the government in the prosecution of the crime, so prosecution use of the hearsay had always suggested the possibility of trial by affidavit. In *Dutton* the government was not involved in the creation of the hearsay. It did not resemble the classic form of trial by affidavit, but the Court did not consider the factual difference because the plurality opinion was still pursuing one global theory of confrontation.

Dutton clearly held that the conviction could not be set aside for violation of the right of confrontation, but there the clarity ends. The plurality opinion was supported by only four votes. The essential fifth vote was supplied by Justice Harlan, who argued that confrontation was satisfied as long as the defendant was permitted to cross-examine the witnesses the prosecutor presented. Justice Harlan's theory of confrontation has never been adopted, but his critique of the plurality

103. Ohio v. Roberts, 448 U.S. 56, 73 (1980) (quoting Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)).

104. Dutton v. Evans, 400 U.S. 74 (1970).

and dissenting opinions was accurate. The dissent described the statement as an "extrajudicial statement attributed to an alleged partner in crime"[105] and argued that admission of the statement without cross-examination violated the right of confrontation. Justice Harlan noted the dissenting position was so broad that it would apply regardless of the circumstances in which the statement was made or whether it was even hearsay.[106] As *Inadi* and *Street* later confirmed, Justice Harlan correctly rejected that approach as too broad. At the same time, Justice Harlan agreed with the dissenters' argument that the plurality had not clearly explained why there was no violation of confrontation.[107]

Another reason the plurality opinion in *Dutton* is difficult to interpret is its switch between discussing two different statements. The out-of-court statement was made by Williams and heard by Shaw, while at trial Shaw repeated the statement before the jury. The plurality first stressed that the defendant exercised his right to confront Shaw on the issue of whether Williams made the statement and whether Shaw heard it.[108] That was a point no one disputed, but it adds a confusing twist to the plurality opinion. The weak part of the plurality opinion is the explanation of why there was no deprivation of the right to confront Williams, even though the jury heard the report of William's statement and the defendant had no opportunity to cross-examine Williams. The Court's language, "there was no denial of the right of confrontation as to [Williams]"[109] is ambiguous, and the plurality opinion did not resolve the ambiguity. The language may mean there was no right of confrontation at all because the confrontation clause did not apply to the kind of hearsay. On the other hand, it may mean that there was a right of confrontation, but it was satisfied by something other than cross-examination of the declarant at trial. The plurality mentioned four things it labelled indicia of reliability but added to that the observations that there was no need to cross-examine Williams, that there was an effective chance to cross-examine Shaw, and that possibly there was harmless error.[110]

The ambiguity in *Dutton* is an inherent consequence of the Court's attempt to articulate a reason for its result without stating a rule that could produce undesired effects in later cases and particularly of doing so without recognizing a major fact distinction. *Dutton* can be interpreted as holding that there is no right to confront the declarant of some kinds of hearsay. That interpretation is consistent with the fact

105. *Id.* at 100 (Marshall, J., dissenting).
106. *Id.* at 94-95.
107. *Id.* at 96.
108. *Id.* at 88.
109. *Id.*
110. *Id.* at 88-89.

that the plurality stressed the defendant's confrontation of Shaw but in contrast never held the defendant had a right to confront Williams. *Dutton* can also be interpreted as holding that there is some right of confrontation for all hearsay, but that for certain hearsay the right can be satisfied by indirect cross-examination. That interpretation is consistent with the plurality argument that the defendant was allowed to cross-examine Shaw. A third variant would interpret *Dutton* as holding that for some hearsay the right to confront the declarant is triggered only when the defendant can demonstrate how the cross-examination might develop relevant evidence. That interpretation is consistent with the plurality argument that the defendant did not show why he needed to cross-examine Williams.

The many permutations of *Dutton* create chaos in confrontation theory only if *Dutton* is given a global interpretation. In contrast, if the factual distinction is recognized, then *Dutton* is no more than the first opinion in which the Court had to consider the confrontation rules for hearsay not created by the government in the prosecution of the crime. This may appear to be a revisionist interpretation of *Dutton*, but it is an interpretation strongly suggested by the holding in *Inadi*. If this interpretation is correct, then prosecution use of hearsay created by the government in the prosecution of the crime is not governed by *Dutton*.

For other hearsay, *Dutton* only establishes that the rules are different and must be developed as the Court considers additional fact situations. Should reliability of the content of the hearsay be a dimension of confrontation doctrine for hearsay not created by the government in the prosecution of the crime? The Court has had little occasion to consider this issue because the conditions for use of hearsay in the rules of evidence minimize the need to consider the constitutional question. One possibility would be a narrower adaptation of Justice Harlan's argument in *Dutton*, leaving the regulation of prosecution use of other hearsay to the rules of evidence. If that too readily allowed prosecution use of unreliable gossip, confrontation doctrine could require that any exception for other hearsay be defined by conditions that would at least give some assurance the hearsay was reliable. While reliability of content cannot be a global, sufficient dimension for prosecution use of all types of hearsay, it could play this lesser role as a limit on use of hearsay not created in the process of prosecution. That development must await further decisions in the Court's common law development of confrontation doctrine.

III. TESTING THE PROPOSALS

A. *Earnest* on Remand

The remand in *Earnest*[111] presented an immediate opportunity for comparing the proposed structure of confrontation doctrine with the Court's hypothesis that the right of confrontation can be satisfied by reliability of the content of the hearsay. In *Earnest* the defendant's accomplice had made an oral confession to the police that incriminated Earnest. The accomplice was given use immunity and ordered to testify against Earnest in their joint trial but refused to do so. The trial judge then permitted the jury to hear the confession and use a transcript of it. The defendant had no opportunity to cross-examine his accomplice. The New Mexico Supreme Court reversed the conviction because the absence of any opportunity to cross-examine the declarant violated the defendant's right of confrontation.[112] The New Mexico court found that *Douglas* was directly on point and rejected the State's argument that the two dimensions of *Roberts* were applicable to all hearsay.

After hearing argument, the United States Supreme Court simply vacated and remanded for further proceedings in light of *Lee*. The concurrence by Justice Rehnquist, for himself and three other Justices, framed the question they saw for remand:

> As *Lee v. Illinois* makes clear, to the extent that *Douglas v. Alabama* interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a codefendant's out-of-court statement, the case is no longer good law. Although *Ohio v. Roberts* . . . did not attempt to set forth specific standards for constitutional admissibility applicable to all categories of hearsay, . . . that decision did establish that a lack of cross-examination is not necessarily fatal to the admissibility of evidence under the Confrontation Clause. . . . In the instant case, therefore, the State is entitled to an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient "indicia of reliability" to satisfy Confrontation Clause concerns.[113]

In a footnote, the opinion asserted that *Lee* had established a test for determining when the interlocking content of a codefendant's confession made it admissible against the defendant.[114]

The key issue on remand was whether a prosecutor should be permitted to establish indicia of reliability from the content of the hearsay. The implication of the concurrence was that it should be possible, but the structure of confrontation doctrine described by the six rules identifies the errors in that conclusion. The first sentence is based on

111. New Mexico v. Earnest, 106 S. Ct. 2734 (1986).
112. State v. Earnest, 103 N.M. 95, 703 P.2d 872 (1985).
113. New Mexico v. Earnest, 106 S. Ct. 2734, 2735 (Rehnquist, J. concurring, joined by Burger, C.J. & Powell & O'Connor, JJ.).
114. *Id.* at 2735 n.*.

a misinterpretation of *Douglas*, while the second sentence erroneously characterizes *Roberts*. Those errors masked the subtle shift in the third sentence from procedure to content as the basis of reliability. The assertion that *Lee* "established" a test is also an overstatement, but one that could be ignored on remand because *Earnest* had made no confession that could interlock with that of his codefendant.

The first sentence is wrong because *Roberts* did not undercut *Douglas* at all. *Douglas* did not make the opportunity for cross-examination the sole condition for prosecution use of a codefendant's confession. A prosecutor can introduce a codefendant's confession if the facts fit any of the first four rules—against the defendant under the first three, and for some purpose other than as hearsay against the defendant under the fourth. That was clear long before *Roberts*, as *Green* had permitted prosecution use of an accomplice's confession under both the first and second rules, *O'Neil* had permitted use of a codefendant's confession under the first rule, and *Harrington* had permitted nonhearsay use of a codefendant's confession under the fourth rule. In *Douglas* the facts fit none of the rules, and none of the Court's opinions has undercut the *Douglas* holding.

The second sentence suggests an interpretation of *Roberts* that is too broad. No opinion has ever held that a lack of cross-examination is necessarily fatal, so *Roberts* did not have to establish the opposite. That does not mean that *Roberts* established the converse, that a lack of cross-examination is never fatal. In fact, *Roberts* itself did not "establish" that hearsay could be used without cross-examination because in *Roberts* there had been the equivalent of cross-examination at the preliminary hearing. The structure of confrontation doctrine identifies those fact situations where a lack of cross-examination is not fatal. Hearsay can be admitted under any of the last four rules without cross-examination, but it is clear from the opinion of the New Mexico Supreme Court and the State's brief in the United States Supreme Court[115] that the facts of *Earnest* fit none of the last four rules. There was no evidence of waiver, it was not offered for a nonhearsay purpose, it was not a dying declaration, and it was not a coconspirator's declaration.

The third sentence simply assumes that the Court has already held that the indicia of reliability can be based on the content of the hearsay. That assumption is untrue for the fact situation in *Earnest* because the accomplice's confession to the police was hearsay produced by the government in the process of prosecution. The first two rules describe the only other fact situations where the Supreme Court has ever upheld prosecution use of such hearsay. Again, it is clear that the

115. Brief for the State of New Mexico, New Mexico v. Earnest, 106 S. Ct. 2734 (1986) (LEXIS, Genfed library, Briefs file).

facts in *Earnest* do not fit either of the first two rules because there was neither trial confrontation nor prior confrontation.

On remand the New Mexico Supreme Court should have ignored the suggestion in the concurrence because it did not accurately describe the confrontation doctrine the Supreme Court has established. The opinion in *Lee* shows no evidence that the Court has considered the effect of eliminating the procedural dimension from the structure of confrontation doctrine. Therefore, reliability of the hearsay had to be based on some procedure that permitted the equivalent of confrontation, something the facts indicate did not occur. Unfortunately, the New Mexico Supreme Court followed the invitation in the concurring opinion and found the content of the hearsay had efficient "indicia of reliability" with only a brief discussion of the reasons for its conclusions.[116] The original opinion should have been reaffirmed because *Earnest* was simply a poor choice by the Supreme Court for refining the rules of confrontation. The facts did not present a new situation, but one the Court had adequately considered.

B. Applying the Structure to New Fact Situations

A critical test of any description of confrontation doctrine is how well it satisfies the parameters for clarity, consistency, and stability with room for flexible adaptation to changing conditions. In addition, any alternative to the Court's hypothesis ought to satisfy those parameters better than a description based on the reliability of the content of the hearsay. The implications of the Court's hypothesis are not wholly a matter of speculation because *Lee* did not suggest a completely novel interpretation. A number of circuit court opinions had previously concluded that *Dutton* or *Roberts* permitted prosecution use of hearsay if the content appeared reliable. Those opinions show there are two good reasons to seek an alternative to the Court's hypothesis.

Although the circuit courts have had several years to develop the reliability dimension, they have not clarified confrontation doctrine for the trial courtroom. The most clear pattern in the circuit court opinions is that a finding of reliable content is a conclusory label employed when the court upholds prosecution use of hearsay. This Article will not attempt to prove that rules cannot be developed to guide trial judges because the second defect is still fatal; it is simply noted that they have not been developed. In contrast, the proposed structure does clarify confrontation doctrine for the trial courtroom. The rules do not duplicate the hearsay rules, but the conditions in the rules are typical conditions that have been well-developed in the hearsay

116. State v. Earnest, 26 N.M. St. B. Bull. 376, 376-77 (N.M. 1987) (also available on LEXIS, States library, NM file, but not reported elsewhere).

rules. The six rules add some constitutional restrictions that go beyond the hearsay rules, but only where essential to protect the right of confrontation. They do not require the development of a wholly new structure.

A more serious, and fatal, defect in the Court's hypothesis is illustrated by the number of circuit court opinions that have eliminated the procedural dimension from prosecution use of hearsay. The Fourth Circuit,[117] Sixth Circuit,[118] Seventh Circuit,[119] and Ninth Circuit[120] have already held that a federal prosecutor can introduce the grand jury testimony of an unavailable witness with nothing more than indicia of reliability of the content of the hearsay. The Fifth Circuit[121] in dictum has indicated it would follow their lead. The Ninth Circuit[122] has permitted a prosecutor to use hearsay statements by suspected aliens to a federal agent to prove that they were aliens who had illegally entered the country. The Ninth Circuit[123] has permitted a prosecutor to use the hearsay statement of a criminologist that the defendant's fingerprint was found on an item. The Seventh Circuit[124] has permitted a prosecutor to use hearsay statements made by a witness in an interview by an F.B.I. agent. The Fourth Circuit[125] has permitted a prosecutor to use the hearsay statement of a firearms manufacturer to a federal agent investigating interstate shipment of the weapon. One district court[126] has approved prosecution use of a statement to the police that named the defendant as the arsonist who burned a building.

The common trait of all these lower court opinions is the assumption that the right of confrontation can be satisfied by indicia of reliability of the content of the hearsay. All these opinions assume the answer to the question that the Court in *Lee* never addressed. If a prosecutor needs only to convince the trial judge that the content of a hearsay statement by an unavailable declarant is reliable, how close is the resulting prosecution to trial by affidavit? What is the distinction between trial by affidavit and a trial in which the prosecutor establishes the guilt of the defendant with a combination of witness state-

117. United States v. Murphy, 696 F.2d 282, 286-87 (4th Cir. 1982); United States v. Walker, 696 F.2d 277, 280-81 (4th Cir. 1982); United States v. Garner, 574 F.2d 1141, 1143-46 (4th Cir. 1978); United States v. West, 574 F.2d 1131, 1136-38 (4th Cir. 1978).
118. United States v. Barlow, 693 F.2d 954, 963-65 (6th Cir. 1983).
119. United States v. Boulahanis, 677 F.2d 586, 588-89 (7th Cir. 1982).
120. United States v. Marchini, 797 F.2d 759, 764-65 (9th Cir. 1986).
121. United States v. Young Brothers, Inc., 728 F.2d 682, 692 n.11 (5th Cir. 1984); United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977).
122. United States v. Winn, 767 F.2d 527, 530-31 (9th Cir. 1985).
123. United States v. Gilbert, 774 F.2d 962, 965 (9th Cir. 1985).
124. United States v. Howard, 774 F.2d 838, 845-46 (7th Cir. 1985).
125. United States v. Simmons, 773 F.2d 1455, 1459-60 (4th Cir. 1985).
126. Buelow v. Dickey, 622 F. Supp. 761, 764-66 (E.D. Wis. 1985).

ments to the police and grand jury testimony? That question is too important to assume it has been answered by *Dutton*, *Roberts*, or *Lee*.

The main reason the Supreme Court and lower courts have moved so far toward reviving trial by affidavit is their inability to see any other way to preserve flexibility in confrontation doctrine. The proposed structure provides that alternative because the rules can be refined as necessary to define when a prosecutor may introduce hearsay evidence or when the right of confrontation limits use of hearsay. Many lower court opinions present fact situations that show how the rules can be refined. This Article will not offer a comprehensive survey of the last decade of confrontation cases, but a few fact situations will be highlighted to show how the proposed structure can provide both stability and flexibility in confrontation doctrine.

Under the first rule, allowing prosecution use of hearsay if there is confrontation at trial, the most difficult issue that can arise was the one left unresolved in Part IV of *Green*. When is less than perfect cross-examination of a difficult witness adequate to satisfy the right of confrontation? That is a factual question that cannot be reduced to a simple test, so the best method of refinement is through decisions on specific facts.[127] However, while the refinement continues for unusual fact situations, the lower courts have a clear rule for the typical case where routine cross-examination is possible.

The second rule, allowing prior confrontation as a substitute in certain fact situations, can be refined in several ways. In one illustrative case,[128] the prosecutor was permitted to use deposition testimony of Swiss witnesses who could not be compelled to attend the trial and would not attend voluntarily or would do so only on unreasonable conditions. The facts fit well within the prior confrontation rule, even though the defendants did not attend the depositions and did not actually confront the witnesses, because the defendant "had the full opportunity, at government expense, with his attorney to confront and cross-examine the Swiss witnesses, which he waived when he and his attorney decided not to attend the taking of the depositions."[129] The facts in a different case[130] suggest that the second rule could be refined to require only one prior opportunity to confront the declarant if there is some reason to permit a prosecutor to introduce multiple repetitions of the identical hearsay statement.

A large group of cases has already refined the third rule on waiver to permit prosecution use of hearsay against a defendant who causes

127. *E.g.*, United States v. Owens, 789 F.2d 750, 757-61 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 1284 (1987); *id.* at 764-66 (Boochever, J., dissenting); United States v. DiCaro, 772 F.2d 1314, 1325-28 (7th Cir. 1985).

128. United States v. Johnpoll, 739 F.2d 702, 710 (2d Cir. 1984).

129. *Id.*

130. United States v. Licavoli, 725 F.2d 1040, 1049 (6th Cir. 1984).

the unavailability of the declarant at trial. Waiver of the right of confrontation has been found where the defendant's threats caused the witness to refuse to testify[131] or where the defendant killed the witness to prevent testimony at the defendant's trial.[132] Other cases illustrate the unresolved issues the lower courts must decide. For example, any standard of waiver may be clearly satisfied if the defendant kills or threatens the witness for the purpose of preventing testimony at trial. The lower courts have also found waiver when the defendant killed the witness when an undercover drug deal went awry,[133] or when the defendant did not kill the witness but had knowledge the witness would be killed by someone else and did not warn the police.[134] Such facts may not meet the classic standard of an intentional waiver of a known right but that does not necessarily mean the lower courts have erred. The Supreme Court has not foreclosed the possibility that the standard for waiver by conduct may be different from the standard for intentional waiver. The lower courts have also assumed that the waiver rule applies to all kinds of hearsay, whether grand jury testimony[135] or a statement by an undercover agent to his superior.[136] That assumption should be expressly addressed; on different facts, one judge has suggested there is a significant difference between the formality of grand jury testimony and the informality of other hearsay.[137]

Under the fourth rule, allowing nonhearsay use of prior statements, there is continual refinement of the *Bruton* rule for confessions of codefendants. In 1987 the Supreme Court has already addressed two *Bruton* issues—holding that prosecution use of the inadmissible confession of a codefendant violates the right of confrontation even if both are interlocking[138] and holding that a confession of a codefendant can be admissible if it is redacted to remove any reference to the defendant.[139] The Court considered both issues within the framework of the *Bruton* precedent and postponed its next look at the broader issues of confrontation doctrine. Other nonhearsay uses of

131. United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir. 1984); United States v. Balano, 618 F.2d 624, 626-30 (10th Cir. 1979).
132. United States v. Thevis, 665 F.2d 616, 627-33 (5th Cir. 1982); United States v. Carlson, 547 F.2d 1346, 1355-60 (8th Cir. 1976).
133. United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985).
134. United States v. Mastrangelo, 722 F.2d 13 (2d Cir. 1983).
135. United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir. 1984); United States v. Mastrangelo, 722 F.2d 13 (2d Cir. 1983); United States v. Thevis, 665 F.2d 616, 627-33 (5th Cir. 1982); United States v. Balano, 618 F.2d 624, 626-30 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346, 1355-60 (8th Cir. 1976).
136. United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985).
137. United States v. McCall, 740 F.2d 1331, 1338-42 (4th Cir. 1984) (Sprouse, J., concurring).
138. Cruz v. New York, 107 S. Ct. 1714 (1987).
139. Richardson v. Marsh, 107 S. Ct. 1702 (1987).

prior statements can only be illustrated because the range is as impossible to limit under confrontation doctrine as it is under the hearsay rule. No simple rule could define whether a letter is circumstantial evidence or hearsay,[140] whether a statement about a defendant is relevant to show why the witness could remember a conversation,[141] or whether a jury will consider a statement for a hearsay purpose or as an adoptive admission of the defendant.[142]

One issue under the fifth rule is whether the confrontation rules track the hearsay rules. For example, an ordinary dying declaration may not appear to resemble trial by affidavit because the immediacy of the situation usually precludes any preparation. What if the victim survives long enough to allow the prosecution to structure a formal accusation on videotape[143] so the hearsay has much more persuasive impact than the last gasp the Court's dictum considered in the nineteenth century? If the witness makes the statement at a time when the defendant is known and can be found for a deposition, does the confrontation clause require that the prosecutor use a deposition even if the hearsay would fit the exception for a dying declaration? The fifth rule does not answer that question. What if the defendant is not known or is a fugitive, and the witness may soon die? Is there any way to preserve the testimony of the witness so it can be used at trial without violating the defendant's right of confrontation? None of the six rules provides a method, but the structure of confrontation proposed in this Article does not establish that it cannot be done. The structure only establishes that the Supreme Court has not held whether or how it can be done.

There are also unresolved issues in the sixth rule on coconspirator statements. The facts in *Inadi* involved true coconspirator statements—between two members of the conspiracy obtained by the government by a secret wiretap. What if the statement is made by one conspirator to the one member of the conspiracy who is an informant or undercover police officer, and made in response to disguised interrogation seeking evidence against other members? The Third Circuit has held that it is sufficient if the statement is redacted to remove the words of the informant,[144] but the issue is not that narrow. While in form such hearsay may appear to be a statement of a coconspirator in the furtherance of the conspiracy, in function it may be the government creation of hearsay evidence for the purpose of prosecution. This issue is raised by the facts in the next case before the Court, as

140. Lyle v. Koehler, 720 F.2d 426, 429-35 (6th Cir. 1983); *id.* at 436-40 (Porter, J., dissenting).
141. United States v. Peaden, 727 F.2d 1493, 1498-1500 (11th Cir. 1984).
142. United States v. Monks, 774 F.2d 945, 951-53 (9th Cir. 1985).
143. This was done in Barker v. Morris, 761 F.2d 1396 (9th Cir. 1985).
144. United States v. Pecora, 798 F.2d 614 (3d Cir. 1986).

well as the issue left open in *Inadi* of whether the coconspirator statement must be reliable.[145]

The fact situations in the six rules cover many of the common uses of hearsay by a prosecutor, but they do not exhaust the possibilities. The structure established by the six rules also clarifies when a new fact situation presents an issue the Court has never considered. For example, the Court has never considered whether or how the confrontation clause limits prosecution use of hearsay statements that are incorporated into expert testimony. The Second Circuit recently held that a toxicologist testifying for the government in a drug prosecution could rely on the hearsay statements of a government chemist who was not called as a witness.[146] The court reached this result by assuming the answer could be based on *Dutton* and the discussion of *Dutton* in *Roberts*;[147] it failed to recognize that *Dutton* involved a fundamentally different fact situation. As a result, the Second Circuit did not even notice how easily its interpretation allows the prosecution to create and use hearsay, even though the hearsay complies with none of the confrontation requirements the Supreme Court has established.

The structure of the six rules also emphasizes how rarely the Court has considered the use of hearsay the government did not create. Only the fifth and sixth rules cover such hearsay, because the Court has given almost exclusive attention to hearsay created by the government in the process of prosecution. Eventually, the Court will have to either define a host of additional rules for other types of hearsay or define a single rule for hearsay not produced by the government in the process of prosecution. The need for this clarification is shown by a number of lower court opinions that may unduly restrict prosecution use of other hearsay because of the assumption that confrontation doctrine is only one global theory. The Fifth Circuit has held that ordinary business records must satisfy the two dimensions of *Roberts*.[148] The Ninth Circuit is moving toward a requirement that circumstantial evidence offered for a nonhearsay purpose must satisfy a confrontation test if it is a writing.[149] The Supreme Court of Colorado has held that an excited utterance must satisfy the two dimensions of *Roberts*.[150] The Supreme Court of Wisconsin has assumed that an adoptive admission must meet the test of *Roberts* under the confrontation clause in the state constitution.[151] All these opinions go beyond what

145. United States v. Bourjaily, 781 F.2d 539 (6th Cir. 1986), *cert. granted*, 107 S. Ct. 268 (1986).
146. Reardon v. Manson, 806 F.2d 39 (2d Cir. 1986).
147. *Id.* at 41.
148. United States v. Washington, 688 F.2d 953, 959 (5th Cir. 1982).
149. United States v. Mouzin, 785 F.2d 682, 691-93 (9th Cir. 1986); United States v. Ordonez, 737 F.2d 793, 802-04 (9th Cir. 1984).
150. People v. Dement, 661 P.2d 675, 679-81 (Colo. 1983).
151. State v. Marshall, 113 Wis. 2d 643, 335 N.W.2d 612 (1983).

the Supreme Court has held or is likely to hold because they threaten to turn every hearsay objection into a constitutional issue of confrontation.

Overly restrictive confrontation limits on the prosecution use of other hearsay will benefit neither prosecution nor defense. At first they will make prosecution more difficult or less effective. In response, the courts will try to restore flexibility in confrontation doctrine by creating new exceptions that could eventually undercut the defendant's right of confrontation. It is almost certain that an unneeded exception, created only to avoid an unnecessary restriction, will be erroneously applied as well to hearsay created by the government in the prosecution of the crime. The risk of confusion and incorrect analysis will grow if confrontation doctrine becomes more complex than necessary.

The strongest argument for the proposals in this Article is the clear, simple structure that emerges when the procedural dimension is recognized and rules are derived from the results of the Court's opinions. The Supreme Court can make the procedural dimension explicit without overruling any of its own opinions, so it can clarify confrontation doctrine without creating new uncertainty. Most of the confrontation doctrine developed by the lower courts would remain stable, because the few opinions that threaten to revive trial by affidavit are only a small part of all the decisions on confrontation. Novelty alone has made most lower courts cautious about allowing prosecution use of hearsay created in the process of prosecution, even though the Court's opinions do not fully explain the need for caution. A few opinions have recognized that there are significant differences about the circumstances under which hearsay is produced in the process of prosecution, but have not fully analyzed the differences because the Supreme Court's opinions did not explain how they were a part of confrontation doctrine.[152] The foundation for further analysis is explicit recognition that the procedural dimension is an essential part of confrontation doctrine.

C. Looking Ahead

Two opinions announced after the completion of this Article show that the new hypothesis announced in *Lee* could mark a critical turning point in confrontation doctrine. First came the affirmance of the conviction in *Earnest* by the Supreme Court of New Mexico,[153] after the remand from the United States Supreme Court. A brief para-

152. *E.g.*, United States v. Feldman, 761 F.2d 380, 387-88 (7th Cir. 1985); *In re* Corrugated Container Antitrust Litigation, 756 F.2d 411, 415 (5th Cir. 1985); United States v. Thevis, 665 F.2d 616, 629 (5th Cir. 1982).

153. State v. Earnest, 26 N.M. St. B. Bull. 376 (N.M. 1987) (also available on LEXIS, States library, NM file, but not reported elsewhere).

graph in the state court opinion gave four reasons for concluding that the hearsay statement of the accomplice to the police was reliable—there was no offer of leniency, the statement was against the declarant's penal interest, the declarant did not seek to avoid his own responsibility, and there was substantial corroborating evidence.[154] The finding of reliability was based on the content of the hearsay and the court's evaluation of the probability the statement was true and the defendant guilty. All that was missing was confrontation, since the defendant did not confront the declarant when when the hearsay evidence was created in the police station and could not confront the declarant when the prosecutor offered the hearsay evidence. The court assumed the constitutional right of confrontation had become no more than a judicial balancing test of the specific facts in each case.

The second recent development is the Supreme Court's opinion in *Cruz v. New York*.[155] The majority opinion in *Cruz* held that a limiting instruction was inadequate to protect a defendant's right of confrontation if the prosecution introduced a nontestifying codefendant's confession that incriminated the defendant as well, even if the two confessions were interlocking. That did not end the case; the New York Court of Appeals had not considered if the codefendant's confession was admissible against Cruz, so perhaps there was no need for the limiting instruction at all. The Court therfore remanded *Cruz* to allow the state court to assess "whether [Cruz's] codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against [Cruz],"[156] with a citation to *Lee*. The Court also mentioned the possibility of harmless error. Again, it is essential to read *Cruz* with a critical eye for what it does not hold. Even though *Cruz* suggests that the interlocking nature may make the confession more reliable, the Court did not hold that the confession of the accomplice was admissible. None of the five Justices comprising the majority in *Cruz* had joined the concurrence in *Earnest*, and the language that stated the issue on remand did not expressly declare that "indicia of reliability" could be based on the content of an accomplice's confession to the police. The Court clearly chose not to resolve this issue in *Cruz* even though both New York and the Justice Department in an amicus brief argued that content alone could be sufficient.[157] However, the state court may not reach this issue on remand either; it was not raised at trial because the prosecutor never offered the confession against Cruz and the statement was not admissible against Cruz under

154. *Id.* at 376-77.

155. 107 S. Ct. 1714 (1987).

156. *Id.* at 1719.

157. Brief for Respondent, Cruz v. New York, 107 S. Ct. 1714 (1987), at 9-13; Brief for United States as *Amicus Curiae*, *id.*, at 9-19.

New York evidence law.[158]

The opinions in *Earnest* and *Cruz* show how close the Court has come to silently eliminating the procedural dimension from confrontation doctrine. The opinions also show that the Court is not yet committed to the hypothesis in *Lee* that reliability of content should be the primary dimension for all hearsay. The Court has never yet held that the content of the hearsay was sufficient to allow prosecution use of hearsay created in the process of prosecution. Whether to take that step is the issue clearly framed but left open by the remands in *Earnest* and *Cruz*. This Article has shown how the hypothesis in *Lee* would make a radical change by eliminating the procedural dimension and has described an alternative structure of confrontation doctrine that makes it unnecessary.

158. See Reply Brief for Petitioner, *id.*, at 1-8.