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Not So Firmly Rooted: Exceptions to the Confrontation Clause

Stanley A. Goldman

NOT SO "FIRMLY ROOTED": EXCEPTIONS TO THE CONFRONTATION CLAUSE

STANLEY A. GOLDMAN†

Hearsay statements admitted under a "firmly rooted" exception may have no inherent guarantees of reliability. Professor Goldman traces the history of the "firmly rooted" doctrine, discusses its rationale, and reviews its expansion. He analyzes these exceptions under confrontation clause requirements and determines they generally lack the requisite reliability. Professor Goldman concludes the "firmly rooted" concept is neither useful nor workable, and urges instead that courts adopt a case-by-case examination of hearsay statements' trustworthiness.

I. INTRODUCTION

"Flugum done it." Everyone who heard the dying man's last words knew they were spoken "in the hush of [death's] impending presence" and with a settled expectation that death was imminent.[1] The listeners also knew that Flugum and the deceased had been bitter rivals for years. At the murder trial, Flugum testified in his own defense that at the time of the fatal shooting he had been home asleep. He could produce no witnesses to support his alibi, nor could any prosecution witness place him at the scene of the murder. Given the deathbed declaration, however, the jury felt confident in its guilty verdict. After all, why would the dead man have voluntarily chosen to go to his Maker with a lie on his lips? In fact, this assumption by the jury that the dying declaration is reliable is the reason why courts admit such hearsay.[2]

What the jury never learned was whether the deceased was an atheist who feared no retribution in an afterlife or whether he had long harbored a secret design for revenge against the man he had named in his last moments. If the declarant had lived, the jury could have heard the accusation from his own lips. He may have proved a credible witness, or he may have projected a demeanor

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† Professor of Law, Loyola Law School, Los Angeles. B.A. 1972, University of California at Los Angeles; J.D. 1975, Loyola Law School, Los Angeles. The author gratefully acknowledges the support of his colleagues, Associate Dean Jan C. Costello and Professors Victor J. Gold, Daniel P. Selmi and Michael E. Wolfson, with the knowledge that, in the words of H.G. Wells, "[no] passion on earth, neither love nor hate, is equal to the passion to alter someone else's draft." The author also thanks Lisa K. Rozzano and Daniel D. McMillan, Loyola Law School, 1987, for their assistance in the preparation of this Article.

1. Shepard v. United States, 290 U.S. 96, 100 (1933) (Cardozo, J.). The introductory illustration was suggested in part by some of the facts of Commonwealth v. Fugman, 198 A. 99 (1938).

2. *See* MCCORMICK ON EVIDENCE § 281 (E. Cleary 3d ed. 1984); 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804(b)(2)[01] (1985); 5 J. WIGMORE, EVIDENCE §§ 1430-1452, (Chadbourn rev. 1974). *See generally* Jaffee, *The Constitution and Proof by Dead or Unconfrontable Declarants*, 33 ARK. L. REV. 227 (1979) (stating possible historical origin of the dying declaration exception).

that combined the more distasteful characteristics of a snake-oil salesman and a pimp. But no matter how poor the declarant's demeanor may have been, it was safely hidden from the trier of fact.

Indeed, whenever a court admits hearsay testimony, the possibility exists that the jury may never be able to accurately judge the reliability of the out-of-court accusation. Of course, when hearsay is used against criminal defendants, they are always at liberty to attempt to persuade the trier of fact that the out-of-court statement was never made, or that, even if made, the declarant should not be believed. Still a risk always exists that by permitting the use of a declarant's hearsay statements, his true motives, beliefs, and perceptions may not emerge as they might have had the declarant been in court and subject to cross-examination.[3]

These increased risks inherent in the inability to cross-examine the declarant under oath and in the presence of the trier of fact account for the general rule excluding out-of-court assertions when offered to prove their truth.[4] Yet, some hearsay statements are said to be spoken in circumstances of such inherent trustworthiness that courts and legislatures have created exceptions allowing their admission even though the opponent has never been provided an opportunity to question the declarant.[5] When these exceptions are invoked against a criminal defendant, the Supreme Court has concluded that the constitutional rights to confrontation of witnesses and due process of law may sometimes be violated.[6]

The United States Supreme Court has concluded that the confrontation clause demands that hearsay from a declarant who has not been confronted must possess adequate "indicia of reliability" before it may be used against a criminal defendant.[7] Unfortunately, the Supreme Court failed to describe the quantum of trustworthiness necessary to satisfy the confrontation clause in other than general terms. Exactly how much reliability is enough remains uncertain.

The Supreme Court, however, has given hints. The Court has stated that sufficient "indicia of reliability" to satisfy confrontation can be "inferred" if the hearsay statement falls within a "firmly rooted hearsay exception."[8] Thus, hearsay falling within such an exception presumptively possesses sufficient indicia of

3. "[O]ne critical goal of cross-examination is to draw out discrediting demeanor to be viewed by the factfinder." Ohio v. Roberts, 448 U.S. 56, 63 n.6 (1980) (citing Government of Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967)).

4. *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 2, § 245.

5. *See generally* MCCORMICK ON EVIDENCE, *supra* note 2, § 245 (discussing admissible hearsay); 4 J. WEINSTEIN & M. BERGER, *supra* note 2, 800[01] (discussing admissible hearsay); 5 J. WIGMORE, *supra* note 2, § 1362 (discussing admissible hearsay).

6. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. No state may "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. *See infra* note 7 and accompanying text.

7. *See Roberts*, 448 U.S. at 72; Mancusi v. Stubbs, 408 U.S. 204, 213 (1972); Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (plurality opinion). For purposes of this Article, the terms "reliability" and "trustworthiness" will be used interchangeably.

8. *Roberts*, 448 U.S. at 66.

reliability to be constitutionally admissible.[9] However, the Court has yet to clearly set forth the specific requirements to be met before an exception can be classified as "firmly rooted."

The thesis of this Article is that a hearsay exception should not be considered firmly rooted merely because it is widely recognized or of ancient origin. Such criteria are not necessarily linked with the basic constitutional requirement of reliability. Rather, the test for determining which exceptions qualify as firmly rooted must critically examine the degree of reliability guaranteed by the exception's requirements.

This Article first seeks to determine what must be required of an exception before it can be labeled "firmly rooted." That test is constructed from various standards the Supreme Court has articulated as necessary for compliance with the confrontation clause. The combination of these standards leads to the conclusion that exceptions to the hearsay rule should be classified as firmly rooted *only* if (1) the exception guarantees the accused a meaningful opportunity to question the declarant or (2) the circumstances prerequisite to admission under that exception realistically assure a substantial likelihood that "virtually any" statement offered under it is based upon personal knowledge and is not the product of either faulty recollection, or intentional or unintentional misrepresentation.

The Article examines the exceptions that the Supreme Court has described as firmly rooted, as well as those additional exceptions which lower courts have added to the ranks of the firmly rooted, to determine whether the classification is justified in light of the Supreme Court's own standards. The Article evaluates the validity of dividing exceptions into categories of "firmly" and non-"firmly rooted," and concludes that the concept is neither workable nor useful and should be abandoned. Finally, the Article suggests that the only method for realistically reconciling the confrontation clause with the exceptions to the hearsay rule is a case-by-case examination to determine whether the hearsay statement was made under circumstances of particularized guarantees of trustworthiness.

II. RELIABILITY AND THE CONFRONTATION CLAUSE

"[T]he Confrontation Clause comes to us on faded parchment."[10] With this single sentence, Justice Harlan captured the enigmatic origins of this provision of the Bill of Rights. Tradition, if not demonstrable fact, suggests that the confrontation clause, as well as the common-law hearsay rule, originated in reaction to the outrageous trial and eventual execution of Sir Walter Raleigh.[11]

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9. *Id.* at 73.

10. California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring). Although the Senate debates from the period are unrecorded, it appears that the House of Representatives adopted the confrontation clause as part of the Bill of Rights without debate. Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1301 n.42 (1985) (citing 1 ANNALS OF CONG. 15-16, 756, 767 (J. Gales ed. 1789)).

11. *See Dutton*, 400 U.S. at 86 n.16 (plurality opinion) ("It has been suggested that the constitu-

Raleigh's conviction rested solely on what would now be described as inadmissible hearsay.[12] Though modern scholars have tended to minimize the influence of Raleigh's trial on the drafting of the confrontation clause, few dispute the basic tenet that the clause, as well as the hearsay rule, were penned to safeguard criminal defendants against conviction in the absence of an opportunity to confront their accusers.[13] Because the specific parameters of the original clause remain obscure, however, both courts and scholars have found considerable difficulty applying this portion of the sixth amendment.[14] The application is particularly complicated when the issue is the relationship between the confrontation clause and the non-constitutionally based hearsay rule.

The hearsay rule and the confrontation clause are similar in that both exclude from evidence certain out-of-court assertions.[15] However, the two are not

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tional provision is based on a common-law principle that had its origin in a reaction to abuses at the trial of Sir Walter Raleigh.") (citing F. HELLER, THE SIXTH AMENDMENT 104 (1951)). For a contrary view, see Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 *Crim. L. Bull.* 99, 100 n.4 (1972). According to Graham,

> [n]o one seems to have been able to write about the right without repeating the claim that the evils of the Raleigh trial led in some way to the Sixth Amendment. My research gives me no reason to suppose that this custom represents anything other than a convenient but highly romantic myth, and I adhere to it for this reason.

Id. (citations omitted).

12. For a more complete account of the trial of Sir Walter Raleigh, see *Green*, 399 U.S. at 157 n.10; Graham, *supra* note 11, at 99-101 (Professor Graham gathered his account from 2 T. HOWELL, STATE TRIALS 25 (1809) and 1 D. JARDINE, CRIMINAL TRIALS 389-511 (1832)); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388-89 (1959); H. Stephens, *The Trial of Sir Walter Raleigh*, TRANS. ROYAL HIST. SOC'Y 172 (4th ser. 1919).

13. The Supreme Court has written:

> [C]ertainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.

Pointer v. Texas, 380 U.S. 400, 404 (1965) (citations omitted). The confrontation clause is acknowledged as having been created to prevent what has been described as the "inquisitional practice of examining witnesses in closed chambers." Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207, 211-12 (1984). "Historically, the inclusion of the Confrontation Clause in the Bill of Rights reflected the Framers' conviction that the defendant must not be denied the opportunity to challenge his accusers in a direct encounter before the trier of fact." Ohio v. Roberts, 448 U.S. 56, 78 (1980) (Brennan, J., dissenting) (citing *Green*, 399 U.S. at 156-58; Park v. Huff, 506 F.2d 849, 861-62 (5th Cir. 1975) (Gewin, J., concurring)).

In an earlier decision, the Supreme Court noted:

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

Mattox v. United States, 156 U.S. 237, 242-43 (1895); *see also Roberts*, 448 U.S. at 356 (Brennan, J., dissenting) (discussing the right of confrontation and cross-examination).

14. "The complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commentary." *Roberts*, 448 U.S. at 66 n.9. For a listing of the scholarly writings on the subject, see *id.* For a general discussion of the confrontation clause, see *Green*, 399 U.S. at 153-64.

15. The "hearsay rules and the Confrontation Clause are generally designed to protect similar values," *Green*, 399 U.S. at 155, and may be said to "stem from the same roots," *Dutton*, 400 U.S. at

coextensive and do not always exclude the same assertions.[16] The hearsay rule was not intended as a means of implementing a line of demarcation between the constitutional and unconstitutional use of out-of-court statements. The hearsay rule may require greater trustworthiness as a prerequisite to admission than does the confrontation clause.[17] The contrary, however, cannot be true: exceptions cannot permit the admission of hearsay that is less trustworthy than the minimum necessary to satisfy the confrontation requirements. This latter fact is important because not every statement admissible under all judicially or statutorily created hearsay exceptions will necessarily comply with the requirements of confrontation.[18]

Beginning with the plurality opinion in *Dutton v. Evans*,[19] the United States Supreme Court has clearly stated that reliability is the linchpin between the exceptions to the hearsay rule and the confrontation clause.[20] Dicta in the

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86; *see Roberts*, 448 U.S. at 66. "[H]istorical evidence leaves little doubt . . . that the [Confrontation] Clause was intended to exclude some hearsay." *Id.* at 63 (citing *Green*, 399 U.S. at 156-57 & nn.9-10); *see also* MCCORMICK ON EVIDENCE, *supra* note 2, § 252 ("constitutional problems of hearsay").

16. United States v. Puco, 476 F.2d 1099, 1102 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973); *see also Dutton*, 400 U.S. at 81-82 (Stewart, J.) (quoting *Green*, 399 U.S. at 155-56 and discussing differences between confrontation clause and hearsay rule); United States v. Carlson, 547 F.2d 1346, 1356-57 (8th Cir. 1976) (discussing differences between confrontation clause and hearsay rule), *cert. denied*, 431 U.S. 914 (1977).

17. In *Green*, 399 U.S. at 170, the Supreme Court permitted the prosecution to use a witness' prior inconsistent statement which was made neither under oath nor subject to prior cross-examination. In spite of this use, Federal Rule of Evidence 801(d)(1)(A) requires that only those prior inconsistent statements previously made under oath are admissible. FED. R. EVID. 801(d)(1)(A). Thus, the exception requires more than does the confrontation clause.

18. "It is clear that the mere existence of a hearsay exception does not cause the confrontation clause to recede. Thus, confrontation values have been found violated even when evidence was admitted under arguably recognized hearsay exceptions." United States v. Smith, 521 F.2d 957, 965 n.20 (D.C. Cir. 1975) (citing *Green*, 399 U.S. at 156; Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965)).

Furthermore, the United States Court of Appeals for the Second Circuit has recognized the problem:

> Whatever the law on this point may have once been, there can no longer be any doubt that, despite the fact that an extra-judicial statement may satisfy the requirements of a recognized exception to the hearsay rule, the introduction of such a statement may in certain circumstances be barred because that introduction, if accomplished, would violate the defendant's right to confrontation.

United States v. Oates, 560 F.2d 45, 80-81 (2d Cir. 1977).

Lee v. Illinois, 106 S. Ct. 2056 (1986), is an example of the United States Supreme Court's reversal of a conviction because the trial court's admission of hearsay violated the defendant's right to confrontation. For a discussion of *Lee*, see *infra* notes 155-65 and accompanying text.

19. 400 U.S. 74 (1970). Having returned to his cell after arraignment on charges of murder, Evans' co-defendant Williams was asked by a cellmate how the day had gone in court. Williams allegedly responded, "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we would not be in this [situation] now." *Id.* at 77. Although this evidence would have normally been inadmissible hearsay in most jurisdictions, Georgia law provided an expansive reading of the coconspirator exception that allowed the admission of this statement against Evans. Georgia's evidence code provided: "[A]fter the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." GA. CODE ANN. § 38-306 (1974). Evans claimed that the use of Williams' out-of-court assertion against him denied Evans the right of confrontation of witnesses. *Dutton*, 400 U.S. at 83. A fragmented Court concluded in a plurality opinion that the confrontation clause was not violated by the use of the statements against defendant Evans. *Id.* at 88.

20. The plurality in *Dutton* concluded that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by

subsequent case of *Ohio v. Roberts*[21] reaffirmed that when a hearsay statement is made under circumstances of sufficient "indicia of reliability," the prosecution could use it without violating the confrontation clause.[22] The Court in *Roberts* further noted that sufficient reliability[23] to satisfy the demands of the confrontation clause "can be inferred without more in a case where the evidence falls within a *firmly rooted* hearsay exception."[24]

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assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton*, 400 U.S. at 89 (quoting *Green*, 399 U.S. at 161).

Another decision also reasoned from this language in *Green*:

> The function of the cross-examination requirement is to assure that "the trier of fact has a satisfactory basis for evaluating the truth of the prior statement" introduced into evidence at trial, whether by transcript of a prior hearing or by hearsay testimony. However, some statements are, because of their content or the circumstances in which they were uttered, obviously reliable even in the absence of cross-examination of the declarant.

United States v. Puco, 476 F.2d 1099, 1103 (2d Cir.) (quoting *Green*, 399 U.S. at 161), *cert. denied*, 414 U.S. 844 (1973).

21. 448 U.S. 56 (1980). In *Roberts* the accused "was charged with possession of stolen checks and credit cards belonging to Bernard Isaacs and [forging a] check in [Isaacs'] name." *Id.* at 58. Isaacs' daughter, Anita, was called by the defense to testify at the preliminary hearing. Anita, a friend of defendant's, testified that she had permitted Roberts to use her apartment while she was away, but had not authorized the use of her father's checks and credit cards. *Id.* at 60.

At trial, Roberts testified that Anita had given him the checks and credit cards with the understanding that he was permitted to use them; in rebuttal, the prosecution offered Anita's testimony from the preliminary hearing. *Id.* at 59. To demonstrate her unavailability, the prosecution pointed to the fact that Anita had failed to answer five subpoenas sent to her parents' home; further, her mother testified that Anita had left home a year prior to trial and had not contacted her parents for seven months, and that they had no way to reach her, even in an emergency. *Id.* at 60. The trial judge admitted the preliminary hearing transcript and Roberts was convicted. *Id.*

22. *Id.* at 73; *see also* Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (former testimony bore sufficient "indicia of reliability" to comply with the requirements of the confrontation clause because defense counsel had previously availed himself of the opportunity to cross-examine the witness at the prior trial); *Green*, 399 U.S. at 165-66 (" 'there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable . . . .' ") (quoting Barber v. Page, 390 U.S. 719, 725-26 (1968)). Dicta in *Roberts* suggested a two-pronged test for determining when the prosecution's use of a hearsay statement does not violate a defendant's right to confrontation. First, the government must demonstrate the declarant's unavailability; second, the out-of-court assertion must possess certain "indicia of reliability." *Roberts*, 448 U.S. at 66.

The first requirement has since been substantially limited by the Court in United States v. Inadi, 106 S. Ct. 1121 (1986), which maintains that *Roberts'* constitutionally mandated unavailability, although a prerequisite to the constitutional use of prior testimony, is not necessarily required for all other hearsay exceptions. For the facts surrounding the witness' unavailability in *Roberts*, see *supra* note 21. Specifically, *Inadi* found unavailability was not a prerequisite for prosecutorial use of hearsay statements of a coconspirator. *Id.* at 1126-27. The necessity of unavailability is an intricate subject in itself, the worthy topic of an entire article, and will not be analyzed in this Article.

23. The discussion in *Roberts* implied there are two *alternative* methods of establishing sufficient reliability by which hearsay can satisfy the confrontation clause. First, defendant must have been provided an opportunity to question the hearsay declarant about the substance of the out-of-court statement. The opportunity to question is, of course, the method by which a witness' credibility is traditionally tested. *See* 5 J. WIGMORE, *supra* note 2, § 1367, at 32 (cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."). A constitutionally sufficient opportunity to question a hearsay declarant may apparently occur either at the time the out-of-court statement was made, as in the case of previously cross-examined former testimony, or at the time of the trial itself, as in the case of those exceptions which allow for the substantive use of prior inconsistent statements, FED. R. EVID. 801(d)(1)(A), past recollections recorded, *id.* 803(5), or prior identifications, *id.* 801(d)(1)(C). As a second alternative if defendant has not been provided an opportunity to question the hearsay declarant, the out-of-court statement can still be admitted so long as it was made under sufficiently trustworthy circumstances.

24. *Roberts*, 448 U.S. at 66 (emphasis added).

The Court failed to define "firmly rooted." Rather, with respect to which exceptions could be so classified, the Court simply stated that "certain hearsay exceptions rest upon such solid foundations that admission of *virtually any* evidence within them comports with the 'substance of the constitutional protection.' "[25] Only those exceptions satisfying this general standard can properly be labeled firmly rooted. If the hearsay does not fall within a firmly rooted exception, it may still be constitutionally admissible, so long as the prosecution can establish the statement was made under circumstances with "particularized guarantees of trustworthiness."[26]

Thus, the use of a declarant's out-of-court assertion against a criminal defendant is "presumptively" constitutional or unconstitutional depending on whether the statement is offered under a firmly rooted exception. Because the Court has created a type of presumption,[27] it is important initially to determine whether that presumption can be rebutted. Most courts faced with this issue have concluded correctly that *Roberts* created *two* rebuttable presumptions. The first presumption is one of constitutional *inadmissibility* when the out-of-court assertion does not fall within a firmly rooted exception. This presumption is rebutted when the prosecution is able to establish that the hearsay was spoken under circumstances with "particularized guarantees of trustworthiness."[28]

The second presumption is one in favor of constitutional *admissibility* when the hearsay falls within a firmly rooted exception.[29] This presumption may be

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25. *Id.* (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)) (emphasis added). For a general discussion of the history of the hearsay rule, see MCCORMICK ON EVIDENCE, *supra* note 2, § 244; 5 J. WIGMORE, *supra* note 2, § 1364.

26. *Roberts*, 448 U.S. at 66. In a recent decision, the Supreme Court noted:

> In *Roberts*, we recognize that even if certain hearsay evidence does not fall within a "firmly rooted hearsay exception" and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet the Confrontation Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." . . . [T]he Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule."

Lee v. Illinois, 106 S. Ct. 2056, 2063-64 (1986) (quoting *Roberts*, 448 U.S. at 65).

27. Although this approach does not technically create a presumption, as that term is typically used in the law of evidence, the Court has nonetheless created a presumption in the general sense of the term. Thus, this Article will use the term "presumption" when analyzing the consequences that flow from the identification of a hearsay statement as falling within a firmly or nonfirmly rooted exception. No other standard having been suggested by the Court, it must be assumed that the burden intended was that of proof beyond a preponderance of the evidence. For a typical statutory definition of a presumption, see CAL. EVID. CODE § 600 (West 1966), in which the term is defined as "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action." For a general discussion of presumptions, see MCCORMICK ON EVIDENCE, *supra* note 2, §§ 342-49.

28. *See Roberts*, 448 U.S. at 66. The rebuttable nature of this presumption was recently reaffirmed by the Supreme Court in *Lee*, 106 S. Ct. at 2063-64.

29. The exceptions lower courts have classified as firmly rooted, yet still have found it necessary to examine the trustworthiness of the particular statement at issue, include adoptive admissions, FED. R. EVID. 801(d)(2)(B), former testimony, *id.* 804 (b)(1), declarations against interest, *id.* 804(b)(3), spontaneous exclamations, *id.* 803(2), and present sense impressions, *id.* 803(1).

For example, in State v. Bauer, 109 Wis. 2d 204, 325 N.W.2d 857 (1982), the Wisconsin Supreme Court noted that although the inference in favor of the reliability of a firmly rooted exception is strong,

> [E]vidence falling within a firmly rooted hearsay exception is not admissible per se. The trial court must still examine each case to determine whether there are unusual circum-

rebutted if defendant can establish that he has not been provided with an adequate opportunity to question the declarant *and* that the hearsay was spoken under untrustworthy circumstances. Unfortunately, as a result of the Supreme Court's lack of clarity with respect to the rebuttable nature of this latter presumption, some lower courts, without expressly stating that they are doing so, have seemed to treat the presumptively constitutional status of hearsay offered under a firmly rooted exception as if it were conclusive.[30] Once these courts determine that a hearsay statement falls within a firmly rooted exception, it appears no attempt is made to evaluate the trustworthiness of that particular statement.[31]

Although *Roberts* never explicitly stated this second presumption is rebuttable, that conclusion extends logically from the Court's underlying call for reliability.[32] This can be illustrated by the application of the firmly rooted theory to

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stances which may warrant exclusion of the evidence. If no such unusual circumstance exists, the evidence may be properly admitted. "Where unusual circumstances are apparent, the court may have reason to inquire into whether a meaningful confrontation was indeed afforded a defendant."

Id. at 213-14, 325 N.W.2d at 862 (quoting Nabbefeld v. State, 83 Wis. 2d 515, 527, 266 N.W.2d 292, 298 (1978)).

Similarly, in State v. Buelow, 122 Wis. 2d 465, 363 N.W.2d 255 (Wis. Ct. App. 1984), the court noted that "[w]hen the evidence fits within a firmly-rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. While the inference of reliability is strong, the court must still examine each case to determine whether there are unusual circumstances which warrant exclusion of the evidence." *Id.* at 479, 363 N.W.2d at 263 (citing State v. Curbello-Rodriguez, 119 Wis. 2d 414, 430, 351 N.W.2d 758, 766 (Wis. Ct. App. 1984)).

In Brown v. Tard, 552 F. Supp. 1341 (D.N.J. 1982), because the hearsay offered by the prosecution qualified as a present sense impression, the court concluded that, for confrontation clause purposes, its reliability could be inferred. In spite of this presumption, however, the court examined the statement itself to determine whether it bore sufficient "circumstantial guarantees of reliability" to satisfy the confrontation clause. *Id.* at 1351; *see also* Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1058 (6th Cir. 1983) (although the statements of a four-year-old molestation victim "fit squarely within the parameters of a well-recognized and firmly-rooted hearsay exception," the court went on to note factors that guaranteed the trustworthiness of the statements), *cert. denied*, 464 U.S. 1071 (1984); State v. Marshall, 113 Wis. 2d 643, 655-56, 335 N.W.2d 612, 617-18 (1983) (court examined the indicia of reliability of the adoptive admission in question, even though it qualified as a firmly rooted hearsay exception).

30. *See* United States v. Chindawongse, 771 F.2d 840, 846-47 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 859 (1986); United States v. Lurz, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); United States v. Peacock, 654 F.2d 339, 349-50 (5th Cir. 1981) *cert. denied*, 464 U.S. 965 (1983); Harrison v. United States, 435 A.2d 734, 736 (D.C. 1981); State v. Porter, 303 N.C. 680, 696, 281 S.E.2d 377, 388 (1981); State v. Bawdon, 386 N.W.2d 484, 487 (S.D. 1986); *see also* United States v. Papia, 560 F.2d 827, 836 n.3 (7th Cir. 1977) ("the confrontation clause presents no bar to the use of extrajudicial statements of a coconspirator . . . ."); Ottomano v. United States, 468 F.2d 269, 273 (1st Cir. 1972) (recognizing the coconspirators' statements as admissible under a recognized exception, therefore satisfying the requirements of the confrontation clause), *cert. denied*, 409 U.S. 1128 (1973).

31. *See supra* note 29.

32. Holding this latter presumption conclusive poses a significant constitutional danger. A conclusive presumption would preclude an accused from arguing that the hearsay admitted against him was made under circumstances so unreliable as to deny the right to confrontation of witnesses.

Not all statements admissible under a particular hearsay exception possess the same degree of trustworthiness and reliability. For example, two statements admissible under the same exception can boast substantially different levels of trustworthiness depending on the self-serving nature of their content. Assume we are in a jurisdiction which labels as "firmly rooted" spontaneous exclamations. A spontaneous exclamation which is favorable to the interests of the declarant made moments after an automobile accident does not possess the same degree of reliability as an exclamation acknowledging the declarant's own liability. Similarly, it can be argued that given the underlying

Roberts itself.[33] Despite the Court's opinion that the hearsay statement involved in *Roberts* was offered under a firmly rooted former testimony exception, the justices nonetheless found it necessary to examine the particular circumstances in which the exception had been applied.[34]

Yet, recently in *Bourjaily v. United States*[35] the Supreme Court stated that "the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of [a firmly rooted exception]."[36] This language, as distinguished from that used by the Supreme Court in *Roberts*, suggests that the confrontation clause is automatically, and perhaps even conclusively, satisfied whenever an out-of-court statement satisfies the statutory requirements of a firmly rooted exception.

The danger inherent in holding this latter presumption to be conclusive is that no guarantee exists that every statement falling within a firmly rooted exception will be reliable. The general standard created by the Court in *Roberts* provides that "virtually any" statement offered under a firmly rooted exception will comport with the confrontation clause. The use of the term "virtually any" appears to acknowledge that some statements admissible under firmly rooted exceptions will not comport with constitutional requirements. The Supreme Court presumably did not intend to deny defendants an opportunity to establish that the particular hearsay offered against them was made under unreliable circumstances simply because it was offered under a firmly rooted exception.

After all, the due process clause guarantees more than just a ritualistic trial.[37] The clause is violated when a criminal defendant is convicted on the basis of unreliable evidence.[38] In reality, hearsay falling under many firmly rooted exceptions may be no more reliable than hearsay offered under non-firmly rooted exceptions.[39] When hearsay is held to be trustworthy simply by virtue of falling within a preexisting exception, the defendant may be provided

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rationale for the exception, the dying declaration of one who is devoutly religious is more reliable than that of an atheist who does not fear the consequences of dying with a lie on her lips.

33. For a discussion of the facts of *Roberts*, see *supra* note 21.

34. *Roberts*, 448 U.S. at 67-68; *see also* C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE 678 (1986) (circumstances should be analyzed in determining reliability).

35. 107 S. Ct. 2775 (1987).

36. *Id.* at 2783.

37. Jackson v. Virginia, 443 U.S. 307, 316-17 (1979). In *Jackson*, the Court concluded that the due process clause of the fifth amendment of the United States Constitution barred criminal conviction absent proof beyond a reasonable doubt. *Id.* This principle was said to be violated by allowing a properly instructed trier of fact to reach an irrational verdict of guilt. A conviction as a result of a procedurally correct trial may nonetheless violate due process if the evidence used to support the conviction is unreliable. *Id.*

38. *See e.g.*, Manson v. Brathwaite, 432 U.S. 98, 113-14 (1977); Neil v. Biggers, 409 U.S. 188, 198-99 (1972); Simmons v. United States, 390 U.S. 377, 383-86 (1968); Stovall v. Denno, 388 U.S. 293, 301-02 (1967); Turner v. Louisiana, 379 U.S. 466, 471-74 (1965); *In re* Oliver, 333 U.S. 257, 273-77 (1948). When a defendant is convicted, that conviction must be based upon a realistic evaluation of the reliability of the evidence submitted against him, not upon unrealistic and unwarranted assumptions of trustworthiness. The same should be true for any conviction rendered without providing the accused an opportunity to challenge the prosecution's use of unreliable evidence against him. This result could occur if the presumption created by the firmly rooted classification was conclusive.

39. The danger inherent in a conclusive presumption is illustrated below by examining the four firmly rooted exceptions acknowledged in *Roberts*: previously cross-examined former testimony,

with no more than a ritualistic trial—a trial that he enters with the deck constitutionally stacked against him.[40] If the presumption were conclusive, it would foreclose a defendant from arguing a violation of his constitutional rights by prohibiting him from demonstrating the untrustworthiness of the particular hearsay offered by the prosecution.[41]

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appropriately administered business and public records, and dying declarations. *Roberts*, 448 U.S. at 66 n.8. For a discussion of these exceptions, see *infra* notes 60-100 and accompanying text.

40. A second principle of due process arises out of Chambers v. Mississippi, 410 U.S. 284, 302 (1973), in which the Supreme Court held that the mechanical enforcement of anachronistic rules of evidence cannot be used to deny an accused confrontation and due process of law. In *Chambers*, the trial court thwarted defendant's attempts to present evidence that Gable McDonald had confessed to the murder for which defendant Chambers was on trial. *Id.* at 289. Because it was defendant who had called the now-recanting McDonald to the stand, the State's prohibition against parties impeaching their own witnesses precluded use of the confession for impeachment. *Id.* at 291-92. The United States Supreme Court reversed the conviction, concluding that these evidentiary rules had denied Chambers his right to due process of law. *Id.* at 302.

Though analytically the reverse of *Chambers*, the consequence of classifying as presumptively constitutional statements admitted under hearsay exceptions that are not legitimately based on inherent guarantees of trustworthiness can result in a similar constitutional deprivation. In *Chambers*, the accused was denied an opportunity to impeach his own witnesses. The constitutional right of a criminal defendant to due process of law is violated by the operation of any rule of evidence that prohibits a defendant from presenting and questioning material witnesses.

Chambers prohibits rules of evidence from controlling the dictates of the Constitution. If all hearsay admissible under an exception is immune from constitutional attack, then the rule of evidence reigns supreme over the Constitution. Great care must be taken before all hearsay admissible under a particular exception is made presumptively constitutional. Exceptions should not be categorized as presumptively reliable simply because they have been created by a court or legislature. Rather, exceptions should be labeled "firmly rooted" only if statements admitted under them comport with the requirements of the Constitution.

41. Specifically, it could be argued that the unwarranted classification of an exception as "firmly rooted" might be contrary to the due process principle established in Leary v. United States, 395 U.S. 6 (1969). *Leary* illustrates the limits due process places on the use of evidentiary presumptions against the criminally accused. Former Harvard Professor Timothy Leary attempted to drive into Mexico but was refused entry by Mexican border officials. *Id.* at 9-10. On his return to the American border checkpoint, Leary was stopped. The ensuing search of his car by American border guards revealed small quantities of marijuana and three partially smoked marijuana cigarettes. *Id.* at 10. Leary was indicted, tried, and convicted of offenses which included having knowingly transported and facilitated the transportation and concealment of marijuana illegally imported or brought into the United States, *with the knowledge that it was illegally imported or brought in*, a violation of 21 U.S.C. § 176a (repealed 1970). *Id.* at 10-11 (emphasis added).

Under this statute, the defendant's knowledge of illegal importation of the marijuana seized from him could be presumed from his possession of the marijuana. The statute stated that "such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." *Id.* at 30 (quoting 21 U.S.C. § 176a, *repealed by* Act of Oct. 27, 1970, Pub. L. No. 91-513, § 1101(a)(2), 84 Stat. 1291, 1292 (1970)). In other words, federal law provided a rebuttable presumption that all marijuana is imported into the United States and that everyone who possesses it has knowledge of this fact. The statute thus placed the burden upon the accused to produce sufficient evidence to rebut this presumption.

After Leary's conviction, he asked the United States Supreme Court to examine the constitutionality of the presumption within 21 U.S.C. § 176a. The Court held the presumption unconstitutional and overturned Leary's conviction, *Leary*, 395 U.S. at 53, concluding that when any presumption is used to the detriment of a criminal defendant a " 'rational connection' " must exist between the underlying preliminary fact and the fact presumed. *Id.* at 33-34 (quoting Tot v. United States, 319 U.S. 463, 467-69 (1943)). If there is no "substantial assurance" that the presumed fact is "more likely than not" to flow from the preliminary fact, the presumption is an unconstitutional deprivation of due process. *Leary*, 395 U.S. at 36. This "rational connection" test was established in Tot v. United States, 319 U.S. 463, 467-68 (1943). *See also* United States v. Romano, 382 U.S. 136, 134-41 (1965) (applying the rational connection test of *Tot*, the Court invalidated a presumption that mere presence at the site of a distillery was sufficient to justify a conviction of the accused for the crime of possession of an illegal distillery). *But cf.* United States v. Gainey, 380 U.S. 63, 66-68 (1965) (applying the rational connection test of *Tot*, the Court sustained the validity of a presump-

When the prosecution submits hearsay evidence of an absent witness, the defendant is unable to question that declarant. When a state-created hearsay exception makes all statements falling within its definition presumptively constitutional, the defendant may not be in a position to effectively challenge the accusations against him and yet may be prevented from constitutionally attacking this actual denial of confrontation. This lack of an opportunity to question the witnesses against him will not violate the confrontation rights of defendants in every case. Some situations in which the defendant is unable to confront the out-of-court declarant, however, may deny the defendant certain constitutional protections.

Thus, the presumptively constitutional nature of all statements falling within firmly rooted exceptions should be rebuttable. The remainder of this Article will analyze the problems inherent in the "firmly rooted" concept even if it creates only a rebuttable, rather than conclusive, presumption in favor of the constitutionality of all hearsay falling within such exceptions. Even if this presumption is rebuttable it still leaves unanswered the question of which exceptions qualify as firmly rooted. A workable definition is needed.

III. "FIRMLY ROOTED" DEFINED

In a footnote, the *Roberts* Court offered four examples of firmly rooted exceptions: previously cross-examined former testimony, appropriately administered business and public records, and dying declarations.[42] It is apparent from the Court's discussion that these four were not intended to be the only exceptions classifiable as firmly rooted.[43] However, had the Court believed that all

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tion providing that mere presence at the site of a distillery was sufficient to justify a conviction of the accused for the crime of running an unlicensed distillery).

Although *Leary* involved a presumption that supplied a factual element of the offense, the decision, by analogy, may also demonstrate the due process limits on the use of all evidentiary presumptions against criminal defendants. A presumption in favor of the constitutionality of all hearsay admissible under an exception places the burden on the accused to establish the unreliable nature of the circumstances under which the statement was made. If no "rational connection" between the circumstances surrounding the hearsay statement and the presumed fact of the statement's reliability exists, the right of the accused to due process of law has been violated. *See* Jaffee, *supra* note 2, at 303-06. For a somewhat different analysis of the due process clause, see Dutton v. Evans, 400 U.S. 74, 96-97 (1970) (Harlan, J., concurring).

42. *Roberts*, 448 U.S. at 66 n.8.

43. Although the Court failed to explain its selection of these exceptions, each arguably falls within one of the Court's two alternative methods of satisfying confrontation discussed above. *See supra* note 23. The *Roberts* Court concluded that the previous opportunity to cross-examine at a prior proceeding, such as the preliminary hearing involved in California v. Green, 399 U.S. 149 (1970), sufficiently approximates the circumstances surrounding an actual trial so as to satisfy the demands of the confrontation clause. *Roberts*, 448 U.S. at 69-70 & n.10. Similarly, when the out-of-court statement offered by the prosecution is made by a declarant who is now present in court and available for full and effective cross-examination, the requirement of the confrontation clause has also been satisfied. *See Green*, 399 U.S. at 158. The objectionable exceptions arise in situations in which neither of these exist—when the declarant is presently unavailable for cross-examination and the defendant has not been previously provided with an opportunity to question the declarant.

Similarly, *Roberts* classified business and public records, as well as dying declarations, as firmly rooted presumably because the circumstances under which these out-of-court statements are made are said to provide reasonable assurance of their trustworthiness. For a discussion of whether these assumptions of reliability are in fact warranted, see *infra* notes 71-100 and accompanying text.

federal hearsay exceptions were firmly rooted it presumably would have said so. Unfortunately, the Court not only failed to explain its selection of these four exceptions, but it also provided little guidance for determining which additional exceptions could be similarly categorized. As mentioned above, the Court simply stated that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.' "[44]

Part of the problem lower courts have had in properly classifying exceptions stems from the Supreme Court's failure to identify specifically the material from which the "solid foundations" of a firmly rooted exception were to be built. As a result of the Supreme Court's failure to communicate the basis of a firmly rooted exception, some lower courts have equated "firmly rooted" with "long established."[45] Advocates of this position are likely to find support in the Supreme Court's recent decision in *Bourjaily*.[46] The majority opinion, authored by Chief Justice Rehnquist, held the hearsay exemption for coconspirator statements was "firmly enough rooted in our jurisprudence" so as to qualify as a firmly rooted exception.[47] The Court supported this conclusion not with an analysis of the reliability safeguards required of the exception, but rather by stating that the Court's acceptance of this exception dated back to an 1827 decision.[48]

However, the concept of firmly rooted should not be synonymous with longevity. An out-of-court assertion may satisfy the requirements of a long-observed hearsay exception, yet not necessarily possess sufficient reliability to meet the requirements of the confrontation clause.[49] Thus, longevity alone should not provide the basis for establishing a statement's compliance with confrontation. The only acceptable meaning of the "solid foundations" demanded by *Roberts* is one based on reliability. Any other conclusion would be inconsistent with the purpose of the confrontation clause as identified in both *Dutton* and *Roberts*.[50] As noted by the Wisconsin Supreme Court,[51] "the question of whether a hearsay exception is 'firmly rooted' does not turn upon how long the

44. *Roberts*, 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

45. *See, e.g.*, McLaughlin v. Vinzant, 522 F.2d 448, 450 (1st Cir.), *cert. denied*, 423 U.S. 1037 (1975) (excited utterance a long-standing exception to the hearsay rule, and does not contravene the confrontation clause); People v. Nieves, 67 N.Y.2d 125, 131, 492 N.E.2d 109, 112, 501 N.Y.S.2d 1, 4 (1986) (in this dying declarations case, the court favored well-established reliance on specific categories of hearsay exceptions rather than an amorphous "reliability" test); State v. Marshall, 113 Wis. 2d 643, 655, 335 N.W.2d 612, 617-18 (1983) (adoptive admissions held to be a firmly rooted hearsay exception which is long established in Wisconsin; citing Richards v. State, 82 Wis. 172, 178, 51 N.W. 652, 653 (1892)); State v. Dorsey, 103 Wis. 2d 152, 163, 307 N.W.2d 612, 617 (1981) (coconspirator statements as an exception to the hearsay rule "well-rooted" in Wisconsin law; citing Baker v. State, 80 Wis. 416, 420, 50 N.W. 518, 520 (1891), which had recognized the well-established admissibility of statements of a coconspirator).

46. 107 S. Ct. 2775 (1987); *see supra* text accompanying notes 35-36.

47. *Id.* at 2783.

48. *Id.* (citing United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827)). For further discussion of *Bourjaily* see *infra* notes 178-82 and accompanying text.

49. *See supra* note 18.

50. *See Bourjaily*, 107 S. Ct. at 2791-92 (Blackmun, J., dissenting).

51. State v. Wyss, 124 Wis. 2d 681, 370 N.W.2d 745 (1985).

rule has been accepted but rather how solidly it is grounded on considerations of reliability and trustworthiness—the very reason for the right to confrontation."[52]

Inserting "reliability" into the general standard articulated in *Roberts* for defining "firmly rooted" establishes a logically consistent test for determining which exceptions are to be classified as firmly rooted. The classification of an exception as firmly rooted depends on whether the requirements of that exception guarantee the reliability of "virtually any" hearsay falling within it. This test serves the ultimate goal sought by *Roberts*, but by itself it is still incomplete. It fails to demonstrate how to realistically measure guarantees of reliability. Fortunately, the plurality opinion in *Dutton* provides some guidance.

The *Dutton* Court propounded four factors that help to measure indicia of reliability.[53] According to *Dutton*, hearsay has a greater likelihood of being trustworthy when: (1) the out-of-court statement does not contain an express assertion about a past fact; (2) the possibility is extremely remote that the out-of-court statement is founded on a faulty recollection; (3) the circumstances under which the statement was made indicate that the declarant is not misrepresenting the facts; and (4) the declarant had personal knowledge of the matters asserted in the statement.[54] Although compliance with these factors cannot ab-

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52. *Id.* at 709-10, 370 N.W.2d at 759. A recently created exception may be surrounded by sufficient reliability-insuring requirements so that virtually any statement falling within it will comport with the requirements of the confrontation clause. For example, *Roberts* described the business records exception as being firmly rooted despite its relatively recent codification. *Roberts*, 448 U.S. at 66 n.8; *see* Johnson v. Lutz, 253 N.Y. 124, 126, 170 N.E. 17, 517-19 (1930) (noting that the business records exception was not recognized at common law). On the other hand, other exceptions of ancient origin may not be founded upon trustworthiness and a statement admissible under that exception should not presumptively comply with the sixth amendment. For a discussion of the dying declarations exception, which is rooted in antiquity but whose underlying rationale is arguably not rooted in reliability, see *infra* notes 88-100 and accompanying text.

53. *Dutton*, 400 U.S. at 88-89. The *Dutton* Court also found the importance of the hearsay relevant to its admission. In particular, the Court noted that the hearsay offered against defendant Evans was neither "crucial" nor "devastating." *Id.* at 87. Presumably, if the hearsay statement had been "crucial" or "devastating," the Court would have required a higher standard of reliability.

54. *Id.* at 87. These four factors appear to have most significance with respect to hearsay admitted under nontraditionally recognized exceptions, such as the expanding-equivalency exceptions of the Federal Rules of Evidence 804(b)(5) and 803(24). In reality, when applied to most previously codified exceptions, factors (1) and (4) have only minimal application.

For example, with respect to the first factor, it must be remembered that—other than exceptions such as those for statements of present mental, emotional, or physical condition, *id.* 803(3), occasionally those for present sense impressions, *id.* 803(1), and those for excited utterances, *id.* 803(2)—almost all hearsay statements, including the typical hearsay admissible under the four exceptions described as firmly rooted in *Roberts*, involve a description of past fact. Thus, if this factor were strictly applied most hearsay would be excluded. This result was clearly not intended by the Supreme Court. With respect to the fourth factor, if the declarant's personal knowledge of the subject matter described in the out-of-court assertion cannot be established, that hearsay statement will rarely, if ever, be admitted into evidence. *See id.* 602. Thus, the first factor cannot be complied with, while the fourth factor would have been complied with regardless of its inclusion by *Dutton*. Therefore, only two of the four factors, (2) the possibility that the out-of-court assertion is based on faulty recollection is extremely remote and (3) misrepresentation of fact by the declarant is unlikely, have significant practical application to the vast majority of codified exceptions.

With respect to the third consideration, the question arises whether the misrepresentation it describes encompasses both intentional fabrications and unintentional misrepresentations. Irrespective of what the Court may have intended, unintentional misrepresentation caused by faulty perception, for example, is a major underlying reason for the creation of the hearsay rule itself. This

solutely guarantee reliability, the Supreme Court has concluded that their presence increases the likelihood of trustworthiness.

Surprisingly, however, *Roberts* failed even to mention these factors. This failure to discuss the *Dutton* factors is a major flaw in the Supreme Court's attempt to set forth a definitive standard for determining which hearsay statements can be admitted without violating the confrontation clause. Not only do these factors create a framework in which to evaluate statements offered under non-firmly rooted exceptions, they also assist in determining which exceptions, if any, should be classified as firmly rooted.

In considering these factors, it must be understood that strict compliance with all of them could never be required as a precondition to the admission of a hearsay statement.[55] For example, strict compliance with the first factor, that the out-of-court statement not contain an assertion of a past fact, would preclude the use of the vast majority of hearsay, because most hearsay contains some assertion describing how a past event occurred.[56] On the other hand, the three remaining *Dutton* factors provide a practical means of evaluating reliability of hearsay when offered against a criminal defendant. Thus, to be admissible under the *Dutton* test, the particular circumstances under which the statement was made must suggest that the hearsay is an accurate recollection of something within the declarant's personal knowledge and that the statement does not contain an intentional or unintentional misrepresentation.[57]

If the *Dutton* factors are used to determine which exceptions should be classified as firmly rooted, then the considerations must be different from those involved in determining the admissibility of an individual hearsay statement offered under a non-firmly rooted exception. When hearsay is offered under a non-firmly rooted exception, the concern is only with the particularized guarantees of trustworthiness of the individual statement offered in that case. When an

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Article will assume the broader interpretation which includes unintentional as well as intentional misrepresentations.

This conclusion is mandated not merely by the Court's inclusion of this third factor of misrepresentation, but also by factors requiring the declarant's personal knowledge as well as the problems of faulty recollection. For example, when the court requires that the declarant have personal knowledge of the subject matter of his narrative, it seems to demand both that the declarant observed the event in question and that his statement describes only the event personally perceived, as opposed to any additional fact added by error of perception. Clearly, this is also an aspect of the potential dangers of faulty recollection. Therefore, although not individually articulated by the Court, a demand that the hearsay statement not be based on erroneous, though unintentional misrepresentation (misperception) exists in the shadow of *Dutton*'s other reliability insuring factors. *Cf.* 3A J. WIGMORE, EVIDENCE § 876, at 643-45 (Chadbourn rev. 1970 & Supp. 1987) (inaccuracy of testimony based on defective qualifications of the observer, such as observation, recollection, or narration, as opposed to inaccuracy based on other factors, such as moral character or emotional prejudice).

55. For example, in United States v. Perez, 658 F.2d 654 (9th Cir. 1981), the United States Court of Appeals for the Ninth Circuit confirmed that "[a]ll four elements need not be present in order to satisfy the confrontation clause. In some circumstances, a statement may be admitted over confrontation clause objections even if it does not pass scrutiny under each prong of the *Dutton* test." *Id.* at 661 (citing United States v. Snow, 521 F.2d 730, 734-35 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976)).

56. Although *Dutton*, 400 U.S. at 88-89, involved an example of what the Supreme Court decided was a hearsay statement that did not contain an assertion of past fact, the exclusion of all hearsay statements describing past facts was clearly not the intent of the Court. *See supra* note 54.

57. *See supra* note 54.

exception is categorized as firmly rooted, the court must conclude that virtually any statement offered under that exception will comport with the requirements of the confrontation clause. Thus, virtually any statement offered under the firmly rooted exception must satisfy the *Dutton* factors for determining trustworthiness.

Combining the *Dutton* factors for determining reliability with the general standard provided in *Roberts*, exceptions can be constitutionally classified as firmly rooted *only* if (1) the exception guarantees the accused a meaningful opportunity to question the declarant or (2) the circumstances prerequisite to admission under that exception realistically assure a substantial likelihood that virtually any statement offered under it is based on personal knowledge and is not the product of either faulty recollection, or intentional or unintentional misrepresentation. When these assurances are not present, the classification of an exception as firmly rooted fails to satisfy the confrontation clause standards articulated by the United States Supreme Court in *Dutton* and *Roberts*.

By classifying exceptions as firmly rooted, a danger exists that courts will presumptively label as reliable all hearsay admitted solely as the result of long accepted, but nonetheless unwarranted, assumptions. Just as placing the burden of disproving the case against criminal defendants would make it more likely that innocent persons might be convicted, similarly, placing the burden of establishing the untrustworthiness of a hearsay statement on the accused increases the possibility that the confrontation clause will be violated by the use of unreliable hearsay. Thus, even if the presumption in favor of the constitutionality of hearsay falling within a firmly rooted exception is only rebuttable, it still unnecessarily increases the likelihood that unreliable evidence will be used to convict the accused. These problems can be avoided only if courts are required to examine on a case-by-case basis the "particular guarantees of trustworthiness" to be found in the circumstances in which these statements were made.[58]

58. *See infra* notes 184-90 and accompanying text. Support for this proposal can be found in the due process clause as well as the confrontation clause. The right of cross-examination and confrontation of witnesses is, after all, an essential element of due process. *See* Smith v. Illinois, 390 U.S. 129 (1968); *In re* Oliver, 333 U.S. 257 (1948); Snyder v. Massachusetts, 291 U.S. 97 (1934); Alford v. United States, 282 U.S. 687 (1931). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965) (quoted in *Roberts*, 448 U.S. at 78 (Brennan, J., dissenting)).

Concurring separately in *Pointer*, both Justices Harlan and Stewart agreed with the majority as to the importance of the right of an accused to confront the witness against him. Justice Harlan went so far as to state that "a right of confrontation is 'implicit in the concept of ordered liberty,' reflected in the Due Process Clause of the Fourteenth Amendment independently of the Sixth. " *Pointer*, 380 U.S. at 408 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Justice Stewart commented: "The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is '[o]ne of the fundamental guarantees of life and liberty,' and 'one of the safeguards essential to a fair trial.' " 380 U.S. at 410 (Stewart, J., concurring) (quoting Alford v. United States, 282 U.S. 687, 692 (1931)). *Accord* Berger v. California, 393 U.S. 314, 315 (1969); Barber v. Page, 390 U.S. 719, 721 (1968); Kirby v. United States, 174 U.S. 47, 55-56 (1899).

Furthermore, the due process clause is violated when an accused is convicted on the basis of untrustworthy evidence. *See supra* note 37; Goldman, *Guilt by Intuition: The Insufficiency of Inconsistent Statements to Convict*, 65 N.C.L. REV. 1, 36-38 (1986).

IV. *ROBERTS'* FOUR FIRMLY ROOTED EXCEPTIONS

Roberts provided four examples of hearsay exceptions which the Court believed to be so firmly rooted as to warrant a presumption in favor of the reliability of virtually any hearsay statements falling within them.[59] This section of the Article examines the underlying rationale for each of these exceptions to determine whether this inference of reliability is justified, and concludes that substantial doubt exists whether virtually any statement offered under these exceptions complies with the requirements of the confrontation clause.

A. *Former Testimony*

Previously cross-examined prior testimony[60] is the first exception listed in *Roberts* as firmly rooted. The underlying rationale of this exception is quite distinct. Some lower courts have taken the position that hearsay admitted under this exception satisfies the requirements of the confrontation clause because of the inherent reliability of the circumstances under which the testimony was originally given.[61] However, the general consensus, including a recent opinion of

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59. *Roberts*, 448 U.S. at 66 n.8.

60. *Id.* The hearsay exception for former testimony provides:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

FED. R. EVID. 804(b)(1).

61. *See, e.g.*, Thomas v. Cardwell, 626 F.2d 1375, 1385-86 (9th Cir. 1980) (former testimony possesses sufficient indicia of reliability to comply with the confrontation clause), *cert. denied*, 449 U.S. 1089 (1981); Younger v. State, 496 A.2d 546, 552 (Del. Super. Ct. 1985) (former testimony firmly rooted hearsay exception); State v. Mee, 102 Idaho 474, 483, 632 P.2d 663, 672 (1981) (former testimony inherently reliable); State v. Keairns, 9 Ohio St. 3d 228, 230, 460 N.E.2d 245, 248 (1984) (former testimony firmly rooted hearsay exception); State v. Bauer, 109 Wis. 2d 204, 216-20, 377 N.W.2d 175, 176 (1985) (former testimony firmly rooted hearsay exception). The oath, the solemnity of the occasion, and the fact that the witness is subject to criminal penalties for perjury suffice to ensure honesty even in the absence of an opportunity to cross-examine.

The majority in United States *ex rel.* Haywood v. Wolff, 658 F.2d 455 (7th Cir.) (per curiam), *cert. denied*, 454 U.S. 1088 (1981), noted:

> The test for determining whether preliminary hearing testimony is admissible under the Confrontation Clause, as with all hearsay, is not whether there was an opportunity for full and complete cross-examination, but whether there are adequate indicia of reliability to justify its placement before the jury, even though there is no contemporaneous confrontation of the declarant.

Id. at 463 (citing *Dutton*, 400 U.S. at 89; *Roberts*, 448 U.S. at 65-66). Applying this test, the majority found that the circumstances under which the declarant originally testified and the degree of cross-examination that was allowed at the preliminary hearing bore sufficient indicia of reliability to warrant the testimony's admission. *Id.* at 463.

Senior Circuit Judge Swygert, however, vehemently dissented, maintaining that the defendant simply had no opportunity below to adequately cross-examine the declarant at the preliminary hearing under Illinois law. *Id.* at 464-65 (Swygert, J., dissenting). Illinois law limits cross-examination at preliminary hearings. *Id.* at 457 n.5. Instead, Judge Swygert preferred the holding of the district court, which had concluded that the "petitioner was prevented from adequately testing [the declarant's] recollection and sifting his conscience to satisfy the demands of the Confrontation Clause." *Id.* at 461 (Swygert, J., dissenting).

In Commonwealth v. Bohannon, 385 Mass. 733, 434 N.E.2d 163 (1982), the Supreme Judicial

the United States Supreme Court in *United States v. Inadi*,[62] is to the contrary. Unlike the other *Roberts* exceptions, the theory with respect to this exception is that the accused has already been provided with an opportunity to confront his accuser. This previous confrontation presumably provides the basis for *Roberts'* categorization of this exception as firmly rooted.[63]

Court of Massachusetts concluded that "the reliability of the evidence is ensured by the circumstances surrounding the giving of the testimony in the first instance and the manner in which the evidence is preserved and restated at the later trial." *Id.* at 747, 434 N.E.2d at 171. "The prior cross-examination of a now unavailable witness before a judicial tribunal provides substantial compliance with the purposes behind the confrontation clause, even though some demeanor evidence relevant to resolving the issue of credibility is forever lost." *Id.* at 747-48, 434 N.E. at 172 (citations omitted); *see also* Thomas v. Cardwell, 626 F.2d 1375, 1385-86 (9th Cir. 1980) ("there was substantial compliance with the confrontation requirement and sufficient 'indicia of reliability' so that the jury in appellant's second trial was afforded a satisfactory basis for evaluating the truthfulness of [the witness'] prior testimony") (citing *Roberts*, 448 U.S. at 73; Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)), *cert. denied*, 449 U.S. 1089 (1981)).

62. 106 S. Ct. 1121 (1986). In *Inadi* the Supreme Court stated:

> Unlike some other exceptions to the hearsay rules, . . . former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.

Id. at 1126. On the other hand, when the declarant is presently *un*available but the defendant has been provided a prior opportunity to confront, the testimony is presumptively constitutional even when the circumstances surrounding the statement fail to possess "particularized guarantees of trustworthiness." *Id.*

The Supreme Court had noted this point in a prior decision:

> It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant. This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.

Barber v. Page, 390 U.S. 719, 722 (1968) (citations omitted).

63. This conclusion does not suggest that the confrontation clause is violated whenever the prosecution uses the prior testimony of an unavailable declarant unless previously subject to meaningful questioning by the accused. "The Confrontation Clause does not preclude admission of prior testimony of an unavailable witness, provided his unavailability is shown and the defendant had an opportunity to cross-examine." United States v. Johnpole, 739 F.2d 702, 710 (2d Cir.) (citing Mattox v. United States, 156 U.S. 237 (1895)), *cert. denied*, 469 U.S. 1075 (1984); *see also* United States v. Molt, 772 F.2d 366, 368 (7th Cir. 1985) (interpreting the United States Supreme Court's holding in Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)), *cert. denied*, 106 S. Ct. 1458 (1986); State v. West, 363 So. 2d 513 (La. 1978) (unconfronted former testimony may be still be used against criminal defendants when it bears sufficient indicia of reliability).

Under the *Roberts* test, if the defendant has not been personally provided a previous opportunity to question the declarant, as is the case with prior grand jury testimony, the burden rests on the prosecution to establish that the former testimony possesses particularized guarantees of trustworthiness sufficient to satisfy the confrontation clause. *See* California v. Green, 399 U.S. 149 (1970). Under this rationale, many lower courts have chosen to admit uncross-examined prior grand jury testimony against criminal defendants. *See* United States v. Murphy, 696 F.2d 282 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. Carlson, 547 F.2d 1346 (9th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

Because grand jury testimony is not subject to defense questioning, it falls outside the federal exception for former testimony. *See* FED. R. EVID. 804(b)(1). Such testimony is then statutorily admissible in a federal court only if it meets the requirements of Federal Rule of Evidence 804(b)(5), one of the expanding exceptions to the hearsay rule. Both this rule and Rule 803(24) permit, under

The presumptively constitutional classification of previously cross-examined former testimony should thus be limited to those occasions when the defendant was personally provided an opportunity to effectively confront the now unavailable declarant.[64] When the accused has been provided this opportunity, it is difficult to argue that the confrontation clause has not been satisfied. Thus, this exception would seem to be the most likely for classification as firmly rooted. However, problems arise with respect to a constitutional presumption in favor of the admissibility of all hearsay falling within the former testimony exception employed in some jurisdictions.

For example, some jurisdictions follow a very restrictive policy of defense questioning at proceedings such as preliminary hearings.[65] On many of these

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certain circumstances, the admission of hearsay not falling within the requirements of any specific exception so long as it was made under sufficiently trustworthy circumstances. *Id.* 803(24), 804(b)(5). Because neither Rule 804(b)(5) nor Rule 803(24) are firmly rooted exceptions, the presumption is that hearsay offered under either exception is *not* constitutionally admissible unless the prosecution meets its burden of establishing particularized guarantees of trustworthiness. *See* United States v. Barlow, 693 F.2d 954, 964 (6th Cir.1982) (804(b)(5) not a firmly rooted hearsay exception), *cert. denied*, 461 U.S. 945 (1983). Furthermore, the trustworthiness required as a prerequisite to admission under the Federal Rules of Evidence may not be identical to that needed to satisfy the confrontation clause. *See infra* note 75.

This analysis is illustrated by the opinion of the United States Court of Appeals for the Fourth Circuit in United States v. Murphy, 696 F.2d 282 (4th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983). The *Murphy* court considered whether former grand jury testimony could be admissible under Federal Rule of Evidence 804(b)(5) and, if so, whether it met the requirements of the confrontation clause. Defendants Murphy and Waddell were convicted of two of three counts of bank robbery. *Id.* at 283. Their indictment rested in part on the grand jury testimony of an alleged accomplice who pleaded guilty to one of the counts. *Id.* When the witness refused to be sworn at the defendant's trial, he was declared unavailable and his grand jury testimony was admitted into evidence under Rule 804(b)(5). *Id.* at 285. While recognizing that the trustworthiness requirement of Rule 804(b)(5) was not necessarily identical to that required by the confrontation clause in *Roberts*, the court found the two tests to be similar.

> When the problem arises under Rule 804(b)(5), under which the extra-judicial statement may not come in unless there are circumstantial guarantees of trustworthiness, the inquiries under the two branches of the problem become closely related. Something more may be required under the Confrontation Clause, but we are satisfied that there are present in this case sufficient *badges* of trustworthiness to meet the tests of Rule 804(b)(5) and of the Sixth Amendment.

Id. at 286 (emphasis added). Similarly, the United States Court of Appeals for the Sixth Circuit in *Barlow* concluded that, because the "circumstantial guarantees of trustworthiness" required by the Federal Rules of Evidence are not coextensive with the "particularized guarantees of trustworthiness" required by *Roberts*, reliability will *not* be presumed with regard to grand jury testimony admissible under Rule 804(b)(5). *Barlow*, 693 F.2d at 964. Thus, a witness' grand jury testimony will be constitutionally usable by the prosecution only when the prosecution can establish a quantum of reliability in excess of that required by Rule 804(b)(5). As with all other non-firmly rooted exceptions, the prosecution bears the burden of establishing that the hearsay was made under circumstances of "particularized guarantees of trustworthiness."

This reliability analysis is presumably not required of formerly cross-examined testimony, which the Supreme Court has concluded is presumptively both reliable and constitutional. *Roberts*' interpretation of the holding in *Green* was that "the *opportunity* to cross-examine at the preliminary hearing—even absent actual cross-examination—satisfies the confrontation clause." 448 U.S. at 70. Thus, the exception's presumptive compliance with the confrontation clause would appear to be the result of the defendants already having had an *opportunity* to cross-examine the witness at the time the former testimony was given.

64. Under Federal Rule of Evidence 804(b)(1), former testimony is inadmissible in all criminal cases unless the defendant against whom the testimony is now being offered is the same defendant who was previously provided the opportunity to question. FED. R. EVID. 804(b)(1).

65. *See* Coleman v. Burnett, 477 F.2d 1187, 1201-02 (D.C. Cir. 1973) (defense questioning at a preliminary hearing may be cut off if it goes beyond a challenge to probable cause to hold to answer

occasions, the opportunity provided the defendant to cross-examine the now unavailable declarant may not have been sufficient to comply with the demands of the sixth amendment.[66] Similarly, if at the time the declarant was confronted the accused was represented by counsel who incompetently cross-examined the witness, the opportunity to cross-examine may not have been very meaningful.[67]

Additionally, it generally is agreed that a confrontation problem arises when the former testimony was given at the separate trial of an alleged accomplice, and the witness is not presently available to testify at the defendant's trial.[68] Although the alleged accomplice may have had the same motive to cross-examine as does the present defendant, that alone is not sufficient to satisfy the accused's right to confrontation.[69] The opportunity previously provided the *defendant* to question the now unavailable declarant is what allows former testimony to presumptively satisfy the confrontation clause.[70]

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for trial and is aimed at discovery); State v. Russo, 101 Wis. 2d 206, 213-14, 303 N.W.2d 846, 849-50 (1981) (defense questioning was cut off because it exceeded proper issues as described under local standards). *But see* Myers v. Commonwealth, 363 Mass. 843, 857, 298 N.E.2d 819, 828 (1973) ("the judge at a preliminary hearing should allow reasonable latitude to the scope of the defendant's cross-examination of prosecution witnesses in order to effectuate the ancillary discovery and impeachment functions of the hearing noted in [Coleman v. Alabama, 399 U.S. 1, 9 (1970)]."); People v. Simmons, 36 N.Y.2d 126, 129, 325 N.E.2d 139, 142, 365 N.Y.S.2d 812, 815 (1975) (prosecution use of deceased witness' former testimony at defendant's preliminary hearing held inadmissible at trial as a result of the restrictions imposed on defense cross-examination at preliminary hearing).

66. Twice the United States Supreme Court has concluded that restrictions limiting a defendant's right to cross-examination at a trial have been sufficient to deny the accused his constitutional right to confrontation. *See* Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931); *see also* Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (state rule of evidence which precluded the defendant from cross-examining his own witness with respect to his prior inconsistent statements was held a denial of due process).

67. *But see* Mancusi v. Stubbs, 408 U.S. 204, 214 (1972) (rejected defense claim that because prior trial counsel's performance had been constitutionally ineffective, all cross-examination conducted by said counsel must be held incompetent per se).

68. Commentators have stated:

> A graver constitutional problem would be presented if prior testimony were proffered against an accused who was not party to the prior proceeding. Even if the party against whom the testimony was initially offered had the same motive and interest to cross-examine as the present accused, the fact remains that the witness never testified in the accused's presence and that he personally never examined the witness. Though physical presence is not critical in confrontation (as it is not in hearsay exceptions such as dying declarations and co-conspirators statements which have received constitutional sanction), the failure of the accused to conduct the examination himself raises the question of whether it is compatible with his right of counsel and right of confrontation to make him bear the consequence of any prior inadequacies in cross-examination.
>
> . . .
>
> In any event, so far as federal criminal cases are concerned, the issue is no longer open. Congress narrowed Rule 804(b)(1) so that the defendant against whom the testimony is now offered had to be the party in the prior proceeding. Another party, no matter how closely allied in interest or motive, will not do.

4 J. WEINSTEIN & M. BERGER, *supra* note 2, 804(b)(1)[05], at 804-96 to -98 (footnotes omitted).

69. 4 J. WEINSTEIN & M. BERGER, *supra* note 2, 804(b)(1)[05], at 804-97. "The question is not whether cross-examination can be dispensed with but whether cross-examination by another in a criminal case ensures its reliability." *Id.*

70. *See Roberts*, 448 U.S. at 74 (in criminal cases, prosecution must show a good faith effort to locate witness against the accused); Barber v. Page, 390 U.S. 719, 724-25 (1968) (when the witness was incarcerated in another state, the confrontation clause required prosecution to make good faith efforts to produce witness at trial before preliminary hearing testimony could be introduced); Government of Virgin Islands v. Aquino, 378 F.2d 540, 550 (3rd Cir. 1967) (witness' absence from trial court's jurisdiction insufficient to establish unavailability; prosecution must make an effort to secure

Thus, because so many situations arise in which former testimony will not satisfy the demands of confrontation, a legitimate question exists as to the wisdom of creating a presumption in favor of the constitutionality of this entire hearsay exception. Compliance with the confrontation clause can be accurately determined only by examining the former testimony each time it is offered.

B. *Business and Public Records*

Roberts classified the business[71] and public records exceptions[72] as firmly rooted because they have been considered to be among the most reliable of hearsay exceptions.[73] The supposed reliability of these exceptions is founded upon the theory that "records of regularly conducted activities cannot fulfill their function . . . unless they are accurate. Thus, the motive for accuracy is great, while the motive to falsify is virtually non-existent."[74]

Despite the faith the Supreme Court seems to have placed in their reliability, business and public records may still reflect unintentional errors or even intentional distortions caused by self-interest. Prior to *Roberts'* classification of these exceptions as firmly rooted, federal circuit courts had split over whether

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the witness' voluntary return and show that the witness would have refused to cooperate); MCCORMICK ON EVIDENCE, *supra* note 2, § 253, at 756-57.

71. The exception for business records provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

72. The exception for public records provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Id. 803(8).

73. *Roberts*, 448 U.S. at 66 n.8; United States v. Keplinger, 572 F. Supp. 1068, 1070 (N.D. Ill. 1983).

74. *Keplinger*, 572 F. Supp. at 1070. "The reliability of business records is supplied by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, and by a duty to make an accurate record as part of a continuing job or occupation. The inherent reliability of business records makes the utility of cross-examination minimal." *Id.* (citations omitted); *see* MCCORMICK ON EVIDENCE, *supra* note 2, § 306; 4 J. WEINSTEIN & M. BERGER, *supra* note 2, 803(6)[01]; 5 J. WIGMORE, *supra* note 2, § 1522.

hearsay admissible under these exceptions would always comply with the dictates of the confrontation clause.[75] The danger of intentional distortion is particularly prevalent when the records are prepared in anticipation of possible litigation.[76] To avoid this possibility and enhance the likelihood of trustworthiness, some jurisdictions specifically provide that these records may be excluded if the method of preparation or the source of the information suggest their unreliability.[77] Acknowledging this latter proposition, the Federal Rules of Evidence permit the admission of regularly recorded documents "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."[78] Perhaps the *Roberts* Court intended to limit the classification of firmly rooted only to those exceptions including a trustworthiness requirement, when the Court restricted the category to only those business and public records

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75. *See* United States v. Leal, 509 F.2d 122, 127 (9th Cir. 1975) (complied with confrontation clause); United States v. Haili, 443 F.2d 1295, 1298 (9th Cir. 1971) (complied with confrontation clause); McDaniel v. United States, 343 F.2d 785, 789 (5th Cir.) ("right of confrontation may not be invoked to exclude evidence otherwise admissible under well-established legitimate exceptions to the hearsay rule"), *cert. denied*, 382 U.S. 826 (1965). In *McDaniel*, the court held:

> We do not believe that all documents covered by the [Business Records] Statute in all cases are admissible in a criminal trial, but the trial judge has the duty to determine in each instance whether such documents are constitutionally admissible under the Sixth Amendment guarantee of confrontation.

McDaniel, 343 F.2d at 789; *accord* United States v. Smith, 521 F.2d 957, 966 n.20 (D.C. Cir. 1975) (preferring the *McDaniel* approach because "[s]uch a balancing test is clearly appropriate").

76. One commentator has stated:

> Special principles attend the admissibility of business records prepared in anticipation of litigation, and courts are especially careful to scrutinize such records as accident reports and hospital records, because these records have proven peculiarly subject to distortion and self-interest. Where a document generally satisfies the elements of rule 803(6), but nevertheless was prepared in anticipation of possible use in litigation, the underlying rationale of trustworthiness is undercut.

Weissenberger, *Hearsay: Business Records and Public Records*, 51 U. CIN. L. REV. 42, 54 (1982) (footnotes omitted).

77. *See* FED. R. EVID. 803(6); 4 J. WEINSTEIN & M. BERGER, *supra* note 2, 803(6)[07], [08], at 803-204 to -225. "Even where a business record satisfies all the requirements of rule 803(6), it nevertheless may be excluded on objection from the opponent where the trial court, in its discretion, determines that the source of the information or the method of its preparation indicates that the resultant record is untrustworthy." Weissenberger, *supra* note 76, at 4 (footnote omitted)

78. FED. R. EVID. 803(6). This potential for untrustworthiness gave rise to the United States Supreme Court's decision in Palmer v. Hoffman, 318 U.S. 109 (1943). In *Palmer* the Court precluded a defendant railroad company from submitting into evidence its own accident report prepared two days after the incident that was the subject of the litigation. *Id.* at 111. The *Palmer* opinion ostensibly excludes all business records authored with an eye towards litigation when offered by the author. *Id.* at 113-14. The case is also cited as authority for the general proposition that only trustworthy records should be admitted under this exception. For cases relying on *Palmer* to exclude unreliable business records, see MCCORMICK ON EVIDENCE, *supra* note 2, § 308, at 877 & n.25.

The former version of the federal rule governing the admission of business records considered trustworthiness as going to the weight rather than the admissibility of the out-of-court document. One court noted:

> The newly enacted version, on the other hand, recognizes that evidence otherwise meeting the requirements of FRE 803(6) may now be inadmissible because "the source of information or the methods or circumstances of preparation indicate lack of trustworthiness." This complete reversal of philosophy is apparently a legislative ratification of the many cases, such as *Palmer v. Hoffman*, which had read implied exceptions into the language of the old statute despite the fact that the purport of the statute was clear on its face.

United States v. Oates, 560 F.2d 45, 80 n.33 (2d Cir. 1977) (citations omitted) (quoting FED. R. EVID. 803(6)).

that are "[p]roperly administered."[79]

The definition of trustworthiness as provided by statute, however, may be significantly different than that required by the Constitution. Both the sixth and eighth circuits have acknowledged that evidence satisfying a statutory requirement of trustworthiness, such as that required of hearsay admissible under the business records or the catchall exceptions, may still not necessarily meet the demands of the confrontation clause.[80] Thus, the prosecution's use of business or public records may meet the demands of a hearsay exception and yet not always satisfy the demands of confrontation.

The primary example of the prosecution's attempt to use business or public records of questionable reliability for confrontation purposes is when the hearsay is contained in probation, police chemist, or arrest reports and the author is unavailable.[81] In *United States v. Oates*[82] the United States Court of Appeals for the Second Circuit held that government records, such as police arrest reports, prepared in anticipation of defendant's criminal prosecution could not be admitted under either Federal Rule of Evidence 803(6), the so-called business records exception, or Rule 803(8), the public records exception.[83] Although Rules 803(8)(B) and (C) explicitly limit the admission of public records under

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79. *Roberts*, 448 U.S. at 66 n.8.

80. *See* United States v. Barlow, 693 F.2d 954, 964 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983); United States v. Carlson, 547 F.2d 1346, 1357 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

Whenever a jurisdiction condones the use of unreliable business or public records against criminal defendants, those defendants have no other recourse but to seek protection in the confrontation and due process clauses. Yet, the actual untrustworthiness of individual records may not sufficiently emerge to overcome the presumptively constitutional nature of business and public records.

81. *See infra* notes 83-84.

82. 560 F.2d 45 (2d Cir. 1977). At Oates' trial for possession of heroin with intent to distribute and conspiracy, the court admitted into evidence a hearsay report from an apparently unavailable chemist, analyzing the white powdery substance seized from Oates' alleged accomplice as heroin. *Id.* at 64.

83. The court wrote:

> [A]n overriding concern of the Advisory Committee was that the rules be formulated so as to avoid impinging upon a criminal defendant's right to confront the witnesses against him. The Advisory Committee, in unequivocal language, offers the specter of collision with the confrontation clause as the explanation for the presence of FRE 803(8)(C) in its proposed (and, since FRE 803(8)(C) was unaltered during the legislative process, final) form:
>
> "In one respect, however, the rule with respect to evaluative reports under [Rule 803(8)(C)] is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the *almost certain collision with confrontation rights which would result from their use against an accused in a criminal case.*"

Id. at 68-69 (quoting FED. R. EVID. 803(8) advisory committee notes).

Representative Hungate who acted as floor manager for the legislation noted:

> As the rules of evidence now stand, police and law enforcement reports are not admissible against defendants in criminal cases. This is made quite clear by the provisions of rule 803(8)(B) and (C). Police reports, especially in criminal cases, tend to be one-sided and self-serving. They are frequently prepared for the use of prosecutors, who use such reports in deciding whether to prosecute. The danger of unfair prejudice inherent in such reports is heightened where—as proposed in the Senate's rule 804(b)(5)—the officer who prepared the report is not available to take the stand and be cross-examined about it. There was some thought that the Senate's rule would raise a constitutional question of the right to confrontation.

120 Cong. Rec. 40,891 (1974) (quoted in part in *Oates*, 560 F.2d at 69-70).

these circumstances, the court found a similar design in the trustworthiness requirement of Rule 803(6), even though not explicit in the language of the Rule.[84] After extensively examining the legislative history of each exception, the court of appeals concluded that "it simply makes no sense to surmise that Congress ever intended that these records could be admissible against a defendant in a criminal case under *any* of the Federal Rules of Evidence's exceptions to the hearsay rule."[85] The Advisory Committee to the Federal Rules of Evidence believed that this rule, prohibiting the use of hearsay arrest reports against criminal defendants, was necessary to avoid "the almost certain collision with confrontation rights which would result from [the] use [of such records] against an accused in a criminal trial."[86]

Oates, however, is a decision of statutory, and not constitutional, dimension. The confrontation clause concerns expressed by both the *Oates* court and Congress have not been repeated in every jurisdiction. Thus, in the absence of constitutional analysis, a lower court could choose to admit a police or arrest report as falling within either the business or public records exceptions.[87] Because these exceptions are firmly rooted, an accused who attempts to challenge the constitutional use of these hearsay reports would be in the awkward position of having to overcome a presumption in favor of their trustworthiness. No presumption should favor the constitutional admission of this type of hearsay. Even though these may be the "most reliable" of exceptions, considerable doubt still exists that "virtually any" statement offered under them will comport with the demands of the confrontation clause.

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84. Representative David Dennis, a floor manager of the legislation and a member of the Committee of Conference, noted:

> I would like to say in answer to my friend, the gentlewoman from New York, that this business of using a police report, if a policeman is unavailable, was not in the rules as they came to us. That was written in by the Senate, and we struck it out in the conference, I am very happy to say. It was a terrible idea. But since we did take it out in the conference, and since it is gone, and since we insisted that it go, I cannot see how anybody could suggest that introducing such a report is possible or a thing that could be done under these rules; because the Senators put it in and we took it out in conference, and that is the legislative history.

120 Cong. Rec. 40,891 (1974) (quoted in *Oates*, 560 F.2d at 71-72).

85. *Oates*, 560 F.2d at 78.

86. *Id.* at 69. According to the United States Court of Appeals for the District of Columbia Circuit:

> While it might be proper to admit a police record as a business record to prove the date an automobile theft has been reported to the police, it would strike at the core of the Sixth Amendment to admit a police report summarizing the prosecution's entire case against a defendant in the absence of the maker of the record. Such a procedure would do no less than allow the prosecution to proceed without allowing the defendant the opportunity to cross-examine what may be his sole accuser.

United States v. Smith, 521 F.2d 957, 966 n.20 (D.C. Cir. 1975) (citations omitted).

87. *See* Holcomb v. State, 307 Md. 457, 515 A.2d 213 (1986). In *Holcomb*, the court admitted a police report against a criminal defendant as a business record. "In general, those portions of the report of a police investigation which record the facts obtained by the direct sense impressions of the investigating officer are admissible as a business record . . . ." *Id.* at 461-62, 515 A.2d at 215.

C. *Dying Declarations*

The dying declaration exception[88] is clearly well rooted in antiquity. The exception "dates back as far as the first half of the 1700s—the period when the hearsay rule was coming to be systematically and strictly enforced . . . ."[89] As one commentator observed:

> The theory is that all self-serving designs and motives to misstate the truth vanish in a man who is conscious of his imminent death since the fear of punishment in an afterlife negates any impulses of greed, hate, or revenge. Even for an individual who lacks strong religious beliefs, the awesome confrontation with death and the unknown is thought to register a sobering impact.[90]

Presumably, this long accepted rationale led the *Roberts* Court to categorize this exception as firmly rooted. Indeed, the Advisory Committee to the Federal Rules of Evidence chose to preserve and broaden[91] the exception, concluding that "it can scarcely be doubted that powerful psychological pressures are present" which give such statements reliability.[92] This underlying justification, however, may not accurately reflect the contemporary psychological reality of a society more secular than the one in which the exception originated. Even the Advisory Committee acknowledged that "the original religious justification for the exception may have lost its conviction for some persons over the years . . . ."[93]

Empirical data from various studies suggests that the pressures which favor the reliability of dying declarations may be outweighed by other factors. For example, considerable evidence suggests that the pressures on which the Advisory Committee relied often do not sufficiently negate emotions, such as revenge. Thus, untruths by the dying are far from a rare occurrence.[94]

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88. Federal Rule of Evidence 804(b)(2) provides:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> . . . .
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> (2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

FED. R. EVID. (804)(b)(2).

89. 5 J. WIGMORE, *supra* note 2, § 1430, at 275; *see also* Ryan, *Dying Declarations in Civil Actions*, 10 B.U.L. REV. 470 (1930) (crediting Thayer with tracing dying declarations back to a case from the year 1202).

90. Goetsch, *Dying Declarations: Connecticut Common Law and the New Federal Rules of Evidence*, 50 CONN. B.J. 424, 428 (1976). *See generally* 5 J. WIGMORE, *supra* note 2, §§ 1438-43, at 289-304 (outlining the history behind the dying declaration exception).

91. The Federal Rules of Evidence provide that, unlike the common-law dying declaration exception, such statements are admissible in civil cases as well as criminal, are not excluded when the declarant believed he or she was dying but recovered, and are presently unavailable for a reason other than death due to the circumstances that give rise to the statement. FED. R. EVID. 804(b)(2).

92. *Id.* advisory committee notes.

93. *Id.* advisory committee notes.

94. One commentator has noted:

> Even the presence of powerful psychological forces does not necessarily guarantee that a man will abandon his instincts of hate, revenge, self interest, or greed. On the contrary,

Other factors also militate against the guarantee of trustworthiness traditionally associated with dying declarations. Any statement by a dying person is likely to be influenced by the inevitable mental stress and confusion caused by physical trauma or pain, as well as by medication.[95] Furthermore, because dying declarations are traditionally admissible only in cases of homicide, the declarant is likely to be more traumatized and confused than the usual deathbed declarant.[96] Nor is an individual witnessing a dying declaration inclined to critically examine the statement's content.[97] These witnesses are not likely to have adequate training to recognize whether the declarant's mind was sufficiently free from stress and trauma to perceive and tell the truth.[98] As one judge has noted:

> Certainly, an accused should not be deprived of his constitutional right to confrontation . . . on a theory that meets neither the test of reason nor of the facts of common knowledge and human experience. This harmful effect of the admission of this type of hearsay is enhanced by a recital of dramatic circumstances under which the statement is alleged to have been made, and, the law having in effect declared this type of hearsay sacrosanct, there is no effective way to challenge its truth and it is more than just likely that the jury will attach undue importance to it and give it undue weight in arriving at a verdict.[99]

Thus, when measured against contemporary realities, no reasonable assurance exists that "virtually any" hearsay falling within this exception will substantially comport with the *Dutton* factors for evaluating indicia of reliability.[100] This hearsay may not be based on personal knowledge and may be the product of either faulty recollection, or intentional or unintentional misrepresentation.

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there is evidence of individuals making patently false statements for vengeful purposes at the point of death. In addition, the presence of mental stress and physical trauma is clearly not conducive to clear perceptions or objective narration. Severe pain, medication, and the presence of family and friends may all serve to distort and unduly influence the memory and motives of the victim.

Goetsch, *supra* note 90, at 446-47.

95. Goetsch, *supra* note 90, at 446-47.

96. A commentator has written:

> Most homicides are violent or passionate and many are victim-precipitated or at least partly so. . . . People daily operate on incomplete or inaccurate perception or data—so much so that they do not notice—and *all* of us are capable of lying, prevaricating, inventing, disregarding, or acting out wishes and hatred. When people are shocked by their own, unexpected, imminent deaths, their immediate reaction is rage, even at God, religion, and morality. Various of these factors may merge around a homicide or suicide victim's injury and final experiences and may preclude reliable perception, analysis, and communications.

Jaffee, *supra* note 2, at 291.

97. "[W]itnesses tend to accept the statements of dying men rather than subject them to critical examination." Goetsch, *supra* note 90, at 447.

98. "If a witness to a dying declaration were not skilled enough to know whether the declarant's mind was truly unimpaired by the fatal trauma, how could a court be sure of the declaration's trustworthiness?" Jaffee, *supra* note 2, at 313.

99. Kidd v. State, 258 So. 2d 423, 430 (Miss. 1972) (Smith, J., concurring). Judge Smith argued that "the admission of this type of hearsay evidence should not be countenanced by the courts in any case, but certainly, in criminal cases, where a man may lose his liberty as the result of it, it should never be admitted." *Id.*

100. *Dutton*, 400 U.S. at 88-89 (listing factors indicating reliability of hearsay statements). For a discussion of the *Dutton* factors see *supra* notes 53-58 and accompanying text.

Hearsay statements offered under this exception, even more so than the preceding three firmly rooted exceptions listed in *Roberts*, lack sufficient likelihood of trustworthiness to warrant characterization as presumptively constitutional. The uncertain assumptions that give rise to the dying declaration exception not only illustrate the dangers inherent in describing firmly rooted exceptions as conclusively constitutional, but they also cast doubt on the wisdom of admitting them under even a rebuttable presumption in favor of their constitutionality.

V. EXPANDING THE LIST OF FIRMLY ROOTED EXCEPTIONS

Lower courts have added numerous exceptions to the ranks of the firmly rooted. Unfortunately, *Roberts'* failure to define exactly what is required for this classification has resulted in disagreement among lower courts as to which additional exceptions qualify under that rubric. The list of exceptions that lower courts have labeled firmly rooted includes spontaneous exclamations,[101] present sense impressions,[102] adoptive admissions,[103] declarations against penal interest,[104] and statements by a coconspirator.[105] Because none of these exceptions

101. *See* United States v. Moore, 791 F.2d 566, 574 (7th Cir. 1986); Haggins. v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984); State v. Jeffers, 135 Ariz. 404, 422, 661 P.2d 1105, 1123, *cert. denied*, 464 U.S. 865 (1983); State v. Yslas, 676 P.2d 1118, 1122-23 (Ariz. 1983); Harrison v. United States, 435 A.2d 734, 736 (D.C. 1981); State v. Porter, 303 N.C. 680, 691-94, 281 S.E.2d 377, 388 (1981); State v. Bawdon, 386 N.W.2d 484, 487 (S.D. 1986); *see also* McLaughlin v. Vinzant, 522 F.2d 448, 450 (1st Cir.), *cert. denied*, 423 U.S. 1037 (1975) (excited utterance, a long standing exception to the hearsay rule, does not contravene the confrontation clause); Harmon v. Anderson, 495 F. Supp. 341, 344 (E.D. Mich. 1980) (excited utterance is reliable and long established exception to the hearsay rule); People v. Grover, 451 N.E.2d 587, 591 (Ill. App. 1983) (excited utterance exception bears sufficient indicia of reliability).

102. *See, e.g.*, Brown v. Tard, 552 F. Supp. 1341, 1351 (D.N.J. 1982) (reliability can be inferred for statements falling within hearsay exception for present sense impressions).

103. *See, e.g.*, United States v. Monks, 774 F.2d 945, 952 (9th Cir. 1985) (adoptive admissions firmly rooted, although the Ninth Circuit rejected proposition that firmly rooted exceptions automatically satisfy the confrontation clause, at least with respect to statements of coconspirators); Poole v. Perini, 659 F.2d 730, 733 (6th Cir. 1981) (adoptive confession avoids confrontation problem), *cert. denied*, 455 U.S. 910 (1982); United States v. Giese, 597 F.2d 1170, 1197-98 (9th Cir.) (adoptive admissions automatically satisfy the confrontation clause), *cert. denied*, 444 U.S. 979 (1979); Graves v. United States, 490 A.2d 1086, 1106 (D.C. 1984), *cert. denied*, 106 S. Ct. 814 (1986); State v. Marshall, 113 Wis. 2d 643, 655, 335 N.W.2d 612, 617 (1983); *see also* United States v. McKinney, 707 F.2d 381, 387 & n.6 (9th Cir. 1983) (Belloni, J., dissenting) (adoptive admission does not violate the confrontation clause); United States v. Sears, 663 F.2d 896, 904-05 (9th Cir. 1981) (adoptive admission admitted without addressing the confrontation clause), *cert. denied*, 455 U.S. 1027 (1982).

104. *See, e.g.*, United States v. Katsougrakis, 715 F.2d 769, 775-76 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983); People v. Geoghegan, 51 N.Y.2d 45, 52, 409 N.E.2d 975, 978, 431 N.Y.S.2d 502, 503 (1980) (Jasen, J., dissenting) (declaration against penal interest inherently reliable); State v. Valladares, 31 Wash. App. 63, 72 n.4, 639 P.2d 813, 818 n.4, *aff'd in part, rev'd in part*, 99 Wash. 2d 663, 664 P.2d 508 (1983); State v. Buelow, 122 Wis. 2d 465, 479, 363 N.W.2d 255, 263 (Wis. Ct. App. 1984); State v. Dorcey, 98 Wis. 2d 718, 722, 298 N.W.2d 213, 216 (Wis. Ct. App. 1980), *aff'd*, 103 Wis. 2d 152, 307 N.W.2d 612 (1981); *see also* United States v. West, 574 F.2d 1131, 1138 (4th Cir. 1978) (declaration against penal interest possesses sufficient indicia of reliability).

105. *See, e.g.*, United States v. Chindawongse, 771 F.2d 840, 846-47 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 863 (1986); United States v. Ordonez, 737 F.2d 793, 812-13 (9th Cir. 1984) (Norris, J., concurring in part); United States v. Xheka, 704 F.2d 974, 987 n.7 (7th Cir.), *cert. denied*, 464 U.S. 993 (1983); United States v. Lurz, 666 F.2d 69, 80-81 (4th Cir. 1981) (statements admissible under the coconspirators exception to the hearsay rule do not violate the confrontation clause), *cert. denied*, 455 U.S. 1005 (1982); United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981), *cert.*

require that the accused be provided with either a present or prior opportunity to question the hearsay declarant, their classification as firmly rooted must rest upon a trustworthiness analysis. These exceptions must be examined to determine whether each possesses sufficient inherent guarantees of trustworthiness to justify a constitutional presumption in favor of its use against criminal defendants.

A. *Spontaneous Exclamations and Present Sense Impressions*

Although the spontaneous exclamation[106] and present sense impression[107] exceptions rest upon slightly different underlying rationales, they share a common basis for their existence.[108] The presumed reliability of both exceptions is

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denied, 464 U.S. 965 (1983); State v. Dorsey, 103 Wis. 2d 152, 162, 307 N.W.2d 612, 617 (1981); *see also* United States v. Papia, 560 F.2d 827, 836 n.3 (7th Cir. 1977) (adopting a per se rule admitting statements of a coconspirator without violating the confrontation clause); Ottomano v. United States, 468 F.2d 269, 273 (1st Cir. 1972) (because coconspirators' statements admissible under a recognized hearsay exception, defendant's confrontation argument was held to be without merit), *cert. denied*, 409 U.S. 1128 (1973). For cases holding the coconspirator exception not firmly rooted, see United States v. Massa, 740 F.2d 629, 638-40 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); United States v. Ammar, 714 F.2d 238, 254-57 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983); United States v. Perez, 658 F.2d 654, 660 & 660 n.5 (9th Cir. 1981); United States v. Wright, 588 F.2d 31, 37-38 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); United States v. Kelley, 526 F.2d 615, 620-21 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976).

106. Federal Rule of Evidence 803(2) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

FED. R. EVID. 803(2).

107. Federal Rule of Evidence 803(1) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

Id. 803(1).

The present sense impression exception first appeared in the writings of Professor Thayer, who proposed an exception for declarations of fact which were very near in time to that which they tended to prove. *See* Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gestae*, 15 AM. L. REV. 71, 107 (1881). However, courts did not readily accept this exception for unexcited statements of present sense impressions. *See* MCCORMICK ON EVIDENCE, *supra* note 2, § 298, at 861. For an early case recognizing this exception, see Houston Oxygen Co. v. Davis, 139 Tex. 1, 5, 161 S.W.2d 474, 477 (1942). In *Houston Oxygen*, the out-of-court assertion offered by the defendant in a civil action was a description made by a declarant when the plaintiff's car had just passed, stating that "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up." The court noted that the statement had not been made under the stress of emotion. *Id.* In spite of this, the statement was found to be "sufficiently spontaneous to save it from the suspicion of being manufactured evidence." *Id.* at 6, 161 S.W.2d at 476. For a discussion of *Houston Oxygen*, see Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 883 (1981).

108. Both the spontaneous exclamation and present sense impression exceptions to the hearsay rule codified part of the criticized *res gestae* doctrine. "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as 'res gestae.' " Morgan, *A Suggested Classification of Utterances Admissible as* Res Gestae, 31 YALE L.J. 229 (1922); *see also* MCCORMICK ON EVIDENCE, *supra* note 2, § 288, at 835-36 (describing the origins of the phrase *res gestae*); 6 J. WIGMORE, EVIDENCE §§ 1745, 1767, at

partially founded on assumptions concerning the immediate proximity of the remarks to the event described.[109] Hearsay admissible under either exception is theoretically said to be credible, at least in part, for two reasons: first, these statements are expressions of an immediate perception unhampered by the potential blurrings and fadings of memory;[110] and, second, the contemporaneous nature of the remarks increases the likelihood that insufficient time was available for fabrication.[111] As a result, the statement is said to accurately describe the observed event.[112] On closer examination, however, these rationales are based

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191-93, 253-56 (Chadbourn rev. 1976) (explaining the difference between "spontaneous exclamations" and "verbal acts" as part of *res gestae*); Waltz, *supra* note 107, at 871-75; Comment, *The Present Sense Impression Exception to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 DICK. L. REV. 347, 348-50 (1976) (stating that the *res gestae* concept obscures understanding of exceptions to the hearsay rule). This doctrine was often, though not exclusively, used as a catchall method for admitting hearsay that would otherwise have been excluded. In particular, *res gestae* was applied to admit hearsay that described events during or immediately after their occurrence.

> The term *res gestae* seems to have come into common usage in discussions of admissibility of statements accompanying material acts or situations in the early 1800's. At this time the theory of hearsay was not well developed, and the various exceptions to the hearsay rule were not clearly defined. In this context, the phrase *res gestae* served as a convenient vehicle for escape from the hearsay rule in two primary situations. In the first, it was used to explain the admissibility of statements that were not hearsay at all. In the second, it was used to justify the admissibility of statements which today come within the[se] four exceptions . . . : (1) statements of present bodily condition, (2) statements of present mental states and emotions, (3) excited utterances, and (4) statements of present sense impressions.
>
> Two main policies or motives are discernible in this recognition of *res gestae* as a password for the admission of otherwise inadmissible evidence. One is a desire to permit each witness to tell his story in a natural way. . . . The other policy, emphasized by J. Wigmore and those following his leadership, is the recognition of spontaneity as the source of special trustworthiness. This quality of spontaneity characterized to some degree nearly all types of statements which have been labeled *res gestae*.

MCCORMICK ON EVIDENCE, *supra* note 2, § 288, at 835-36.

109. *See* 6 J. WIGMORE, *supra* note 108, § 1749, at 199; Morgan, *supra* note 108, at 236-37; Comment, *supra* note 108, at 353-57.

110. 6 J. WIGMORE, *supra* note 108, § 1750(b), at 202-03; *see infra* note 114.

111. 6 J. WIGMORE, *supra* note 108, § 1750(b), at 202-03; *see* Foster, *Present Sense Impressions: An Analysis and Proposal*, 10 LOY. U. CHI. L.J. 299, 317-18 (1979). Additionally, the present sense impression is sometimes said to be based on a third underlying rationale, founded on the belief that the individual who testifies to the declarant's out-of-court statement was presumably present to observe the same event and can thus be cross-examined as to the accuracy of the declarant's remarks. Foster, *supra*, at 335; *see* Morgan, *supra* note 108, at 236; Comment, *supra* note 108, at 355. However, even if the testifying witness' presence was required, it does not guarantee that the witness would have been in a position to adequately observe the event described or have any independent recollection of what occurred. Even assuming the analytical accuracy of this third rationale, it has not been incorporated into the Federal Rules of Evidence. *See* FED. R. EVID. 803(1). Under the federal exception for present sense impressions, the trial witness who now repeats the declarant's out-of-court statements need not be present at the time the event occurred. *Id.* "[T]he Advisory Committee's position seems to be that the testifying witness may be cross-examined regarding the surrounding circumstances and that whatever factors minimize the trustworthiness of the statement should go to the weight but not the admissibility of the evidence." 4 J. BAILEY & O. TRELLES, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 163 (1980).

112. Wigmore has written:

> This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-

on questionable psychological assumptions.

An inherent flaw in the first rationale is that it depends completely on the assumptions that descriptive accuracy is a natural consequence of observation[113] and that this accurate observation is preserved by a contemporaneous statement.[114] These assumptions, however, are rarely warranted. The "cognitive processes of the human organism are not the equivalent of a photographic process which renders and preserves an essentially accurate counterpart of some event."[115] These cognitive powers do not operate in a vacuum,[116] but are influenced by other factors and emotions, including unidentifiable subconscious influences which can vary greatly according to the relative circumstances surrounding the observer.[117] Even if spontaneity results in less opportunity for the declarant's memory to fade, the possibility that he may have inaccurately observed the event remains.[118]

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interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy . . . and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him . . . .

6 J. WIGMORE, *supra* note 108, § 1747, at 195.

113. For a discussion of the psychological concept of the "logical completion mechanism," which results in unconsciously distorted perceptions, see A. TRANKELL, RELIABILITY: METHODS FOR ANALYZING AND ASSESSING WITNESS STATEMENTS 18 (1972); *see generally* Buckout, *Psychology and Eyewitness Identification*, 2 L. & PSYCHOLOGY REV. 75 (1976) (discussing the unreliability of eyewitness identification); Lezak, *Some Psychological Limitations on Witness Reliability*, 20 WAYNE L. REV. 117 (1973) (stating that eyewitness testimony is inherently unreliable).

114. That a statement was made nearer in time to the event it allegedly describes could be an argument in favor of admitting any hearsay statement and would thus potentially spell the demise of the hearsay rule. In the absence of other reliability-ensuring factors, however, relative nearness in time has never provided the sole basis for justifying the creation of any exception. The contemporaneous nature of the statement to the event described, not simply the fact that the statement was made nearer in time to the event than the witness' trial testimony, is said to give these statements reliability. *See supra* notes 110-12 and accompanying text.

115. Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 21 (1970). Professor Stewart concludes:

> The degree of correspondence between the testimony of an event and the reality it purports to represent may . . . vary widely according to the effect of numerous factors. The imperatives of successful adaptation do not require that the individual's cognitive process operate in all instances to provide information having the degree of objective accuracy necessary for accurate, after-the-fact reconstruction which is attempted by judicial fact determination.

Id.

116. "[I]t is virtually impossible to ascertain whether the utterance is generated by the episode observed or by the operation of the declarant's mental processes, even where the declaration is emitted virtually instantaneously upon cognizance of the event. Yet it is speed which usually forms the crux of the spontaneity requirement." Foster, *supra* note 111, at 325-26 (footnote omitted).

117. Professor Foster suggests that when an individual perceives an event, the individual

> arbitrarily selects signals from among a universe of sensory stimuli, . . . [and] then coalesces the fragments into a sequence of events which are subjectively logical and acceptable, but may bare only a tenuous relationship to the objective reality of the occurrence perceived. . . . Thus, even elimination of the hearsay risk of flawed memory provides scant assurance that the declarant's perceptual acuity operated at the time in question to produce anything more than an idiosyncratic image bearing only slight relationship to objective reality.

Foster, *supra* note 111, at 328-29; *see* Marshall, *Evidence, Psychology and the Trial: Some Challenges to Law*, 63 COLUM. L. REV. 197, 207-08 (1963); A. TRANKELL, *supra* note 113, at 18-20.

118. As one commentator has noted, "[E]ven where the contemporaneity requirement is strictly applied, mere speed, as an aspect of spontaneity, at best renders the veracity of a response more likely, but not a certitude." Foster, *supra* note 111, at 326.

The second rationale, that the declarant has insufficient time to fabricate, is subject to similar attack. Empirical psychological studies confirm that when only a matter of a few seconds or fractions of seconds separate the event and description, the danger of fabrication is decreased.[119] However, once the number of seconds has increased even slightly, the reliability of the remarks is substantially reduced.[120] The hearsay statement would have to have been spoken virtually simultaneous to the described event for even the slightest assurance of increased reliability.[121]

The application of this second rationale has two problems: first, spontaneity is not easily measured after the fact;[122] and second, courts tend to be very lenient in the amount of time permitted to pass between the observation and the contemporaneous or spontaneous statement.[123] Both present sense impressions and spontaneous exclamations have often been admitted when made several minutes or even hours after the event described.[124] Thus, if the empirical data is believed, the interval between event and description typically permitted by courts renders the reliability of statements admitted under either exception dubious.[125]

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119. Foster, *supra* note 111, at 315; Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 436-37 (1928); Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204, 210-11 (1960).

120. Hutchins & Slesinger, *supra* note 119, at 437.

121. Foster, *supra* note 111, at 315. Even if stopwatch accuracy with respect to the interval between the event and statement were possible, the courts are not prone to the strict enforcement of such requirements; *see infra* note 124.

122. Commentators cite to psychological studies indicating that the interval between cognition and onset of the capacity to fabricate is brief, often a matter of fractions of seconds, and impossible to gauge without the aid of instruments. *See* Hutchins & Slesinger, *supra* note 119, at 437; Stewart, *supra* note 115, at 8-22.

123. "From the point of view of subjective veracity, the speed the courts demand does not necessarily guarantee truth." Hutchins & Slesinger, *supra* note 119, at 439.

124. *See* United States v. Golden, 671 F.2d 369, 371 (10th Cir.) (excited utterance made 15 minutes after assault held admissible), *cert. denied*, 456 U.S. 919 (1982); United States v. Blakey, 607 F.2d 779, 786 (7th Cir. 1979) (present sense impression held admissible when spoken within 23 minutes); Hilyer v. Howat Concrete Co., 578 F.2d 422, 427 (D.C. Cir. 1978) (excited utterance made 15 to 45 minutes after accident held admissible); McCurdy v. Greyhound Corp., 346 F.2d 224, 226 (3d Cir. 1965) (excited utterance made 15 minutes after accident held admissible); State v. Stafford, 237 Iowa 780, 787, 23 N.W.2d 832, 836 (1946) (excited utterance made 14 hours after beating held admissible). *But see* Hamilton v. Missouri Petroleum Products Co., 438 S.W.2d 197, 200 (Mo. 1969) (excited utterance made 25 minutes after accident held inadmissible); Bowman v. Barnes, 168 W. Va. 111, 128, 282 S.E.2d 613, 623 (1981) (excited utterance held inadmissible after 44 minutes); *see also* MCCORMICK ON EVIDENCE, *supra* note 2, § 297, at 856-57 ("[p]erhaps an accurate rule of thumb might be that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process"); Hutchins & Slesinger, *supra* note 119, at 432-33 (noting that although in one case a statement made over twenty-five minutes after an accident was held admissible, "[i]n other cases declarations made from a few seconds to fifteen minutes after the occurrence has been termed mere narration of past events, and therefore excluded").

125. Stewart notes:

> [E]xcitement exaggerates, sometimes grossly, distortion in perception and memory especially when the observer is a witness to a nonroutine, episodic event such as occurs in automobile collision cases and crimes. The likelihood of inaccurate perception, the drawing of inferences to fill in memory gaps, and the reporting of nonfacts is high. . . . Yet in J. Wigmore's view an excited utterance is such a superior quality of evidence that the declarant need not testify even though available—"a proposition never disputed." In fact, the theory is merely an artifice for the admission of highly unreliable evidence which is often

As noted previously, the exception for spontaneous exclamations rests upon the same two assumptions regarding spontaneity and reliability that support the exception for present sense impressions.[126] Additionally, the trustworthiness of spontaneous exclamations is said to be bolstered by the fact that the declarant has uttered the hearsay while in the throes of excitement caused by having witnessed a startling event. Theoretically, the excitement eliminates the witness' capacity to reflect, thus precluding the ability to fabricate and ensuring an accurate and reliable description of the event perceived.[127]

Although strong emotion may negate the power to fabricate, it may also distort the ability to observe or recall and thereby reduce the trustworthiness of the declarant's account. "What the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation."[128] The more startling the event and the greater the emotional reaction, the less likely the declarant's observation will be accurate.[129]

Thus, contrary to the conclusion of most lower courts that have addressed the issue,[130] neither the spontaneous exclamation nor present sense impression exceptions should qualify as firmly rooted. No reasonable assurance exists that virtually any hearsay admissible under these exceptions has been made under circumstances that inherently guarantee the absence of either an intentional fabrication, distortion at the time of the initial observation or an inability to recall the event as observed.[131] Accordingly, neither exception complies with

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the only type of evidence available. No justification exists for foregoing cross-examination and admitting such evidence if the declarant is available.

Stewart, *supra* note 115, at 28-29 (footnotes omitted).

126. *See supra* notes 110-11 and accompanying text.

127. *See generally* MCCORMICK ON EVIDENCE, *supra* note 2, § 297, at 855 (in order for the exception to apply "there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes); 6 J. WIGMORE, *supra* note 108, §§ 1747, 1749, at 195, 199 (" 'special trustworthiness' arises from the fact that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of [the witness'] actual impressions and belief").

128. Hutchins & Slesinger, *supra* note 119, at 439. "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation." *Id.* at 437.

129. Professors Hutchins and Slesinger believed that the existence of this paradox left no justification for the exception.

> [I]f reflective self-interest has not had a chance to operate because of emotional stress, then the statement should be excluded because of the probable inaccuracy of observation. On the other [hand], if little emotion is involved, clearly a very short time is sufficient to allow reflective self-interest to assume full sway.

Hutchins & Slesinger, *supra* note 119, at 439. The authors concluded that "[o]n psychological grounds, the rule might very well read: Hearsay is inadmissible, especially (not except) if it be a spontaneous exclamation." *Id.*

Arguably, this danger of inaccuracy or misperception would not be reduced if the declarant were required to testify to the event observed because the testimony would incorporate the same perceptual errors that stem from the original observation. Furthermore, if the witness testifies to what he saw, the danger exists that the witness/declarant's memory may have faded since the event. Thus, a statement made at the time the event occurred or soon thereafter is arguably just as reliable as the witness' present testimony. However, this argument misses the point: if the declarant can be cross-examined, the opportunity of revealing any errors of perception or fabrications is far better than when the declarant is unavailable for questioning.

130. *See* cases cited *supra* notes 101-02.

131. The potential for admitting unreliable spontaneous exclamations or present sense impres-

the trustworthiness factors delineated in *Dutton* which require that the out-of-court statement be based on an accurate recollection of the event and be made under circumstances that ensure the declarant was not intentionally or unintentionally misrepresenting.[132]

B. *Adoptive Admissions*

The theory of the adoptive admissions exception[133] is that when an individual is confronted with an accusation a reasonable person in like circumstances would deny, that person's silence may be treated as assent. In other words, the failure to respond allows the trier of fact to conclude that the listener has adopted the declarant's assertion as his own.[134]

Although this assumption may guarantee the reliability of some statements, courts also recognize that the assumption may not be appropriate in every case, particularly when viewed in light of the constitutional demands of trustworthiness.[135] Adoptive admissions traditionally have been received with caution; the

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sions is illustrated by the fact that the anonymity of the declarant is not a bar to admission under either exception. *See* FED. R. EVID. 803(1)-(2). The dangers presented by the admission of a hearsay statement of an anonymous declarant are described by Weinstein and Berger:

> [T]he remarks of a bystander and even of an unidentified bystander are admissible, provided the requirements of the exception are met. . . . If the declarant, though a bystander, is identified, it may be possible to place him at the scene so that a judge could find it reasonable to infer perception. If he is unidentified, his capacity to observe can neither be substantiated nor attacked . . . .
>
> . . .
>
> [T]he court's suspicion of the witness' testimony may lead it to find that the declarant's perception was not established. On the other hand, it may conclude that since the witness can be cross-examined, the question of his credibility and the derived credibility of the declarant's statement, are matters which can safely be left to the jury. Much depends on the type of case, the availability of other evidence, the verifying details in the statement, and the setting in which the statement is made.

4 J. WEINSTEIN & M. BERGER, *supra* note 2, 803(1)[01], at 803-77 to -79 (footnote omitted).

132. *See supra* notes 53-54 and accompanying text.

133. The adoptive admission exception to the hearsay rule provides in part: "(d) *Statements which are not hearsay.* A statement is not hearsay if— . . . . (2) *Admission by party-opponent.* The statement is offered against a party and is . . . (B) a statement of which he has manifested his adoption or belief in its truth. . . ." FED. R. EVID. 801(d)(2)(B).

That adoptive admissions are described as nonhearsay by the Federal Rules of Evidence is merely a theoretical distinction and is of no consequence with respect to any confrontation clause analysis. Simply because Congress chooses to define certain out-of-court assertions offered to prove their truth as nonhearsay does not render them immune from attack under the confrontation clause.

134. "If a statement is made by another person in the presence of a party to the action, containing assertions of facts which, if untrue, the party would under all the circumstances naturally be expected to deny, his failure to speak has traditionally been receivable against him as an admission." MCCORMICK ON EVIDENCE, *supra* note 2, § 270, at 799; *see also* 4 J. WIGMORE, EVIDENCE § 1071, at 102 (Chadbourn rev. 1972) ("[T]he inference of assent may safely be made only when no other explanation is equally consistent with silence; . . . unless the circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been correct."). The underlying rationale assumes that "the normal human reaction would be to deny such a statement if untrue." 4 J. WEINSTEIN & M. BERGER, *supra* note 2, § 801(d)(2)(B)[01], at 801-201.

135. "Despite the offhand appeal of this kind of evidence, the courts have often suggested that it be received with caution, an admonition that is especially appropriate in criminal cases." MCCORMICK ON EVIDENCE, *supra* note 2, § 270, at 800.

According to one court,

> The adoptive admission hearsay exclusion does not withstand rigorous constitutional analysis. Allowing admissions by silence appears to be based on the idea that he who is

exception is often allowed only if accompanied by restrictions or safeguards that ensure the offered admission was in fact adopted by the person against whom it is being admitted.[136] If the defendant against whom the statement is offered did not adopt it, then the reliability allegedly guaranteed by the exception's rationale does not arise. Nonetheless, despite the need for individualized examination, most courts confronted with the issue have found adoptive admissions to be firmly rooted.[137]

In *State v. Marshall*,[138] for example, the Wisconsin Supreme Court held that the adoptive admissions exception is firmly rooted. In a concurring opinion, however, Justice Abrahamson disagreed with the majority's conclusion that adoptive admissions possess inherent guarantees of trustworthiness.[139] Consistent with the criticism leveled against the exception and the underlying rationale by other respected commentators, Abrahamson argued that the justification for the admissibility of such admissions is a "generalization, the truth of which must be tested in each case." Abrahamson concluded that the reliability of an admission by silence " 'turns on a number of factors including the circumstances in which the accusation is made, by whom it is made, and the physical and psychological state of the particular person involved.' "[140]

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silent appears to consent ("*qui tacet consentire videtur*"). Courts and commentators uniformly stress that the legal maxim does not guarantee the reliability of an adoptive admission consisting of silence.

State v. Marshall, 103 Wis. 2d 643, 659, 335 N.W.2d 612, 619 (1983) (Abrahamson, J., concurring) (citing Gullickson v. State, 256 Wis. 407, 411, 41 N.W.2d 291, 293 (1950)).

136. MCCORMICK ON EVIDENCE, *supra* note 2, § 270, at 800-01; *see also* 2 JONES, THE LAW OF EVIDENCE, § 13:49, at 526 (6th ed. 1972 & Supp. 1986) ("[T]estimony [as to defendant's silence] should be received and applied with caution—especially where the statements have been made, not by a party to the controversy, but by a stranger thereto.").

137. *See* cases cited *supra* note 103.

138. 113 Wis. 2d 643, 335 N.W.2d 612 (1983). The *Marshall* trial court found that the defendant had adopted the incriminating assertion of one Jackson when Jackson stated, in defendant's presence, that defendant had agreed to kill someone but had "hit" the wrong person. *Id.* at 645, 335 N.W.2d at 613. A third party witnessed and testified to the conversation between Jackson and Marshall. *Id.* at 647, 335 N.W.2d at 614. The lower court reasoned that "[a] false accusation of a crime as serious as murder would certainly call for a denial." *Id.* at 656, 335 N.W.2d at 618. The majority noted that the adoptive admissions exception had been accepted in that State since the nineteenth century and was in fact defined as nonhearsay by the Rule 801(d)(2)(B). *Id.* at 655-56, 335 N.W.2d at 617-18. Peculiarly, the court then inferred that confrontation had been satisfied because the accused had already had an opportunity to confront his accuser at the time the out-of-court statement was made. *Id.* at 656, 335 N.W.2d at 618.

139. *Id.* at 659, 335 N.W.2d at 619 (Abrahamson, J., concurring). Justice Abrahamson wrote,

> Neither adoptive admissions in general nor the testimony in this case meets the standards of trustworthiness and reliability set forth in *Ohio v. Roberts*.
>
> . . .
>
> This hearsay exception is not "firmly rooted" merely because it is "long established in Wisconsin." To determine whether an exception is "firmly rooted," the court should determine whether the hearsay exception guarantees that the evidence admitted is trustworthy and reliable to the degree necessary to satisfy the requirements of the confrontation clause.

Id. at 658, 335 N.W.2d at 619 (Abrahamson, J., concurring) (citing State v. Bauer, 109 Wis. 2d 204, 213, 325 N.W.2d 857, 862 (1982); State v. Dorsey, 103 Wis. 2d 152, 170, 307 N.W.2d 612, 621 (1981) (Abrahamson, J., dissenting)). *But see* State v. Wyss, 124 Wis. 2d 681, 709-10, 370 N.W.2d 745, 759 (1985), discussed *supra* notes 51-52 and accompanying text.

140. *Id.* at 659, 335 N.W.2d at 619 (Abrahamson, J., concurring) (quoting 4 J. WEINSTEIN & M. BERGER, *supra* note 2, 801(d)(2)(B)[01], at 801-201 to -203).

Abrahamson was clearly correct in concluding that, before an adoptive admission can be used against a criminal defendant, the presence of these reliability-ensuring "factors" must be assured. Absent these guarantees of trustworthiness, such statements should not be admissible. Not all adoptive admissions exceptions, however, explicitly demand the existence of factors beyond the requirement that the accusation against the defendant be made in his presence.[141] Under these statutes, if a court fails to require the presence of factors ensuring reliability, compliance with the exception may result in the admission of unreliable statements. This exception illustrates the rare instance which the fourth *Dutton* factor requiring personal knowledge on the part of the declarant may not be satisfied.[142] In other words, no reasonable assurance exists that the listener remained silent because he agreed with the accusation against him. Because personal knowledge by the declarant is not guaranteed, the accuracy of the statement is substantially in doubt. Thus, in the absence of individualized evaluation, none of the *Dutton* factors for determining reliability can be said to exist with respect to virtually any statement offered under this exception. Because of the need for additional guarantees of trustworthiness, the burden of establishing the unreliability of an adoptive admission should not be placed on the opponent of the evidence. A presumption of constitutionality in favor of every adoptive admission is no more warranted than it is for present sense impressions or spontaneous exclamations.

C. *Declarations Against Penal Interest*

The underlying rationale of the declaration against penal interest exception[143] rests on the assumption that no reasonable individual would knowingly say something against her own interest unless convinced of its truth.[144] Ini-

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141. *See supra* note 134.

142. For a discussion of the *Dutton* factors, see notes 53-54 and accompanying text.

143. The Federal Rules of Evidence define statements against penal interest as follows:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(b)(3).

144. "The basis of the exception is the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned, though oath and cross-examination are wanting . . . ." 5 J. WIGMORE, *supra* note 2, § 1457, at 329. Other commentators concur in this rationale:

> When a declarant has made a disserving statement, it is reasonable to presume that he or she was under the influence of a truth-telling stimulus strong enough to overcome the fear of criminal liability. The potential for reckless or intentional misstatement is greater when the facts stated are either self-serving or neutral.

Note, *Declarations Against Penal Interest: Standards of Admissibility Under An Emerging Majority Rule*, 56 B.U.L. REV. 148, 154 (1976); *see also* People v. Spriggs, 60 Cal. 2d 868, 874, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845 (1964) (declarations against penal interest "give[s] reasonable assurance

tially, this rationale was accepted with respect to admission of hearsay declarations against pecuniary and proprietary interests, and later was expanded to include civil liability.[145] Only in the past two decades have a significant number of jurisdictions broadened the exception to include declarations against penal interest,[146] an expansion that has increased the potential danger the hearsay might be unreliable.[147] Although many declarations against penal interest ar-

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of the veracity of his statement made against that interest"); Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 17-29, 43-63 (1944) (discussing trustworthiness of statements against interest and the time when the declaration must be against the party's interest).

Furthermore, one court has noted:

> With respect to inculpatory declarations against interest, . . . admission is proper only when it is demonstrated that "corroborating circumstances clearly indicate the trustworthiness of the statement." . . . [T]he statement is receivable only if (1) the declarant is unavailable as a witness; (2) the statement is so far contrary to the declarant's pecuniary, proprietary, or penal interest that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the trustworthiness of the statement is corroborated by the attendant circumstances.

United States v. Palumbo, 639 F.2d 123, 131 (3d Cir.), (quoting FED. R. EVID. 804(b)(3)) *cert. denied*, 454 U.S. 819 (1981).

145. MCCORMICK ON EVIDENCE, *supra* note 2, § 277, at 821-22.

146. *See* 4 J. WEINSTEIN & M. BERGER, *supra* note 2, 804(b)(3)[04], at 804-157 to -163; MCCORMICK ON EVIDENCE, *supra* note 2, § 278, at 822-24.

147. "The inclusion of statements against penal interest in the exception for statements against interest raises a host of intertwined constitutional and evidentiary problems . . . ." 4 J. WEINSTEIN & M. BERGER, *supra* note 2, 804(b)(3)[03], at 804-139.

> The exception for statements against interest . . . rests on the assumption that persons will not make damaging statements against themselves unless they are true. As a psychological generalization, this conclusion rings true; in the individual case, the diversity of the human personality makes generalizations suspect. Persons will lie despite the consequences to themselves to exculpate those they love or fear, to inculpate those they hate or fear, or because they are congenital liars. Others will not realize that they are making an admission against themselves, or will make ambivalent statements susceptible of differing interpretations.

Id. 804(b)(3)[01], at 804-123; *see also* MCCORMICK ON EVIDENCE, *supra* note 2, § 279, at 824-27 (elaborating on the following factors to be considered when determining whether a statement is against interest: the time the statement was made; the nature of the statement; what outside facts existed when the statement was made; and the actual state of mind of the declarant). Another commentator has noted that "[c]ross-examination of the individual declarant focuses attention on his quirks and idiosyncrasies. If a declarant's statement against penal interest is admitted as hearsay, thus sacrificing cross-examination for the sake of practicality, the possibility that an innocent defendant can be convicted on the basis of an *unreasonable* declarant's statement increases." Comment, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 163 (1983).

In fact, some lower courts have permitted the prosecution to use declarations against penal interest when made under circumstances of questionable reliability. *See, e.g.*, Olson v. Green, 668 F.2d 421 (8th Cir.) (although ultimately held to be harmless error, accomplice's custodial statements made after extensive police questioning, admitted by the trial court as declarations against penal interest, did not bear sufficient indicia of reliability), *cert. denied*, 456 U.S. 1009 (1982); United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978) (defendant's conviction reversed on Fifth Circuit's finding that the statement of a now-deceased declarant, although contrary to his penal interest, was not sufficiently trustworthy to be used against defendant; the prosecution witness who testified to the declarant's remarks was also implicated in the criminal activity and hoped to receive preferential treatment; the argument that the statement was against the declarant's interest was weak and the statements lacked corroboration); People v. Lee, 129 Ill. App. 3d 1167, 491 N.W.2d 1391, *appeal denied*, No. 5-82-0539 (March 1984), *rev'd sub nom*, Lee v. Illinois, 106 S. Ct. 2056 (1986) (United States Supreme Court held that the trial court had improperly relied on a codefendant's confession given to the police as violative of defendant's right to confrontation; codefendant's confession, made only after he was told defendant had implicated him and that the defendant had implored him to share "the rap" with her, gave a substantially different version of how the crimes came to be commit-

guably may possess indicia of reliability and have been classified as firmly rooted by some lower courts,[148] the trustworthiness of the typical declaration offered against criminal defendants is questionable.

The exception for declarations against penal interest is used against criminal defendants when, though spoken by a third party declarant, the statements nonetheless tend to incriminate the accused as well as the declarant.[149] Although the statement may incriminate the declarant, he may have lied in hopes of transferring some of the blame to the nondeclarant defendant.[150] When declarations specifically inculpating a nondeclarant are offered against that nondeclarant, the exception's rationale for ensuring reliability no longer applies.[151] Therefore, the declaration should not fall within this hearsay exception. There is a danger some courts might admit such statements under this exception. In fact, some courts have admitted these declarations under either an

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ted). See *infra* notes 155-65 and accompanying text for a further discussion of *Lee* and the potential dangers of admitting declarations against penal interest as an exception to the hearsay rule.

The potential danger of untrustworthiness with respect to declarations against penal interest theoretically applies to statements offered by either the prosecution or the defense. Either could submit a third party's declaration, even though it may have been spoken in circumstances of questionable reliability. A defendant, for example, could arrange for another person to confess falsely to the crime for which the defendant is accused. To prevent this from occurring, the Federal Rules of Evidence have provided that declarations against penal interest cannot be used to exculpate an accused unless made under trustworthy circumstances. FED. R. EVID. 804(b)(3). This places the burden of establishing the trustworthiness of the statement on the accused, the party on whose behalf the hearsay is offered. No corresponding requirement of trustworthiness appears in the Federal Rules as a prerequisite to the prosecution's use of hearsay under this exception. *See* MCCORMICK ON EVIDENCE, *supra* note 2, § 252, at 749. Presumably, no statutory requirement of trustworthiness is necessary because the confrontation clause already provides defendants with a guarantee that the hearsay will be used against them only if it was made under reliable circumstances.

148. *See* cases cited *supra* note 104.

149. Declarations against penal interest are not uttered by a defendant, because any prior statement made by a defendant is admissible against him as a party admission. *See* FED. R. EVID. 801(d)(2)(A).

150. Although some courts have correctly distinguished between declarations which merely incriminate the declarant and those which inculpate a third party as well, other courts have admitted these declarations against nondeclarant defendants:

> The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

Lee v. Illinois, 106 S. Ct. 2056, 2064 (1986); *see also* Parker v. Randolph, 442 U.S. 62, 79 (1979) (Blackmun, J., concurring) (even though codefendants had confessed and their confessions overlapped, the court should weigh all the circumstances surrounding the making of the statement before deciding whether admission of the statemate was harmless error). These statements should be admissible only after an examination of the actual circumstances surrounding the making of the statement reveals particularized guarantees of trustworthiness. United States v. Katsougrakis, 715 F.2d 769, 775 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); People v. Moore, 693 P.2d 388, 390 (Colo. Ct. App. 1984).

151. A commentator has noted:

> [M]ost statements inculpating a defendant are only collateral to the portion of the declarant's statement that is against his own penal interest. The portion of the statement that specifically implicates the defendant is rarely directly counter to the declarant's penal interest. This further weakens the contention that statements against penal interest are trustworthy.

Comment, *supra* note 147, at 163.

expanding hearsay exception[152] or the exception for statements of a coconspirator.[153] Because the motive to falsify is substantial, the statement may fail to comply with the third *Dutton* factor because it may contain a misrepresentation of fact. This danger undercuts the reliability of declarations against penal interest with respect to both prearrest and postarrest statements that incriminate both the declarant and a third-party defendant.

When the declaration is made in the questionable atmosphere of postarrest interrogation, the already pervasive potential for untrustworthiness is exacerbated.[154] In *Lee v. Illinois*[155] the United States Supreme Court expressed considerable concern over the use of postarrest declarations against a nondeclarant defendant. Lee's murder conviction rested in part on a confession given to the police by her codefendant.[156] That confession implicated both the declarant and Lee. In reversing defendant's conviction, the five-to-four majority noted that " 'the post-arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.' "[157]

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152. *See* FED. R. EVID. 803(24), 804(b)(5).

153. See *infra* notes 166-83 and accompanying text for a discussion of the coconspirator exception.

154. *See* United States v. Riley, 657 F.2d 1377, 1384 (8th Cir. 1981), *cert. denied*, 459 U.S. 1111 (1983); United States v. Love, 592 F.2d 1022, 1025 (8th Cir. 1979); FED. R. EVID. 804(b)(3) advisory committee notes; MCCORMICK ON EVIDENCE, *supra* note 2, § 279, at 826; J. WEINSTEIN & M. BERGER, *supra* note 2, 804(b)(3)[03], at 804-150 to -157.

> For example, a declarant who is in custody while making his statement may very well desire to curry favor with the authorities by implicating another, whether or not leniency has been expressly promised. Other motives to falsify may be present even where there is no fear of reprisal for admitting a crime: the desire to share blame with another; the wish for revenge; the hope for diverting attention from oneself; and even publicity-seeking or simple lying.

Comment, *supra* note 147, at 163-64. This concern for the reliability of such a statement was reiterated by the United States Supreme Court in Lee v. Illinois, 106 S. Ct. 2056 (1986), in which Justice Brennan, writing for the majority, noted that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without benefit of cross-examination." *Id.* at 2062 (citing Bruton v. United States, 391 U.S. 123, 141 (1968) (White, J., dissenting)).

155. 106 S. Ct. 2056 (1986).

156. *Id.* at 2061. Lee had also confessed to the police and, although the two confessions were in part consistent, codefendant Thomas' confession provided a very different version of how the two had committed the murders. *Id.* at 2059. The most significant difference was that Thomas claimed he and Lee had previously discussed the possibility of killing one of the eventual victims and that they had referred to this earlier conversation "immediately prior to the murders." *Id.* at 2060-61. This suggested the killings may have been premeditated. *Id.* at 2059. On the other hand, Lee's confession implied that she and Thomas had never planned or discussed the possibility of killing the victims. She had suggested that her co-defendant Thomas had "snapped" the night of the murders and that he was to blame for the killings. *Id.* at 2062.

157. *Id.* at 2062 (quoting Bruton v. United States, 391 U.S. 123, 141 (1968) (White, J., dissenting)). Justice Brennan, writing for the majority, noted that this case was not a case like *Bruton*, in which the Court was "concerned with the effectiveness of limiting instructions in preventing spillover prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial. Rather, this case is strikingly similar to [Douglas v. Alabama, 380 U.S. 415 (1965)]." *Id.* at 2063.

At Douglas' trial for assault with intent to murder, his alleged accomplice was called as a prosecution witness. Invoking the privilege against self-incrimination, the witness refused to testify. Douglas v. Alabama, 380 U.S. 415, 416 (1965). The prosecution, in a dubious attempt to allegedly

The majority opinion in *Lee*, harkening back to *Roberts*,[158] cautioned that if a hearsay statement does not fall within a firmly rooted exception, it can satisfy the requirements of the confrontation clause only if it is "marked with such trustworthiness that 'there is no material departure from the reason of the [confrontation clause's] general rule.' "[159] The Court did not decide whether the declaration against penal interest exception was firmly rooted. Rather, the Court held that under the facts of this case, the statement did not fall within a firmly rooted exception, and thus the proponent bore the burden of establishing that the statement was spoken in circumstances of "particularized guarantees of trustworthiness."[160]

The Court in *Lee* agreed with the lower state court[161] that, given sufficient "indicia of reliability," this presumption of untrustworthiness *could have been* rebutted in the present case.[162] The majority concluded, however, that the lower court had erred in finding that the circumstances surrounding the confession in this case were sufficiently reliable to rebut this presumption.[163] "[O]nce partners in a crime recognize that the 'jig is up' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices."[164] Based on the record before it, the Court found no reason "to depart from the time honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation."[165]

"refresh" the witness' memory, read the witness' prior confession to him in the presence of the jury. The witness, however, remained recalcitrant and refused to answer any questions on either direct or cross-examination. *Id.* at 416-17. The *Douglas* Court held that the inability to cross-examine a witness whose incriminating confession had been read to the jury denied the accused his right of cross-examination and as a result was too unreliable to be constitutionally admitted. *Id.* at 419. "This holding . . . was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by implicating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee*, 106 S. Ct. at 2062-63.

158. *Roberts*, 448 U.S. at 56 (1980).

159. *Lee*, 106 S. Ct. at 2064 (quoting *Roberts*, 448 U.S. at 65). The Court thus reaffirmed what it had established in *Roberts*: "even if certain hearsay evidence does not fall within a 'firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet the Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.' " *Id.* at 2063-64 (quoting *Roberts*, 448 U.S. at 66).

With respect to the facts of *Lee*, Justice Brennan concluded that the circumstances surrounding the confession did not rebut its presumptively unreliable and inadmissible character. *Id.* at 2064. In support, the Court noted:

> When Thomas was taken in for questioning and read his rights he refused to talk to the police. The confession was elicited only after Thomas was told that Lee had already implicated him and only after he was implored by Lee to share "the rap" with her. The unsworn statement was given in response to the questions of police, who, having already interrogated Lee, no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent.

Id. at 2064.

160. *Id.*

161. The Illinois Supreme Court denied hearing on the matter. *Id.* at 2061.

162. *Id.* at 2063.

163. *Id.* at 2064.

164. *Id.*

165. *Id.* at 2065.

Although the Supreme Court has thus eliminated some of the danger associated with the use of postarrest declarations against penal interest offered against nondeclarant defendants, it has not yet similarly restricted the use of such prearrest declarations. This latter category of statements, though they may not have all the dangers of untrustworthiness associated with postarrest declarations, nonetheless possess only limited indicia of reliability. In the absence of either an opportunity to cross-examine the declarant or unusually trustworthy circumstances, the out-of-court confession of an alleged accomplice, whether made in a prearrest or postarrest setting, should not be admissible against an accused.

D. *The Coconspirator Exception*

Many incriminating statements attributed to an alleged coconspirator[166] can be used against all other alleged members of the conspiracy. The problems surrounding the admission of declarations against penal interest offered against nondeclarant defendants are similar to and overlap those respecting some statements admitted under the coconspirator exception.[167]

Lower courts have divided over the question of whether the hearsay exception for statements of a coconspirator should be classified as firmly rooted. Although several courts have held the exception to be firmly rooted,[168] other courts have reached the opposite conclusion, reasoning that hearsay statements falling within this exception are admitted as a result of factors having nothing to do with any claim of trustworthiness.[169] Rather, these statements gain admis-

166. The hearsay exception for statements of a coconspirator provides: "(d) *Statements which are not hearsay.* A statement is not hearsay if— . . . . (2) *Admission by party-opponent.* The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." FED.R.EVID. 801(d)(2)(E). The Federal Rules of Evidence define the statements of co-conspirators, as well as party admissions, as nonhearsay rather than hearsay admissible under an exception. The exclusion for both of these exceptions is justified by their substantially similar underlying rationale.

167. Normally for a statement to be admissible under the coconspirator exception, it must be made during the course of and in furtherance of the conspiracy; therefore, most hearsay admissible as a statement of a coconspirator is made in prearrest settings. However, the Supreme Court has affirmed the prosecution's use of postarrest statements of a coconspirator as not inconsistent with the requirements of the confrontation clause. *See Dutton*, 400 U.S. at 89.

168. *See* cases cited *supra* note 105; *see also* Note, *Reconciling the Conflict Between the Coconspirator Exemption From the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294, 1299 & nn.36-38 (1985) [hereinafter *Reconciling*] (discussing how circuit courts have analyzed the reliability of coconspirator statements, and citing opinions that hold that coconspirator statements are inherently unreliable as well as opinions that hold that coconspirator statements are inherently reliable); Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay*, 53 FORDHAM L. REV. 1291, 1310 n.122 (1985) [hereinafter *Closing the Window*] (list of cases in which courts have dismissed confrontation challenges only on the grounds that the coconspirator exception was firmly rooted).

169. Although the coconspirator exception may be "firmly established" in the United States' rules of evidence, "its origins nevertheless were distinct from those of most exceptions." *Reconciling*, *supra* note 168, at 1307-08. According to another commentator:

> When measuring the reliability of coconspirator statements in terms of sincerity, ambiguity, perception and memory, it becomes obvious that the coconspirator statement is not "firmly rooted." Because they have a special incentive to shift blame to one another, coconspirators are likely to bend the truth of their statements. They are also likely to speak

sion as a result of a combination of estoppel and agency rationales that bears no relation to the statement's inherent reliability.[170]

In *United States v. Inadi*[171] the Supreme Court commented that "[c]onspirators are likely to speak differently when talking to each other . . .

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in code words or names that make the identification of their meaning or subject matter ambiguous.

Closing the Window, *supra* note 168, at 1311. For cases analyzing the indicia of reliability of coconspirators' statements, see *id.* at 1315-16 nn. 153 & 154.

170. Justice Marshall has stated:

> Under the agency theory that supports conspiracy law, 'once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all.' Every statement made by co-conspirators in furtherance of their illegal scheme is thus a verbal act admissible against each conspirator as if it had been his own.

United States v. Inadi, 106 S. Ct. 1121, 1132 (1986) (Marshall, J., dissenting) (quoting United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469 (1827)); *see* MCCORMICK ON EVIDENCE, *supra* note 2, § 267, at 792; 4 J. WIGMORE, *supra* note 134, § 1079, at 180; Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1165-66 (1954).

Holding that the exception for statements of coconspirators is not firmly rooted, the United States Court of Appeals for the Eighth Circuit acknowledged the estoppel rationale. The court noted that, like party admissions, the statements of a coconspirator are "not admitted because of confidence in their inherent reliability; rather, they are admitted because 'a party will not be heard to object that she is unworthy of credence.' " United States v. Massa, 740 F.2d 629, 639 (8th Cir. 1984), (quoting United States v. Ammar, 714 F.2d 238, 255 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983)) *cert. denied*, 471 U.S. 1115 (1985). However, because the assertions of alleged coconspirators are being offered against nondeclarant defendants, some form of analysis based on vicarious liability or alter-ego is a necessary prerequisite to the application of the estoppel rationale. *See* State v. Canaday, 684 P.2d 912 (Ariz. Ct. App. 1984). The missing analytical link is provided by a classic legal fiction under which coconspirators, as partners in crime, are said to be authorized to speak on behalf of one another. *See* MCCORMICK ON EVIDENCE, *supra* note 2, § 267, at 792; 4 J. WIGMORE, *supra* note 134, § 1079, at 180. One court has noted:

> Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made "a partnership in crime." What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.

Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926). Therefore, everything said by a coconspirator in furtherance of and during the course of the conspiracy is admissible against any conspirator. This rationale is, of course, fictitious; very few coconspirators are actually authorized to speak on behalf of each other. Thus, this exception arises out of principles of criminal and agency law that are not inherently reliable. *See Reconciling*, *supra* note 168, at 1314-16.

171. 106 S. Ct. 1121 (1986). The lower court in *Inadi* determined that the admission of a coconspirator's statements violated the defendant's sixth amendment rights because the government had not established that declarant was unavailable to testify. *Id.* at 1124-25 n.3. Despite language to the contrary in *Roberts*, 448 U.S. at 65, the Supreme Court reversed, holding that unavailability is not a constitutional prerequisite to the prosecution's use of the coconspirator exception. *Inadi*, 106 S. Ct. at 1129.

The Court acknowledged that this was opposite to what it had traditionally demanded as a precondition to the admission of hearsay under the former testimony exception. The Court noted, however, that former testimony is not admitted because it has any independent evidentiary significance of its own. Rather, "if the declarant is unavailable, no 'better' version of the evidence exists, and the former testimony may be admitted as a substitute for the live testimony on the same point." *Id.* at 1126. This analysis is somewhat inconsistent with the Court's opinion in Mancusi v. Stubbs, 408 U.S. 204, 213 (1972), in which Justice Rehnquist noted that it was clear "from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of the 'indicia of reliability' referred to in *Dutton*."

Justice Powell, writing for the majority in *Inadi*, commented that although "former testimony often is only a weaker substitute for live testimony," the statements of a coconspirator gain trustworthiness from the circumstances in which they are made. *Inadi*, 106 S. Ct. at 1126.

than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy."[172] Thus, the Court strongly implied that the out-of-court statements of a coconspirator were likely to be more trustworthy than his testimony at trial.

In response to the majority's suggestion that coconspirator hearsay is trustworthy, Justice Marshall in his dissent argued that the roots of this exception do not lie in any claim of special reliability.[173] Rather, as noted above, he found that the exception was born of a questionable authorization parentage.[174] "This agency theory, which even the Advisory Committee on the proposed Federal Rules of Evidence labeled 'at best a fiction,' . . . might justify the exemption conferred upon co-conspirator declarations from the traditional rule against hearsay. But it speaks not at all to the Confrontation Clause's concern for reliable factfinding."[175]

The Court in *Inadi* did not decide whether the exception for statements of a coconspirator should be classified as firmly rooted.[176] By suggesting that these statements are made under trustworthy circumstances that cannot be duplicated at trial, however, the decision pointed the way to the exception's classification as firmly rooted.[177]

In *Bourjaily v. United States*[178] the Court answered the question left unresolved in *Inadi*. The majority held that the statements of a coconspirator made during the furtherance of a conspiracy are firmly rooted.[179] Justice Rehn-

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

173. *Id.* at 1132 (Marshall, J., dissenting).

174. *See supra* note 170 and accompanying text.

175. *Inadi*, 106 S. Ct. at 1132 (Marshall, J., dissenting).

176. Justice Marshall's dissent, joined by Justice Brennan, was clearly correct in stating that the Court's "decision does nothing to resolve the conflict among the lower courts as to whether declarations of coconspirators who are not present in court for cross-examination must be shown to have particularized 'indicia of reliability' before they can be admitted for substantive purposes against a criminal defendant." *Id.* at 1129 n.1. "With respect to the case before us, the majority takes but a small step. . . . Respondent is . . . free to return to the Court of Appeals and argue that the coconspirator declarations admitted against him lack the 'indicia of reliability' demanded by the Confrontation Clause." *Id.* at 1129.

177. The four *Dutton* factors were created by the plurality in that case to enable the court to determine whether a statement offered under the Georgia coconspirator exception satisfied the demands of the confrontation clause. *Dutton*, 400 U.S. at 88-89 (1970); *see supra* notes 53-58 and accompanying text.

178. 107 S. Ct. 2775 (1987).

179. *Id.* at 2783. The three-vote dissent in *Bourjaily* was written by Justice Blackmun, who had authored the majority opinions in *Roberts* and *Inadi*, and was signed by Justices Marshall and Brennan, who had dissented in *Inadi*. The dissent found the majority's conclusion "astounding," *id.* at 2792 (Blackmun, J., dissenting), particularly in light of the majority opinion's also having eliminated the rule against "bootstrapping." *Id.* at 2791 (Blackmun, J., dissenting); *see id.* at 2780-81. This rule previously had required that only evidence independent of the statement itself could be used to preliminarily establish the existence of a conspiracy. Federal Rule of Evidence 104(a) permits this circular reasoning, but had never before been applied to Rule 801(d)(2)(E), which had codified the common law on the admission of coconspirator statements.

The majority held that the preliminary requirement of proof of a conspiracy, which has to be established before the out-of-court statement could be admitted under this exception, could be satisfied by first accepting the statement as true. *Id.* at 2790 (Blackmun, J., dissenting); *see id.* at 2780-81. In other words, when deciding whether the statement satisfies the exception's foundational re-

quist did not, however, find it necessary to credit this exception with inherent reliability. Rather, he concluded simply that coconspirators' statements "have a long tradition of being outside the compass of the general hearsay exclusion."[180] He found this tradition sufficient to satisfy the confrontation clause, without the need "to embark on an independent inquiry into the reliability of the statements . . . ."[181] This analysis suggests that the majority of the Court may not be as concerned with the reliability of statements offered under firmly rooted exceptions as it is with the longevity of those exceptions.

Justice Blackmun, writing for the dissent, was concerned with the lack of inherent reliability in many statements offered under the coconspirator exception. He commented that "unlike many common-law hearsay exceptions, the coconspirator exemption from hearsay with its agency rationale was not based primarily upon any particular guarantees of reliability . . . ."[182]

This exception should not be classified as firmly rooted. A finding of trustworthiness sufficient to satisfy the confrontation clause should not be based on the unsupported assumption that virtually any out-of-court statement uttered by an alleged coconspirator is more reliable than his in-court testimony. A statement falling under this exception should be excluded unless sufficient evidence shows it was based on the declarant's personal knowledge and is not the product of faulty recollection, or intentional or unintentional misrepresentation. Absent such a finding, the admission of statements offered under the co-conspirator exception should be held to violate the Supreme Court's standard for satisfying the demands of confrontation as expressed in *Roberts* and *Dutton*.[183]

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quirement that a conspiracy existed, trial courts can rely, at least in part, on their belief in the truth of the statement. *Id.* at 2783-84 (Stevens, J., concurring).

Thus, in one breath, the majority labeled this exception as firmly rooted while eliminating a long-standing reliability safeguard. The majority enigmatically concluded that abolishing the rule against bootstrapping did not affect the firmly rooted status of the exception because "[t]he bootstrapping rule relates only to the *method of proof* that the exception has been satisfied. It does not change any element of the coconspirator exception, which has remained substantively unchanged since its adoption in this country." *Id.* at 2783 n.4.

The dissent countered that the majority was attempting to "have it both ways: it cannot transform the exemption, as it admittedly does, *and* then avoid Confrontation Clause concerns by conjuring up the firmly rooted hearsay exception as some benign genie who will extricate the Court from its inconsistent analysis." *Id.* at 2792 (Blackmun, J., dissenting).

180. *Id.* at 2783.

181. *Id.*

182. *Id.* at 2786 (Blackmun, J., dissenting).

183. *See supra* text accompanying notes 42-58. In this context, an additional noteworthy exception that has been held to be firmly rooted by a lower court is that for statements made for purposes of medical diagnosis or treatment. FED. R. EVID. 803(4). Though this exception is not as likely to arise in as many criminal cases as the other exceptions discussed in this Article, it is coinceivable that it might be employed by the prosecution. Because at least one lower court has classified it as firmly rooted some discussion is justified. *Wyss*, 124 Wis. 2d at 710, 370 N.W.2d at 759. A patient suffering from a malady seeks the advice of a physician to make her well again, and thus is strongly motivated to be truthful to obtain the appropriate care. *See Wyss*, 124 Wis. 2d at 710, 370 N.W.2d at 759. Patients are unlikely to be untruthful to a treating physician; to do so could result in misdiagnosis and erroneous treatment. *See* MCCORMICK ON EVIDENCE, *supra* note 2, § 292, at 839; *see generally* 6 J. WIGMORE, *supra* note 108, §§ 1719-1720, at 103-13 (statements to a physician may be admitted into evidence if they are spontaneous and natural expressions of pain or suffering; most jurisdictions admit only statements of present pain and exclude statements of past condition and symptoms). This principle provides the basis for the exception for statements made by a patient for purposes of medical diagnosis or treatment. Accepting the accuracy of this rationale, courts have

VI. "FIRMLY ROOTED" REVISITED

Obviously, at some point a defendant's constitutional right to confrontation may be somewhat limited by substantial, though countervailing, benefits to the efficient administration of criminal justice. To a limited extent this balancing allows for the use of exceptions to the hearsay rule to the detriment of criminal defendants. The creation of a formula for reconciling the confrontation clause and the exceptions to the hearsay rule is appealing when compared to case-by-case analysis. Unfortunately, the "firmly rooted" formula does not effectively promote administrative efficiency enough to justify placing the burden of establishing untrustworthiness upon the accused.

The advantages of establishing such a formula would presumably include ease and consistency of application, time saved at both the trial and appellate levels in reaching decisions on the correctness of admitting hearsay, as well as

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held that, absent unusual circumstances, statements made by a patient to a treating physician are "clearly grounded on considerations of reliability and trustworthiness." *Wyss*, 124 Wis. 2d at 710, 370 N.W.2d at 759; *see also* Goldstein v. Sklar, 216 A.2d 298, 305 (Me. 1966) (statements made by a patient to an examining physician "are viewed as highly reliable and apt to state true facts").

The indicia of reliability allegedly provided by this exception's underlying rationale is, however, more problematic than the comments in the preceding paragraph would suggest. While it may often be in the patient's best interest to be truthful with his or her physician, this is not a realistic assessment of all doctor-patient communications. For example:

> Reliance on the patient's desire for effective treatment as the basis for the hearsay exception does not limit the physician to only those symptoms which bothered the patient at the time the statement was made. The patient's complaint of prior pain and suffering may also be admissible since both present and past pain could form the basis for diagnosis and treatment.
>
> . . .
>
> Much more difficult to deal with is the patient claiming only past pain and no present symptoms. If the patient claims to seek a tardy treatment for past ailments in fear that they may re-occur, his statements should be no less admissible, although perhaps more suspect.

Theis, *The Doctor as Witness: Statements for Purposes of Medical Diagnosis or Treatment*, 10 LOY. U. CHI. L.J. 363, 366 (1979). Because the statement is often submitted on the patient's behalf in litigation, the chances that the statement might inaccurately reflect the actual medical condition is greater than in the typical doctor-patient consultation. Theis continues,

> The rule assumes a patient who suffers genuine illness. More importantly, it assumes the patient has minimal ability to reject the advised course of treatment. If the patient suffers from no illness at all, however, he may either reject the treatment, sometimes without informing his physician, or may follow the treatment, as long as he has a reasonable expectation that the treatment will have no deleterious effects. For example, a patient complaining of "whiplash" has little to lose by so representing to his doctor. If the doctor prescribes pain-killers and a cervical collar, the patient might easily disregard the treatment without ever informing his doctor. He might choose to follow the treatment with little danger to his actual good health.
>
> It is impossible to determine which stereotype is predominant: the patient who makes truthful disclosure for fear that his health will be further endangered if he misleads his doctor or the patient who manufactures symptoms, secure that he can do himself no harm. The law has assumed the honest patient in accepting these statements for the truth of the matter asserted.

Theis, *supra*, at 365.

Thus, as is true for other exceptions discussed in this Article, this exception fails to comply with the third *Dutton* factor. *See supra* notes 53-58 and accompanying text. Statements falling within this hearsay exception may be spoken in circumstances that would result in misrepresentation. As with many other exceptions that suffer from similar failings, this potential untrustworthiness is not great enough to mandate repeal of the entire exception. However, it is sufficiently significant to cast doubt on this exception's classification as firmly rooted.

the certainty with which litigants could predict evidentiary rulings. If all hearsay falling within firmly rooted exceptions were conclusively constitutional, then substantial judicial efficiency would result. Not only would there be ease, predictability, and consistency of application, but substantial court time would also be saved by eliminating the need to hear evidence on a case-by-case basis.

Not all statements admissible under a particular hearsay exception, however, possess the same degree of trustworthiness and reliability.[184] A conclusive presumption would foreclose a defendant from meritoriously arguing a violation of his constitutional rights by prohibiting him from demonstrating the untrustworthiness of the particular hearsay offered by the prosecution.[185] Such a result would be constitutionally intolerable, because it undercuts the essential character of the confrontation clause.[186] This sacrifice is too great to justify on the grounds of judicial efficiency.

But courts should not, and most do not, employ the "firmly rooted" formula in this conclusive manner. Statements offered under firmly rooted exceptions are customarily inadmissible only if the accused is able to establish that they were uttered in untrustworthy circumstances. In other words, courts are still required to consume time in determining whether the particular hearsay offered was made under unreliable circumstances. It cannot be said that the "firmly rooted" formula is a substantial improvement in terms of the ease, predictability, consistency of application, or time consumption that would exist if the constitutionality of each hearsay statement were considered on a case-by-case basis. Rather, courts are still required to engage in a case-by-case analysis, with all the consequential uncertainty and time consumption. Thus, unless we adopt a constitutionally intolerable conclusive presumption, the "firmly rooted" formula benefits little, if at all, the goal of improving the efficiency of judicial administration.

Although the rebuttable presumption created by the "firmly rooted" formula may not be as potentially damaging to the constitutional rights of defendants as a conclusive presumption, it still may unnecessarily increase and dangerously limit a defendant's constitutional right to confrontation. Although hearsay exceptions suffer from a variety of problems, a common thread runs throughout this discussion. All of these exceptions, other than the exception for previously cross-examined former testimony, are generally rationalized by an

184. For example, two statements admissible under the same exception can boast substantially different levels of trustworthiness depending on the self-serving nature of their content. Assume a jurisdiction labels as "firmly rooted" spontaneous exclamations. A spontaneous exclamation which is favorable to the interests of the declarant made moments after an automobile accident, may not possess the same degree of reliability as an exclamation acknowledging the declarant's own liability. Similarly, it is arguable that given the rationale underlying the exception, the dying declaration of one who is devoutly religious may be more reliable than that of an atheist who does not fear the consequences of dying with a lie on his lips.

185. *See supra* text accompanying notes 32-41.

186. As in Leary v. United States, 395 U.S. 6 (1969), constitutional rights may be violated even if the presumption merely places the burden of producing evidence on the accused. However, if the presumption of constitutional admissibility is rebuttable, then the accused would at least have the opportunity to demonstrate that the particular hearsay submitted by the prosecution is so unreliable as to deny the right to confrontation. For a discussion of *Leary*, see *supra* note 41.

unrealistic evaluation of the safeguards that supposedly ensure the statements' reliability. Their continued existence is more a consequence of long-established tradition than of compelling logic.

Once courts label an exception as firmly rooted, the burden shifts to the accused to establish the untrustworthiness of hearsay falling within that exception. Logically, the party on whom the burden rests will be less likely to overcome that burden. For example, if a trial judge concludes that the evidence from both the prosecution and defendant as to whether the hearsay statement is reliable lies in equipoise, then a decision against the party with the burden is mandated.[187] The practical significance of having to overcome such a burden typically arises in two situations. One is when versions of the circumstances surrounding the making of the out-of-court statement conflict. The other is when no evidence exists at all regarding the indicia of reliability of the hearsay statement, as when the hearsay was spoken by an anonymous declarant and is offered under an exception, such as that for spontaneous exclamations. In such a situation, nothing may be known about the declarant or the circumstances under which his statement was uttered, except that a trial witness now recounts having heard the out-of-court statement.

In both situations, the fact that a hearsay statement is presumptively reliable and constitutionally admissible may lead some courts to admit unreliable hearsay by erroneously concluding that the defendant has not met the burden of establishing untrustworthiness. Thus, the presumptive constitutional status of statements falling within these exceptions makes it more difficult for a defendant to argue successfully a legitimate claim that his constitutional rights have been violated.

Furthermore, courts have been overly liberal in construing the firmly rooted concept to include numerous exceptions, the requirements of which clearly do not guarantee the trustworthiness of virtually any statement offered under them.[188] Therefore, even if it were conceded that the guarantees of trustworthiness offered by one or two exceptions might warrant their classification as firmly rooted, this does not justify the existence of the firmly rooted concept in general. The concept of firmly rooted exceptions results in little, if any, practical benefit over case-by-case analysis. The constitutionality of each hearsay state-

187. *See* FED. R. EVID. 301 ("a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption").

188. *See supra* notes 101-05 and accompanying text. When the accused has not been provided an opportunity to question the witness, courts should refrain from categorizing an exception as firmly rooted in two situations: (1) when the exception is not founded on the statement's inherent reliability, but rather on some other legal justification; and (2) when the exception is founded on irrational assumptions regarding the inherent reliability of the circumstances under which such statements are made. An irrational assumption can arise when an exception was created long ago as a result of psychological assumptions that no longer are correct. If the reliability underlying an exception is fictional or irrational, then its classification as "firmly rooted" would be contrary to both due process and the reliability rationale that underlies the confrontation clause. Some of the exceptions listed in *Roberts*, 448 U.S. at 66 n.8, as well as all of the exceptions discussed in this section of the Article, fall into one or both of these two categories and do not merit classification as "firmly rooted."

ment must still be tested in every case in which the defendant challenges the statement's reliability.

The prosecution's use of hearsay may or may not violate a defendant's right to confront witnesses. In the absence of an opportunity to question the declarant, that determination depends on whether the hearsay was spoken in circumstances possessing adequate "indicia of reliability." Therefore, a different test is needed to determine when hearsay exceptions conform to the demands of confrontation. The most important feature of such a test would be its flexibility in allowing the prosecution use of reliable hearsay without impairing the constitutional rights of the accused.

VII. CONCLUSION

The United States Supreme Court has held that unconfronted hearsay must possess adequate "indicia of reliability" before it can be used against a criminal defendant. In dicta, the Court in *Roberts* concluded that sufficient "indicia of reliability" can be inferred if the hearsay statement falls within the definition of a firmly rooted exception.[189] However, the Court has not fully explained which exceptions are firmly rooted and why.

Based on the standards articulated by the Court, any determination on which exceptions qualify as firmly rooted must be based on the reliability that is likely for virtually any statement admissible within that particular exception. Combining the standards established in both *Dutton* [190] and *Roberts*,[191] the test should be formulated as follows: Exceptions to the hearsay rule should be classified as firmly rooted *only* if (1) the exception guarantees the accused a meaningful opportunity to question the declarant or (2) the circumstances prerequisite to admission under that exception realistically assure a substantial likelihood that virtually any statement offered under it is based on personal knowledge and is not the product of either faulty recollection, or intentional or unintentional misrepresentation. Exceptions founded on mistaken assumptions of trustworthiness or not based on inherent guarantees of trustworthiness should not be categorized as firmly rooted.

The division of exceptions into categories of firmly and nonfirmly rooted, is an unsatisfactory method of determining the constitutionality of admitting hearsay against criminal defendants. The likelihood of trustworthiness for each hearsay statement must be measured by reference to the four factors for testing reliability set forth in *Dutton*.[192] Measured against these factors, most exceptions that have been classified as "firmly rooted," including those listed by the Supreme Court, inspire little confidence that virtually any statement admissible under them will possess inherent indicia of reliability. Thus, the "firmly rooted" concept is neither workable nor useful and should be abandoned.

189. *Roberts*, 448 U.S. at 66.
190. *Dutton*, 400 U.S. at 88-89.
191. *Roberts*, 448 U.S. at 66.
192. *Dutton*, 400 U.S. at 88-89.

Flexibility is required to balance the need for face-to-face confrontation and the efficient administration of justice. The only workable method of reconciling exceptions to the hearsay rule with the reliability demands of the confrontation clause is the one *Roberts* suggested for hearsay not falling within firmly rooted exceptions: a case-by-case examination to determine whether the hearsay statement was made under circumstances of particularized guarantees of trustworthiness. The burden of establishing trustworthiness should rest on the prosecution as the proponent of the evidence.

However, if courts continue to apply the concept of firmly rooted exceptions, at a minimum the presumption in favor of the constitutionality of any statement falling within such an exception should not be conclusive. Rather, the presumption should be rebutted whenever the accused has been denied an opportunity to question the declarant *and* the out-of-court assertion was not made under circumstances of "particularized guarantees of trustworthiness." To hold otherwise would impose a rigidity that contravenes the constitutional protections afforded those who are criminally accused.