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The Right to Confrontation: One Step beyond Bruton: *United States v. Rogers*, 549 F.2d 490 (8th Cir. 1976)

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Note

The Right to Confrontation: One Step Beyond *Bruton*

United States v. Rogers, 549 F.2d 490 (8th Cir. 1976).

I. INTRODUCTION

Despite the simplicity and apparent straightforward language of the confrontation clause,[1] its constitutional dimensions are not easily discernable.[2] There exists an aura of conflict and confusion surrounding this doctrine. The impetus for the framers of the Constitution to include the right of confrontation for the protection of criminal defendants purportedly was rooted in defects noted at the trial of Sir Walter Raleigh,[3] but even this has not gone without dispute.[4] It was over 100 years after the adoption of the sixth amendment that the United States Supreme Court was faced with the opportunity to comment on the constitutional dimensions of this doctrine.[5] This has been followed by increased comment and at-

1. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.
2. *See* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972), for an excellent discussion dispelling any "lingering beliefs in simplicity." The article focuses on five problem areas: (1) Who are "witnesses against?" (2) What does it mean "to confront" a witness? (3) Does the clause allow exceptions? (4) May the right of confrontation be waived? (5) Are there special safeguards when the use of unconfronted evidence is allowed?
3. 5 J. WIGMORE, EVIDENCE § 1397, at 168 n.17 (Chadbourn rev. 1974) relates that "[a] crucial element of the evidence against him consisted of statements of one Cobham, implicating Raleigh in a plot to seize the throne. Raleigh had since received a written retraction from Cobham, and believed that Cobham would now testify in his favor. After a lengthy dispute over Raleigh's right to have Cobham called as a witness, Cobham was not called, and Raleigh was convicted." F. HELLER, THE SIXTH AMENDMENT 104 (1951), traces the origins of the confrontation clause to the reaction against these abuses.
4. Graham, *supra* note 2, at 100, repeated the circumstances of the Raleigh trial in his article, although he noted that there is no reason to believe there was any link between the origins of the sixth amendment and the Raleigh affair. He is of the opinion that it is merely a "convenient but highly romantic myth."
5. Mattox v. United States, 156 U.S. 237 (1895).

tempted refinement up to the present time.[6] Most recently, the United States Court of Appeals for the Eighth Circuit was faced with the confrontation issue when the extrajudicial statement of an uncooperative witness, which implicated the defendant, was introduced for impeachment purposes.[7] The court accepted the task and disposed of the issues with deceptive ease.[8] This note will critically examine the court's decision sanctioning the use of the extrajudicial statement and the court's handling of the confrontation issue raised by its decision.

II. THE CASE

George Samuel Walter Rogers was arrested and subsequently convicted of armed robbery on a United States military reservation. One of the witnesses called by the prosecution at Rogers' trial was Walter Baker. Prior to Rogers' trial, Baker had pleaded guilty to the robbery in a court-martial proceeding. Upon direct examination Baker was unable to identify Rogers. He admitted pleading guilty to the robbery; however, he testified that he was unable to remember the incident. He admitted having given a statement to an FBI agent, but he could not remember the substance of that statement. At this point in his testimony, the jury was sequestered to allow further examination of Baker regarding his lack of memory. Baker read the statement, but he was unable to identify it as the statement he had made. The trial court informed Baker of his fifth amendment privilege after Rogers' counsel suggested that the testimony which the prosecution sought to elicit from Baker might be self-incriminating. At this point the jury was allowed to return and further examination ensued. Consistent with his earlier testimony, Baker claimed a lack of memory and subsequently invoked his fifth amendment privilege.

The prosecution called as its next witness an FBI agent, Brown, who testified that Baker had made an oral statement to him which he subsequently transcribed. Over defense counsel's objection, the trial court allowed Brown to read the unsworn and unsigned statement. The court instructed the jury that the statement was admissible for impeachment purposes only.[9] It was the admission

6. The increased discussion focusing on the confrontation clause is most directly attributable to its incorporation into the fourteenth amendment and resultant applicability to the states following Pointer v. Texas, 380 U.S. 400 (1965), and Douglas v. Alabama, 380 U.S. 415 (1965).
7. United States v. Rogers, 549 F.2d 490 (8th Cir. 1976).
8. But not without a strong dissent by Judge Lay. *Id.* at 502.
9. The statement disclosed that earlier on the day of the crime Baker had accompanied Rogers to the Oklahoma Tire and Supply Company,

of this statement for the limited purpose of impeaching Baker's credibility which set the stage for the major points of Rogers' appeal.[10]

III. ANALYSIS OF THE DECISION

The decision of the majority is a very methodical, and superficially logical, step-by-step approach to the solution of the main issues presented for review. Initially, the court properly noted that separate treatment was required as to the evidentiary and constitutional grounds for admissibility of Baker's ex parte statement.[11] The decision of the majority on each of these issues largely recognized applicable precedent but poorly applied the facts of the present case to the law in reaching its conclusion.

A. Admissibility of the Prior Statement

The court observed that in order for a prior inconsistent statement to be admitted for impeachment purposes it must pass the tests of inconsistency and relevance. Further, adequate instructions must be given to the jury outlining the limited purpose for which the statement is admissible. The court had little difficulty in finding that Baker's claimed lack of memory was inconsistent with the prior statement attributed to him. This is rather curious in light of recent commentary:

> The most unsettled aspect of determining what amounts to an inconsistency is presented when a witness denies all recollection of a matter about which he had formerly made a statement. Can this former statement be regarded as inconsistent? The common law practice—and still probably followed in most jurisdictions—would not consider such statements inconsistent and would not, therefore, permit their use even for impeachment purposes.[12]

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where, following appellant's instructions, Baker had purchased a gun using appellant's identification. The statement further described the robbery and placed appellant with Baker as two of the three who held up the soldiers. *Id.* at 495.

10. Rogers assigned five different points of error. In addition to the two which are the focus of this note, he alleged that the trial court erred in the denial of the motion to suppress evidence seized from his automobile, the denial of several discovery motions insofar as they sought the criminal records of government witnesses, and the overruling of a motion for a mistrial based on a comment by the prosecutor. These assignments of error were briefly treated and summarily dismissed by the majority of the court.
11. *Id.* at 498 nn.9 & 10. The court relied on the Advisory Committee Note to FED. R. EVID. 804(b)(3), and California v. Green, 399 U.S. 149, 155-56 (1970), wherein the Supreme Court rejected the idea that there is any complete overlap of the confrontation clause and the hearsay rules.
12. 3 J. WEINSTEIN, EVIDENCE ¶ 607[06], at 607-66 (1976). *See also* 98 C.J.S. *Witnesses* § 583 (1957):

The eighth circuit has obviously rejected this "common law" mechanical test for inconsistency in favor of the more liberal approach, under which a prior statement is admissible if it is possible that one reasonable inference would be that of inconsistency.[13] This is the focus advocated long ago by Wigmore,[14] who favored allowing considerable discretion to the trial judge in a situation such as this. In discussing the requirement of inconsistency, the Eighth Circuit Court of Appeals quoted a concurring opinion from the Third Circuit Court of Appeals which has been regarded as embodying the spirit of this liberal federal approach.[15]

The majority favored this flexible, discretionary approach, which had been earlier espoused by the Second Circuit Court of Appeals in *United States v. Insana*.[16] The majority opinion intimates that since the court in *Insana* was justified in allowing a former statement to be utilized for impeachment, despite a claimed lack of memory, the same should be allowed as to Baker's statement. However, the facts surrounding the statement in *Rogers* are clearly distinguishable from those in *Insana*. In *Insana*, the witness specifically indicated his lack of memory was linked to his desire "not to hurt anyone."[17] Also, the witness in *Insana* had previously testified before the grand jury in detail, and the statements offered were prior sworn testimony. Further, the witness had identified the defendant Insana while he was on the stand. In contrast, in *Rogers* the witness Baker did not indicate he was motivated by any noble goal, such as intending to protect someone.[18] He refused to

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> [W]here a witness merely states that he does not remember, he cannot be impeached by the showing of former statements with respect to the facts which he claims not to remember, and the same principle applies where, at the trial, a witness professes lack of knowledge as to a particular matter.

13. *See* 3 J. WEINSTEIN, *supra* note 12, ¶ 607[06], at 607-68.
14. 3A J. WIGMORE, *supra* note 3, § 1043, at 1061. But Wigmore did warn of the prejudicial effect such statements may have.
15. 549 F.2d at 406, citing from Agnellino v. State, 493 F.2d 714, 730 (3d Cir. 1974): "[a] defendant who chooses to answer questions with half truths cannot claim constitutional protection to remain silent as to the other half. A complete answer to a question may be as inconsistent with a partial reply as one completely different in detail."
16. 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970).
17. *Id.* at 1170.
18. The dissenting opinion of Judge Lay relates that "[t]here is no indication from the record that the trial judge disbelieved the witness" in regard to his claimed lack of memory. 549 F.2d at 503 n.4 (Lay, J., dissenting). The majority in *Insana* admits, notwithstanding its conclusion, that "there may be circumstances where the witness in good faith asserts that he cannot remember the relevant events. In such circumstances the trial court may in its discretion exclude the prior testimony." United States v. Insana, 423 F.2d at 1170.

testify before the grand jury[19] and he failed to identify the defendant Rogers at the trial. Also, the proffered statement was not prior testimony, nor sworn to, nor signed by the witness, but rather it was transcribed from notes after the questioning of Baker had taken place.

The majority attempted to utilize the *Insana* opinion as a guide in discussing the apparent inconsistency between the present lack of memory and the prior statement, but for all practical purposes the majority abandoned the teaching of *Insana* when it considered the relevance of the Baker statement. Even the flexible approach would not admit all prior inconsistent statements made by a witness.[20] The use of such statements in these circumstances should be tempered by a balancing of the interests articulated in Federal Rules of Evidence 401[21] and 402,[22] which seek admission of all relevant evidence, with the discretion granted by rule 403,[23] which is directed at providing a degree of protection, while remaining consistent with the liberal federal philosophy.[24]

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19. This is revealed in the dissenting opinion. United States v. Rogers, 549 F.2d at 504 n.6. It is curious that the majority ignores such factors as this in its discussion, especially since it believed that the government was justifiably "surprised" by Baker's failure to remember and lack of cooperation. *Id.* at 495 n.6. Another fact which the dissent brings to light is that the prosecution read the statement of Baker "*in toto*" in its closing argument to the jury. *Id.* at 505.
20. *See* note 18 *supra.*
21. FED. R. EVID. 401 states: " 'Relevant evidence' means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
22. FED. R. EVID. 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."
23. FED. R. EVID. 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."
24. This balancing approach has been explained by J. WEINSTEIN, *supra* note 12, ¶ 607[06] at 607-72:

> Evidence at which the collateral test is primarily directed, which is relevant solely because it suggests that the witness may have lied about something in the past would generally be excluded because of its low probative value and its tendency to prejudice the jury. Evidence of higher probative value would be assessed in terms of its impact on the jury in light of the particular circumstances presented. Such an approach would probably effect very little change in prior practice, but would authorize a flexible approach when the

In discussing the relevance of the prior statement the primary concern of the majority was whether "the prosecution's case will be adversely affected if the inconsistent testimony is allowed to stand."[25] The court did express passing concern that impeachment might be used as a subterfuge to get normally inadmissible evidence before the jury. However, it quickly dispelled such a thought, reasoning that the possible negative inference from Baker's failure to identify Rogers was "potentially injurious to the government,"[26] and that was the end of the inquiry.

The balancing approach is a sound one as outlined,[27] but it proves to be difficult in application because of the inclination toward liberal admissibility under the federal rules[28] and the deference of appellate courts to the discretion of the trial judge. This difficulty is compounded by Federal Rule of Evidence 607[29] which has been interpreted as dispensing with the common law requirements of surprise and prejudice as prerequisites to the admission of impeaching statements.[30] The wisdom of this conclusion should be severely questioned because it clears the way for prosecutors to get inadmissible hearsay before the jury, creating the possibility that it may be given substantive effect despite limiting instructions. This is a concern which numerous courts have expressed in the

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proffered statement has high probative value but is strongly prejudicial, or when the probative value of the statement is debatable.

25. 549 F.2d at 496.
26. 549 F.2d at 497. No further mention was made of any possible prejudicial substantive effect the statement may have been given by the jury. The court considered this to be fully taken care of by limiting instructions. Limiting instructions are by no means a cure-all. *See* note 57 *infra*. It is difficult to understand how limiting instructions could prevent undue weight being given to the statement, especially since it was read in full by the prosecution in its closing argument. While the court paid lip service to the idea of subterfuge, it attached no significance whatever to the fact that Baker had similarly refused to testify before the grand jury. This should have put the government on notice that it could not expect testimony from Baker at Rogers' trial. Also overlooked was the fact that the FBI agent was present throughout the trial. This indicates that the prosecution anticipated the need to impeach Baker. These facts were noted by the dissenting Judge who was more suspicious of the prosecutor's motives than was the majority of the court. 549 F.2d at 504 n.6 (Lay, J., dissenting). *See also* note 19 *supra*.
27. *See* note 24 *supra*.
28. *See* notes 18 and 22 and accompanying text *supra*.
29. FED. R. EVID. 607 states: "The credibility of a witness may be attacked by any party, including the party calling him."
30. 549 F.2d at 495 n.6 (citing United States v. Morlang, 531 F.2d 183, 189 n.14 (4th Cir. 1975) (opinion of the court), and 531 F.2d at 193 (Butzner, J., dissenting)).

past,[31] and the enactment of the Federal Rules of Evidence should not be considered authority for repealing these common law requirements. Although it appears that the court is sanctioning increased discretionary latitude in search of the truth, it is clear that such pursuit is subject "to any constitutional confrontation limitations that may exist in criminal cases."[32]

B. The Right to Confrontation

The *Rogers* majority explained, as it began its discussion of the confrontation issue, that it was working under somewhat of a handicap because "the Supreme Court has declined thus far to define the exact circumstances within which hearsay admitted for a limited purpose under federal evidentiary rules may nonetheless offend a defendant's Sixth Amendment right to such an extent that his conviction must be set aside."[33] While this may be a legitimate concern for the court, nothing in this area of the law is so clear

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31. For example, in United States v. Coppola, 479 F.2d 1153, 1158 (10th Cir. 1973) the court stated:

> It is clear . . . that positive damage and surprise to the party calling the witness are requisite.
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> . . . And the absolute rule remains that a party is not allowed under the guise of impeachment to bring before the jury an *ex parte* statement of a witness by calling him to the stand when there is reason to believe that he will refuse to testify and when in fact he does so refuse. The party is bound by his refusal and cannot introduce his prior statement by the expedient of asking him leading questions.
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> . . . .
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> . . . Instead, one is impressed that an effort of the government was to bring about damage in order to justify the introduction of prior statements.

It was also concluded in United States v. Dobbs, 448 F.2d 1262, 1263 (5th Cir. 1971) that "[i]mpeachment is permitted only to remove the adverse effect of any surprise testimony and cannot be used to supply the anticipated testimony." These and other examples of this school of thought were appropriately noted in the dissenting opinion in United States v. Rogers, 549 F.2d at 504-05.

32. 3 J. WEINSTEIN, *supra* note 12, ¶ 607[06] at 607-75.

33. 549 F.2d at 498-99. While it is true that no exact boundaries have been set, it is also true that no simple rules exist against which to test the sufficiency of confrontation of substantive evidence. The important point is that evidence introduced for a limited purpose must adhere to the confrontation requirements. This proposition was articulated in dictum in California v. Green, 399 U.S. 149, 164 (1970), where the Court stated that "*Bruton's* refusal to regard limiting instructions as capable of curing the error, suggests that there is little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used only for impeachment purposes, and permitting them to be used for substantive purposes as well."

that an answer is easily provided. Despite its precautionary remarks, the majority launched into a methodical survey of the law relating to the right of confrontation. After a brief discussion of recent case law, the court noted that the factors to be considered were the jury's ability "to weigh the credibility of the extrajudicial statement, whether the extrajudicial statement was crucial to the government's case, and . . . whether limiting instructions were given which were sufficient under all the circumstances to protect the defendant from impermissible reliance upon the statement by the jury."[34] Once again it appears that the majority was cognizant of the appropriate concerns while it artificially applied them to the facts of the case.

In order to get the right of confrontation in proper perspective and to comprehend the various positions taken in *Rogers*, it is important to trace the evolution of this doctrine. It was clear from the first time that the Supreme Court approached the confrontation clause that, contrary to the tenor of the language of the sixth amendment, the right of confrontation is not absolute. Also, it is evident that one examining the applicability and basis of this doctrine will become involved in more than tracing a single constitutional principle. It is necessary to distinguish it from the other doctrines which often revolve around it, namely, the hearsay rule[35] and the due process clause of the fourteenth amendment.

The constitutional dimensions of the confrontation clause were first considered by the United States Supreme Court in *Mattox v. United States*.[36] The court made it clear from the beginning that "technical adherence" to the sixth amendment is not constitutionally mandated and "must occasionally give way to consideration of public policy and the necessities of the case."[37] Shortly after *Mattox*, the decisions of the Supreme Court in *Kirby v. United States*[38]

34. 549 F.2d at 500.
35. FED. R. EVID. 802 states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 801 (c) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."
36. 156 U.S. 237 (1895). The defendant, who had been convicted of murder, sued out a writ of error, which was sustained on appeal and the case was remanded for a new trial. The second trial also resulted in a conviction and once again the defendant appealed. His main contention was that the admission of the recorded testimony of two witnesses, who had testified at the initial trial, but who had since died, infringed upon his right to be confronted with the witnesses against him.
37. *Id.* at 243.
38. 174 U.S. 47 (1899). The defendant was convicted of receiving stolen

and *Motes v. United States*[39] indicated that the confrontation clause put a premium on the right to actual cross-examination.

It has been noted that a fair reading of these early decisions results in a pattern which suggests that the confrontation clause "is substantially that of the hearsay rule applied to criminal cases."[40] The goal of the hearsay rule and the right of confrontation are essentially the same in that each seeks reliability through cross-examination or something equivalent thereto,[41] but to say that the evidentiary rule and the constitutional principle are synonomous would be reading far too much into these early decisions of the Supreme Court. In fact, in *Stein v. New York*,[42] the Supreme Court expressly disclaimed any intent to raise the hearsay rule to constitutional proportions by incorporating it into the fourteenth amendment, and further attempted to explain away earlier decisions which implied that a right of confrontation existed under the fourteenth amendment. Despite these protestations, the decisions both prior and subsequent to *Stein* intimated that cross-examination, the basic goal of confrontation, was an essential element of procedural due process in various settings.[43]

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goods under a federal statute which provided that conviction of the principal felon was conclusive evidence in the case against the receiver that the property had been stolen. Without the introduction of the conviction of the principal felon into evidence, the government would have failed to show that these goods were stolen. The Court held that the defendant's right to confrontation was violated because of his inability to cross-examine the thieves or the witnesses against him at the initial trial.

39. 178 U.S. 458 (1900). Motes and several other defendants had been found guilty of killing a man. Part of the evidence admitted against the parties was a statement made at a preliminary hearing by Taylor, a co-defendant. Although there was evidence of some limited opportunity for the defendants to cross-examine Taylor as to his statement in the earlier proceeding, the Court held that the negligence of the prosecution in allowing Taylor to escape from custody and the subsequent use of his statement operated to violate the defendant's right to confrontation.

40. 5 J. WIGMORE, *supra* note 3, § 1398, at 197 n.9. Therein it is further noted that as of 1900, the confrontation clause meant that "an accused is entitled to have the witnesses against him testify under oath, in the presence of himself and trier, subject to cross-examination; yet considerations of public policy and necessity require the recognition of such exceptions as dying declarations and former testimony of unavailable witnesses."

41. *See* 5 J. WIGMORE, *supra* note 3, §§ 1364 & 1369; Dutton v. Evans, 400 U.S. 74 (1970).

42. 346 U.S. 156 (1953). Defendant's argument that statements introduced at trial implicating him, which were made by co-defendants, violated his right to confrontation, was rejected by the majority.

43. Willner v. Committee on Character, 373 U.S. 96 (1963) (state bar ad-

In 1965, the Supreme Court put to rest any question of the applicability of the confrontation clause to the states in *Pointer v. Texas*,[44] by announcing that this sixth amendment requirement was incorporated into the fourteenth amendment.[45] While settling this question the court added fuel to the flames of uncertainty surrounding the relationship of the hearsay rule to the confrontation clause. The majority opinion could be read as intimating, although it did not expressly state, that evidence admitted under an established hearsay exception would consequently pass constitutional muster. However, such a reading has been strongly criticized by commentators[46] and expressly repudiated by subsequent decisions of the Supreme Court.[47]

Douglas v. Alabama[48] presented the Supreme Court with a situation similar in several respects to that faced by the court in *Rogers*. The defendant was tried and convicted of assault with intent to commit murder. The prosecution called a witness, Loyd, who had been convicted in a separate trial of the same crime. The witness invoked his privilege against self-incrimination because of the pending appeal of his own conviction. After his refusal to reply to questions, he was declared a hostile witness and under the guise of refreshing his memory, the prosecution read from his confession, which implicated the defendant, pausing intermittently to ask: "Did you make that statement?"[49] Loyd continually refused to reply. The Supreme Court held that since the defendant was unable to cross-examine the uncooperative witness his right of confrontation was violated.

In spite of the appellant's contention in *Rogers* that *Douglas* mandated a reversal of his conviction, the majority, noting that a

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mission proceeding); Greene v. McElroy, 360 U.S. 474 (1959) (revocation of security clearance); In re Oliver, 333 U.S. 257 (1948) (state contempt proceeding); Bridges v. Wixon, 326 U.S. 135 (1945) (deportation proceeding).

44. 380 U.S. 400 (1965). The transcript of preliminary hearing testimony of a key witness, who had since moved to California, which was allowed into evidence over the defendant's objection, was ruled violative of defendant's right of confrontation.
45. Justices Harlan and Stewart concurred in the result of the majority but vehemently refused to accept its rationale. They balked at expanding federalism and chose to hold that the right of confrontation is implicit in the due process clause of the fourteenth amendment independently of the sixth. *Id.*
46. *See* Notes, 13 U.C.L.A. L. REV. 366 (1966); 113 U. PA. L. REV. 741 (1965); 75 YALE L.J. 1434 (1966).
47. Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970).
48. 380 U.S. 415 (1965).
49. *Id.* at 416.

"case-by-case analysis" is to be employed,[50] held that the present case was clearly distinguishable from *Douglas.* The court considered that unlike Loyd, the witness Baker admitted his prior conviction of the crime. Further, the court determined that if the jury erroneously gave substantive effect to Baker's statement any damage was merely "cumulative."[51] It seems inherently inconsistent at this point to conclude that the effect of the statement was "cumulative," while in discussing the admissibility of the statement earlier in its opinion, the majority noted that if Baker's testimony was to stand without admission of the statement it would be "potentially injurious to the government."[52] The significance of the statement to the prosecution beyond its use as an impeaching tool is indicated by the fact that, similar to the statement in *Douglas*, it was the only direct "evidence" putting the defendant at the scene of the crime. Also, the government read the statement in full during its closing argument.[53]

In *Bruton v. United States*,[54] the prosecution was allowed to admit into evidence the oral confession of a co-defendant, who refused to take the stand, which implicated the defendant. On appeal, the Eighth Circuit Court of Appeals[55] held that the confession was inadmissible hearsay[56] and reversed the co-defendant's conviction, while refusing to set aside that of the defendant, because the trial court adequately instructed the jury to disregard the confession and its reference to the defendant. As in *Pointer* and *Douglas*, the Supreme Court put a premium on the actual ability to cross-examine the witness. The Court held "that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the confrontation clause of the sixth amendment."[57]

50. United States v. Rogers, 549 F.2d at 500.
51. *Id.* at 501.
52. *Id.* at 497.
53. *See* notes 19 and 25 and accompanying text *supra.*
54. 391 U.S. 123 (1968).
55. 375 F.2d 355 (8th Cir. 1967), *rev'd,* 391 U.S. 123 (1968).
56. Because it was in violation of Miranda v. Arizona, 384 U.S. 436 (1967), decided one week earlier.
57. 391 U.S. at 126. The Court further noted that the effect of limiting instructions in this context "is the same as if there had been no instruction at all." *Id.* at 137. Some courts have sought to avoid this problem by deleting the defendant's name from the statement reported. *See* Stewart v. State, 257 Ark. 753, 519 S.W.2d 733 (1975); Miller v. State, 250 Ark. 199, 464 S.W.2d 594 (1971). The Supreme Court has not considered the constitutionality of this practice, but it would seem to amplify what was being left out.

In a dissenting opinion, Judge Lay concluded that *Bruton* was clearly dispositive of the issue before the court in *Rogers*.[58] This would certainly appear to be true had the majority agreed that the prior statement of Baker was inadmissible hearsay.[59] The dissenting opinion focused on the unavailability of the declarant-witness for cross-examination and concluded that this, in conjunction with the circumstances surrounding the admission of the statement, required a reversal. This would appear to be the proper approach. Even granting the prosecution's major premise that the prior statement was properly admitted, the rationale of *Bruton* indicates that confrontation rights have been violated. In *Bruton*, just as in *Rogers*, at the time the statement was put before the jury, its use was expressly limited. There would appear to be no reason for concluding that had the statement been admissible against the co-defendant in *Bruton* that confrontation rights would not have been abridged. Once again, limiting instructions would have been incapable of curing the error. The majority in *Rogers* discounted the applicability of *Bruton* in favor of subsequent cases which play down the significance of actual cross-examination in favor of more fluid criteria.[60]

In *California v. Green*,[61] the Supreme Court specifically put to

58. The only difference between this case and *Bruton v. United States* . . . is that the declarant here took the witness stand and asserted the Fifth Amendment, whereas in *Bruton* the declarant exercised his privilege against self-incrimination by refusing to take the stand. In both cases an ex parte statement incriminating the defendant was clearly inadmissible and should have been excluded.

549 F.2d at 502 (Lay, J., dissenting) (citation omitted).

59. As the Eighth Circuit pointed out in United States v. Kelley, 526 F.2d 615, 620 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976), "it has become well-settled that the *Bruton* rule is limited to circumstances where the out-of-court statements are inadmissible hearsay." It is submitted here that this is too restrictive a reading of *Bruton*. The rationale of the Court would have been equally applicable had the statement been admissible against the co-defendant.

60. This is not to say that *Bruton* is no longer good law. On the same facts a violation of the confrontation clause would result today since the "incriminations [were] devastating to the defendant but their credibility is inevitably suspect." Bruton v. United States, 391 U.S. at 136. These are the major concerns today as noted in Dutton v. Evans, 400 U.S. 74 (1970). *See* note 64 and accompanying text *infra*.

Cross-examination has not been done away with as a goal of the confrontation clause in all contexts. In fact it is very much alive in cases which involve no hearsay issue. *See, e.g.*, Davis v. Alaska, 415 U.S. 308 (1973), where it was held that the defendant's right of confrontation was superior to the state's policy of protecting juvenile offenders, and any temporary embarassment to the key witness by disclosure of his juvenile court record and probation status is subordinate to the defendant's right to effectively cross-examine a witness.

61. 399 U.S. 149 (1970).

rest any fears expressed in reaction to *Pointer* that the hearsay rule was of constitutional proportions.[62] The Court held that California could, consistent with the sixth amendment, change its hearsay rules to reflect a minority view,[63] but it failed to decide whether exceptions not subject to any degree of cross-examination would pass muster under the confrontation clause. However, it was not long before the Court in *Dutton v. Evans*[64] answered this question.

In *Dutton* the trial court allowed a hearsay statement, admissible under Georgia's minority rule allowing statements of a co-conspirator during the concealment phase of the conspiracy to have substantive effect, to be put before the trial court, in spite of the defendant's inability to cross-examine the declarant.[65] Neither the prosecution nor the defense called the declarant to testify.[66] The Supreme Court concluded that no right of confrontation was violated because the statement was not "crucial" to the prosecution or "devastating" to the defense[67] and the statement was surrounded with certain "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."[68] In reaching this conclusion, the Court attached significance to the following:

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62. While it may readily be conceded that the hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to say that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.
Id. at 155.

63. CAL. EVID. CODE § 1235 (West 1966) in conjunction with § 770 provided in substance that a prior inconsistent statement was admissible as substantive evidence at trial where the declarant was given some opportunity to explain or deny the statement at trial.

64. 400 U.S. 74 (1970).

65. The alleged co-conspirator Williams, who had been convicted earlier, was reported to have said: "If it hadn't been for . . . Alex Evans, we wouldn't be in this now." *Id.* at 77. A fellow prisoner, Shaw, was permitted to testify as to the making of this statement.

66. The dissenting opinion suggested that this was probably due to the fact that to do so would have been futile, because it was inevitable that the declarant would invoke the fifth amendment privilege due to his pending appeal. *Id.* at 102 n.4 (Marshall, J., dissenting). The majority opinion suggested this was due to the fact that the defense felt that it "would not be in the best interests" of the defendant. *Id.* at 88 n.19.

67. This test would appear to link confrontation in the context of a hearsay exception to the concept of harmless error although not designated as such.

68. *Id.* at 89.

> First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony [given in exchange for immunity] and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. . . . His statement was spontaneous and it was against his penal interest to make it.[69]

The eighth circuit, in *Rogers*, ignored its own admonition that this area of the law requires a "case-by-case analysis" and concluded on the authority of *Dutton* that no confrontation rights were violated. It felt that since the conviction of Baker was before the jury "the reliability of the out-of-court statement was clear."[70] Yet, it is unclear how the fact that Baker was involved in the crime, by itself, is conclusive on the issue of his credibility. Unlike the situation in *Dutton*, the statement in *Rogers* consisted *entirely* of assertions of past fact; it was not corroborated by an eye witness; and the majority specifically ruled that it was not a declaration against Baker's interest, as it noted further that "[h]e had not yet been sentenced for the robbery when he made the statement, and the danger here might well be that his interest in obtaining a lesser sentence in return for his cooperation could have affected the reliability of the statement."[71] This is information which was not before the jury and militates against the conclusion that reliability was "clear" under the circumstances.

IV. CONCLUSION

Dutton is the latest major attempt by the Supreme Court to refine this area where admissible hearsay meets a constitutional challenge. Its twin tests, focusing on the "crucial" or "devastating" nature of the evidence and "indicia of reliability" leave much to be desired. However, it does not appear that any test, short of actual cross-examination in every instance, could be easily applied. No alternatives are readily forthcoming, nor are they anticipated.[72] It

69. *Id.* at 88-89.
70. United States v. Rogers, 549 F.2d at 500.
71. *Id.* at 498 n.8.
72. Although *Dutton* was only a 4-1-4 decision, the majority opinion in Mancusi v. Stubbs, 408 U.S. 204 (1972), adopted the "indicia of reliabil-

would appear indeed that the Supreme Court is working toward fashioning a confrontation clause which "ensures reliability while not hamstringing the states."[73] Despite the persistent declarations by the Supreme Court in *Green* and *Dutton*, that the hearsay rule is not of constitutional dimensions, it has been established in several circuits that since reliability is the goal, a statement admitted under a recognized exception to the hearsay rule is presumptively constitutional.[74]

The approach of the majority in *Rogers* is not atypical of that taken by other reviewing courts. What the Supreme Court in *Dutton* referred to as "indicia of reliability" have been adopted as a checklist, the presence of one or more, mechanically applied, being assumed conclusive on the issue of credibility. The error in such an approach is manifest because in any given situation the court may conclude that the possibility of faulty recollection is "remote" or that the conviction of the declarant put him "in a position to know" that the defendant was involved in the crime. The use of such catch phrases is meaningless out of the context of *Dutton* where they were fostered. Even in *Dutton* they weren't addressed to the primary inquiry of whether the statement was in fact made.

The decision of the court in *Rogers* illustrates the problem of working with the present amorphous standards. It has been suggested that something similar to the present approach is adequate and the "developing precedents" can explain what constitutes requisite reliability.[75] This may well be the approach required, but in order to fashion such a system increased vigilance and restraint are needed on the part of judges at the trial and the appellate levels.

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ity standard." In doing so it apparently undercut the earlier decision of the Warren Court in Barber v. Page, 390 U.S. 719 (1968), which required a good faith effort on the part of the prosecutor to secure the attendance of all witnesses.

73. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1405 (1972).

74. *See* United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973) and Hoover v. Beto, 467 F.2d 516, 533 (5th Cir.), *cert. denied*, 409 U.S. 1086 (1972) where the court noted:

> Neither the Sixth nor the Fourteenth Amendment is violated when hearsay is admitted in accordance with recognized exceptions to the hearsay rule because the fundamental values and notions which are the foundation for the exception and which permit its introduction as a matter of the law of evidence also satisfy the Sixth Amendment's demand for indicia of reliability.

75. Annotation, *Interplay of the Confrontation Clause and the Hearsay Rule*, 29 ARK. L. REV. 375, 384 (1975).