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Hearsay and the Confrontation Guaranty

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more significantly than is at first apparent. Further litigation may supply a rationale for prohibiting unions from using forced contributions for certain purposes. For example, a distinction could be based on the extent of the abridgement of the individual rights.[53] However, a basic rethinking of the judgment espoused in *Abood* (and attributed to *Hanson* and *Street*) would be a preferable resolution. Such a reexamination would require, of course, an articulation of state interests that might justify the first amendment impact of union shops.

Paul S. Hughes

HEARSAY AND THE CONFRONTATION GUARANTY

During defendant's trial for aggravated rape, hearsay evidence was admitted pertaining to a medical examination of the alleged victim by an assistant coroner who was not called as a witness.[1] The Louisiana Supreme Court reversed[2] and held that admission of a business record as an exception to the hearsay rule is contingent upon proof of the entrant's unavailability. The court noted that introduction of the evidence without such proof probably violates the state[3] and federal[4] constitutional guar-

Douglas, JJ., dissenting). *See also* Abood v. Detroit Bd. of Ed., 431 U.S. 209, 236; Note, 75 HARV. L. REV. 233 (1961).

53. *See* Buckley v. Valeo, 424 U.S. 1, 59 (1976). It is arguable that the impact on employees of the use of their compelled contributions for a particular purpose may not be substantial or significant enough to warrant judicial relief. This line of thought is conceptually different from an inquiry into whether there is *any* impact brought about by those uses.

1. The trial court admitted the evidence under LA. CODE CRIM. P. art. 105 which states: "A coroner's report and a proces verbal of an autopsy shall be competent evidence of death and the cause thereof, but not of any other fact."

2. The Louisiana Supreme Court found Code of Criminal Procedure article 105 inapplicable because the evidence was not used as evidence of death or the cause thereof, but of the presence of sperm in the alleged victim's vagina.

The state also argued that the coroner's report should be admissible under the exception for hospital records, LA. R.S. 13:3714 (Supp. 1966), but the supreme court found this statute inapplicable because there was no evidence introduced to prove the examination was conducted in a hospital.

3. LA. CONST. art. I, § 16 provides in part: "An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf." *See also* La. Const. art. I, § 9 (1921).

anties of the right to confrontation. *State v. Monroe*, 345 So. 2d 1185 (La. 1977).

The relationship between hearsay and the confrontation clause is unclear at present. Until recent years, the confrontation clause and hearsay exceptions existed in harmony. However, United States Supreme Court decisions in the past thirteen years regarding the scope of protection afforded criminal defendants by the confrontation guaranty have questioned the constitutionality of the traditionally recognized hearsay exceptions.[5]

The origin and early history of the two concepts seem to indicate that the confrontation clause was intended to be compatible with the hearsay exceptions.[6] The hearsay exclusionary rule and its exceptions developed in the common law. Initially common law juries made informal investigations among those individuals with knowledge of the incident in question in order to gather sufficient evidence for a decision. By the late fifteenth century, jurors were stripped of their investigative duties and the practice of confining jurors to the courtroom became the predominant method for conducting trials. With the jurors confined, the need to ensure the reliability of the evidence presented became evident. To guarantee a high degree of reliability, the common law gradually developed three prerequisites to the introduction of evidence: evidence had to be presented by a witness who was personally present at trial, under oath, and subject to cross-examination.[7] Hearsay[8] could not meet these conditions and consequently was not admissible as a general rule. Neverthe-

4. U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

5. Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965). *See generally* Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 50 GEO. WASH. L. REV. 76 (1971).

6. C. MCCORMICK, EVIDENCE § 252 at 606 (2d ed. 1972); *contra*, Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529, 532 (1974). Baker correctly states that research has uncovered little documentation on the purpose of the draftsmen of the confrontation clause, but he does not consider the circumstances existing at the time the provision was drafted in 1789. See text at notes 10-15, *infra*.

7. C. MCCORMICK, *supra* note 6, § 244-45.

8. Hearsay is difficult to define in a brief statement. Definitions include:

BLACK'S LAW DICTIONARY 852 (4th rev. ed. 1968); "HEARSAY. Evidence not proceeding from the personal knowledge of the witness, but from mere repetition of what he has heard others say."

C. MCCORMICK, *supra* note 6, § 246, at 584: "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an

less, numerous hearsay exceptions were recognized, and were justified by the hearsay's unusual reliability and the extreme necessity for certain types of hearsay.[9]

The early common law exceptions to the hearsay exclusionary rule were firmly established when the confrontation guaranty was included in the Bill of Rights.[10] Yet the confrontation clause is written as an absolute guaranty and, if interpreted literally, would exclude the use of all hearsay.[11] In 1895, in *Mattox v. United States*,[12] the Supreme Court declared that the clause's primary objective was to forbid the hated English practice of using depositions and *ex parte* affidavits in lieu of a personal examination of the witness.[13] The court then admitted evidence under the prior testimony exception to the hearsay rule despite confrontation objections by the accused.[14] The *Mattox* court's rejection of a literal interpretation of the confrontation clause, so as to admit hearsay evidence in the face of a confrontation argument, caused some scholars to conclude that confrontation does not impose restrictions upon the traditional hearsay exceptions.[15]

These conclusions seemed correct until 1970, when the Court in *Cal-*

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assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." (Footnote omitted).

FED. R. EVID. 801(c): "Hearsay is a statement, other than one made by a declarant while testifying, offered in evidence to prove the truth of the matter asserted."

For a more comprehensive definition see Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 768 (1961).

9. *See* C. MCCORMICK, *supra* note 6, § 245; Seidelson, *supra* note 5 at 89.

10. C. MCCORMICK, *supra* note 6, § 252; *see* Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 746 (1965) [hereinafter cited as *A New Approach to Hearsay*].

11. C. MCCORMICK, *supra* note 6, § 252, at 606; J. WEINSTEIN & M. BURGER, WEINSTEIN'S EVIDENCE ¶ 800[04] [hereinafter cited as WEINSTEIN]. The text of the confrontation clause is in note 4, *supra*.

12. 156 U.S. 237 (1895).

13. *Id.* at 242.

14. *Id.* at 244.

15. *See* C. MCCORMICK, *supra* note 6, § 252. Among the recent scholars who adhere to this view are Justice Harlan and Professor Wigmore. See notes 32-34, *infra*, and accompanying text.

When *Mattox* was first appealed to the Supreme Court, the Court stated, "Dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed, in favor of the defendant as well as against him." Mattox v. United States, 146 U.S. 140, 151 (1892). This statement also encouraged scholars to conclude hearsay and the confrontation clause were congruent concepts, but it must be noted that the last five words of this statement comprised a dictum, because the dying declaration in question was offered on behalf of the accused, not against him, and therefore no confrontation problem existed. *See* Seidelson, *supra* note 5, at 89.

ifornia v. Green[16] expressly rejected the notion that the confrontation clause excludes only evidence which would be excluded by the hearsay rule.[17] The clause, which had been rarely invoked in the past, became the court's principal vehicle for imposing constitutional restrictions upon the introduction of hearsay evidence.[18] Although the court has failed to define clearly the extent of these restrictions,[19] some general principle may be gleaned from the decisions. The confrontation guaranty is satisfied when the declarant is present at trial and subject to full cross-examination.[20] Actual unavailability of the declarant will also usually result in the admissibility of the hearsay if it qualifies under a traditional exception, despite the demands of the confrontation clause.[21] A question remains whether the Supreme Court will require a showing of unavailability to admit evidence under a hearsay exception for which unavailability is considered immaterial.[22]

Modern evidence codes[23] divide hearsay into two major categories. One consists of those exceptions under which evidence can be admitted only if the declarant is unavailable. In these exceptions, such as prior testimony and statements against interest, the declarant's testimony in court is believed to be more reliable than the recorded evidence.[24] However, if the declarant is truly unavailable, the evidence may be admitted

16. 399 U.S. 149 (1970).

17. *Id.* at 155: "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions."

Several important earlier decisions suggested the conclusion ultimately reached by the Court in *Green*. Perhaps the most important of these was *Pointer v. Texas*, 380 U.S. 400 (1965), in which the Court held the confrontation clause applicable to the states through the due process clause of the Fourteenth Amendment. For discussion of the impact of *Pointer* and other pre-*Green* cases, *see* Comment, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651 (1970); Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 U.C.L.A. L. REV. 366 (1966).

18. *See* cases cited in note 5, *supra.*

19. See text at notes 20-36, *infra. See* WEINSTEIN, *supra* note 11, ¶ 800[04].

20. Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970).

21. Justice Harlan made a persuasive analysis in *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring): "[T]he Confrontation Clause of the Sixth Amendment reaches no further than to require the prosecution to *produce* an *available* witness whose declaration it seeks to use in a criminal trial." *See generally* Barber v. Page, 390 U.S. 719 (1968); Mattox v. United States, 156 U.S. 237 (1895).

22. See text at notes 23-37, *infra*; WEINSTEIN, *supra* note 11, ¶ 800[04].

23. *See, e.g.*, FED. R. EVID. 803, 804 (1975); UNIFORM RULES OF EVIDENCE 803, 804 (1974).

24. FED. R. EVID. 804 (1975); UNIFORM RULE OF EVIDENCE 804 (1974). *See generally Hearsay Evidence and the Federal Rules: Article VIII*, 36 LA. L. REV. 159 (1975), in Sympo-

out of necessity.[25] The second category consists of those exceptions, such as present sense impressions, excited utterances, and business records, for which the presence of the declarant in court is considered to be immaterial. The declarant's testimony is not considered to be more reliable than the recorded evidence under these exceptions because the evidence is produced under conditions which guarantee a very high degree of reliability.[26]

In *Dutton v. Evans*,[27] the Supreme Court considered whether evidence was admissible under a Georgia statute which allowed co-conspirators to testify regarding statements made by fellow co-conspirators. The Court looked to three factors—the reliability of the evidence, the significance of the evidence in the case, and the conduct of the prosecutor—and held that the evidence was admissible without a showing of unavailability.[28] However, *Dutton* raised more questions than it answered. The Court did not indicate the relative weight to be given to each factor, nor did it indicate the standards for determining whether evidence is unreliable or insignificant, or whether a prosecutor has been guilty of misconduct.[29] In a subsequent case, *Mancusi v. Stubbs*,[30] the Court failed to clarify the significance of the three factors considered in *Dutton*.[31]

At present, the Supreme Court may be in the process of abandoning the confrontation clause as a means for imposing constitutional restrictions upon the use of hearsay. In a concurring opinion in *Dutton*,[32] Justice Harlan indicated that the confrontation clause may be too restrictive and imprecise for such a purpose. He suggested that the Court adopt Wigmore's idea that the law of evidence determines when a witness must be produced and that the confrontation clause prescribes the mode of

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sium, *The Federal Rules of Evidence*, 36 LA. L. REV. 59 (1975) [hereinafter cited as *Article VIII*].

25. FED. R. EVID. 804 (1975), Adv. Comm. Note.

26. *See* UNIFORM RULE OF EVIDENCE 803 (1974); FED. R. EVID. 803 (1975), Adv. Comm. Note. *See generally Article VIII, supra* note 24, at 159.

27. 400 U.S. 74 (1970).

28. *Id.* at 87-89. *See* WEINSTEIN, *supra* note 11, ¶ 800[04]; *The Supreme Court—1970 Term*, 85 HARV. L. REV. 3, 198 (1971).

29. The opinion in *Dutton*, written by Justice Stewart for a four-man plurality, has been criticized for its carelessness. *See* WEINSTEIN, *supra* note 11, ¶ 800[04]; *The Supreme Court—1970 Term*, 85 HARV. L. REV. 3, 198 (1971).

30. 408 U.S. 204 (1972).

31. *Id.* at 213. The Court seemed to consider the reliability factor as most significant, but did little toward clarifying factors considered in *Dutton*.

32. 400 U.S. at 93 (Harlan, J., concurring).

procedure to be followed.[33] He recommended using the more flexible concept of due process to impose constitutional restrictions.[34]In *Chambers v. Mississippi*,[35] Justice Powell spoke principally in terms of due process instead of confrontation,[36] giving some indication that the Supreme Court may be willing to follow Justice Harlan's suggestion in the future. However, the confrontation guaranty arose in an unusual context and along with another due process issue, creating doubt about whether Justice Powell spoke in terms of due process because of dissatisfaction with the confrontation clause.[37]For the present, it is unclear whether confrontation requries a showing of unavailability when such a showing is considered immaterial under the law of evidence.

The Louisiana Supreme Court has followed the United States Supreme Court's expansion of the confrontation clause, and has ex-

33. *Id.* at 94. Justice Harlan quoted the following statement from Wigmore: "The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed— i.e. a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially. 5 J. Wigmore, Evidence, § 1397, at 131 (3d ed. 1940)."

It should be noted that Harlan attacked Wigmore's view in his opinion in *Green*, stating that such a view "would have the practical consequence of rendering meaningless what was assuredly in some sense meant to be an enduring guarantee." 399 U.S. at 178. Some feel Harlan never satisfactorily explained his full circle swing to Wigmore in *Dutton*. *See* Baker, *supra* note 6, at 534.

34. 400 U.S. at 100. The view advocated by Harlan in *Dutton* is questioned by many. Baker, *supra* note 6, at 534; *A New Approach to Hearsay, supra* note 10, at 742; Comment, *Hearsay and Confrontation: Can the Criminal Defendant's Rights Be Preserved Under Bifurcated Standard?*, 32 WASH. & LEE L. REV. 243, 272 (1975). The principal argument against use of due process alone to impose constitutional restrictions upon the use of hearsay is that it places too much reliance upon each judge's subjective perception of the evidence.

35. 410 U.S. 284 (1973).

36. *Id.* at 295-303.

37. *Id.* Chambers claimed a denial of due process because of the combined effect of two factors. Chambers had called as a witness one McDonald, who had earlier confessed to the crime of which Chambers was accused. Chambers introduced into evidence McDonald's sworn out-of-court confession. On cross-examination by the state, McDonald stated that he had later repudiated his confession. Chambers was prevented from pursuing the matter further because the Mississippi court applied the voucher rule, a common law rule based on the premise that a party vouches for the credibility of his witness and therefore cannot later impeach his testimony. The Supreme Court held that Chambers was denied the right to confront and cross-examine *his own witness.*

Additionally, the Mississippi court ruled that other confessions made by McDonald to three witnesses were inadmissible under the hearsay exception for declarations against interest because the confessions were not against the pecuniary interests of the declarant. The Supreme Court indicated that the declarations were very reliable under the circumstances and should be admitted into evidence.

panded the confrontation guarantee of the state constitution accordingly.[38] As a result, the state and federal confrontation clauses have been construed interchangeably, despite the fact that the Louisiana Constitution of 1974 guarantees the criminal defendant a right to cross-examination in addition to confrontation,[39] making the state guaranty appear to be broader. The United States Supreme Court and the Louisiana Supreme Court have both recognized that confrontation necessarily includes the right to cross-examination.[40]

Originally, as the business records exception developed in the common law, proof of unavailability of the entrant was required. With the advent of the modern business era, this requirement became too restrictive. In modern businesses the difficulty and often impossibility of identifying and producing the persons who handled the various steps of transactions, coupled with the probability that such persons cannot recall the transactions, makes the requirement impractical. The courts were first to recognize this impracticality by allowing unavailability to be proven by a showing of mercantile inconvenience.[41] Recent statutes recognize that business records are reliable because of the circumstances under which they are recorded[42] and have made proof of unavailability immaterial. They require only that the method of record-keeping be explained by a custodian or other qualified witness.[43]

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38. *E.g.*, State v. Bell, 346 So. 2d 1090 (La. 1977); State v. Jones, 325 So. 2d 235 (La. 1976); State v. Sam, 283 So. 2d 81 (La. 1973); State v. Washington, 261 La. 808, 261 So. 2d 224 (1972). The decisions in *Sam* and *Washington* came before, and the decisions in *Bell* and *Jones* after, the enactment of the Louisiana Constitution of 1974. In all four cases the Louisiana Supreme Court relied totally upon federal cases decided under the sixth amendment and earlier Louisiana cases based upon federal cases, indicating that the guaranty of confrontation in the Louisiana Constitution is identical to its counterpart in the United States Constitution.

39. See note 3, *supra.*

40. In *Barber v. Page*, 390 U.S. 719, 725-26 (1968), the United States Supreme Court stated; "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness . . . ." This statement is quoted by the Louisiana Supreme Court in *State v. Sam*, 283 So. 2d 81, 84 (La. 1973).

41. *See* C. MCCORMICK, *supra* note 6, §§ 305-11; *see generally* Green, *The Model and Uniform Statutes Relating to Business Entries as Evidence*, 31 TUL. L. REV. 49, 55 (1962).

42. *See* FED. R. EVID. 803 (1975), Adv. Comm. Note.

43. FED. R. EVID. 803(6) (1975) and UNIFORM RULE OF EVIDENCE 803(6) (1974) both provide with regard to business records:

> 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

Before *State v. Monroe*, the Louisiana Supreme Court had not clearly indicated whether the common law or modern requirements regarding business records were applicable.[44] This was partially due to the fact that the exception has only recently come into general use in criminal cases in Louisiana. The Code of Criminal Procedure of 1928 did not specifically provide for a business records exception; article 434, which excludes all hearsay "except as otherwise provided in this Code,"[45] was thought to preclude use of the exception.[46] In 1973 the Supreme Court held in *State v. Smith*[47] that the 1928 Code of Criminal Procedure was adopted in the contemplation that traditional hearsay exceptions would remain in force.[48] However, in subsequent cases the court applied either the common law or modern requirements for admission of business records in a haphazard fashion.[49]

In the instant case, the court held that unavailability must be shown

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memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, [shall be admissible] 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.

44. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 671 (1976); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 547 (1975). The relevant cases are cited in note 49, *infra*.

45. LA. R.S. 15:434 (1950). When the present Code of Criminal Procedure was adopted in Louisiana in 1966, the evidentiary provisions of the 1928 Code were shifted to title 15 of the Revised Statutes.

46. See note 48, *infra*.

47. 285 So. 2d 240 (La. 1973).

48. "From the prior statutes, jurisprudence, and the structure of the 1928 Code itself, it is evident that the hearsay exclusionary rule was adopted with the contemplation that its traditional exceptions would reman [sic] in force." 285 So. 2d at 244. *See The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 543 (1975).

49. In *State v. Junegain*, 324 So. 2d 438 (La. 1975), the court applied the common law requirement of unavailability. The court noted that an investigative report was not admissible because the entrant of the record was not unavailable to testify. In *State v. Launey*, 335 So. 2d 435 (La. 1976), the court also applied the common law requirement but admitted evidence under the exception upon a showing of mercantile inconvenience. The court stated, "considering the distance and expense involved in requiring that person to appear at the trial, it can be considered that he was, for all practical purposes, unavailable."

In several other cases the court apparently adhered to the modern view. In *State v. Graves*, 259 La. 526, 250 So. 2d 727 (1971), *State v. Lewis*, 288 So. 2d 348 (La. 1974), *State v. Corey*, 339 So. 2d 804 (La. 1976), and *State v. Roche*, 341 So. 2d 348 (La. 1977), the court admitted a firearms record, an inventory sheet, phone slips, and gambling records of a casino respectively. In each instance the evidence was admitted without proof of unavailability. In *State v. Hodgeson*, 305 So. 2d 421 (La. 1975), the court expressly followed the

as a prerequisite to the introduction of business records,[50] stating that it had always intended to follow the common law requisite of proof of unavailability, but had mistakenly admitted business records in several cases without such proof.[51] However, at common law it was sufficient to show that the appearance of the entrant of the record would be an inconvenience.[52] The court rejected this aspect of the common law exception and stated that the right to confrontation in criminal cases is "paramount."[53]

Although the court did not expressly state that proof of unavailability will be required under all hearsay exceptions for which such proof has been thought immaterial, the holding in *Monroe* does raise the question whether in future cases the court will find the confrontation clause to be "paramount" in every hearsay category. It is not even clear whether *Monroe* will apply to all business records. The requirement that unavailability be shown was reasonable as applied to a coroner's report, but several factors militate against the imposition of this requirement upon a typical business record. Business records are reliable because they are recorded in the daily course of business by a trained entrant, checked by systematic balance-striking, and relied upon as the basis for future business activity.[54] This reliability, combined with the probability that the entrant, if he can be identified, will not recall the transaction among the hundred he has handled, makes the requirement of proof of unavailability impractical.[55] A coroner's report is not made subject to these conditions which insure reliability. A coroner must make subjective conclusions which only he can best explain. Additionally, the examining

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modern form of the exception, holding that proof of unavailability is unnecessary when computer print-out sheets are admitted as business records.

50. 345 So. 2d at 1190.

51. *Id.* at 1188. Regarding the cases in which a showing of unavailability was not required, the court overruled *Corey* and *Graves* insofar as they did not require a showing of unavailability. The remaining cases, *Launey, Junegain, Roche,* and *Hodgeson* were not overruled because in each case it was apparent from the facts that the entrant of the record *probably* could not have been identified and was thus unavailable.

52. *See id.* at 1189. See also text at note 41, *supra,* regarding mercantile inconvenience. The assistant coroner in the instant case did not appear at the trial because he had been called to deliver a baby.

53. 345 So. 2d at 1189.

54. C. MCCORMICK, *supra* note 6, § 306, at 720.

55. Note that the defendant is not left defenseless when proof of unavailability is not required. Several other factors must be considered by the court before the record may be admitted into evidence. If the judge does not believe that the source of the information or the circumstances of preparation indicate sufficient trustworthiness, he may deny use of the exception. The court in *Monroe* could have simply held the coroner's report to be untrustworthy because it did not carry the indicia of reliability of a normal business record.

coroner is identifiable and he is likely to remember the specific examination.

The underlying rationale of *Monroe* suggests that unavailability must be proven under other exceptions in which unavailability has been deemed to be immaterial. Proof of unavailability would then be a prerequisite to the introduction of excited utterances and present sense impressions.[56] Once again, the result of such an approach would be to impose needless impediments to the introduction of evidence by the state. In neither instance would the presence of the witness enhance the reliability of the evidence, because the circumstances under which the evidence is produced tend to ensure reliability.[57]

The underlying rationale of *Monroe* also suggests that the confrontation clause may be "paramount" despite the presence of Louisiana statutes which specifically authorize the introduction of certain types of hearsay without proof of unavailability. One such statute is Louisiana Code of Civil Procedure article 105, which allows a coroner's report or proces verbal of an autopsy to be introduced as evidence of death and the cause thereof.[58] A much broader example may arise in the future should the Louisiana legislature adopt a hearsay rule similar to that of the Federal Rules of Evidence. The Federal Rules do not require proof of unavailability when present sense impressions, excited utterances, then existing mental, emotional or physical conditions, or records of regularly conducted activity are produced as evidence.[59] In a decision under such statutes, the court could not turn to jurisprudential rules as it did in

56. These are two of the major exceptions in which proof of unavailability is considered to be immaterial. *See* FED. R. EVID. 803 (1975).

57. Underlying the present sense impression exception "is the assumption that statements of perception substantially contemporaneous with an event are highly trustworthy because: (1) the statement being simultaneous with the event, there is no memory problem; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who has equal opportunity to observe and check misstatements." WEINSTEIN, *supra* note 11, ¶ 803(1) [01]. Excited utterances are trustworthy for similar reasons. *See id.* ¶ 803(2) [01].

58. LA. CODE CRIM. P. art. 105 states: "A coroner's report and a proces verbal of an autopsy shall be competent evidence of death and the cause thereof but not of any other fact." In *State v. Holmes*, 258 La. 221, 224, 245 So. 2d 707, 710 (1971) the Louisiana Supreme Court held that the right of confrontation was not violated when a coroner's report made without a proces verbal was offered in evidence. The United States Supreme Court denied certiorari. 406 U.S. 909 (1972). The defendant was later released, however, in a habeas corpus proceeding. United States District Court, Western Division, Civil Action 72-178 (United States District Court, W.D. La.).

59. FED. R. EVID. 803 (1975).

Monroe, and would be forced to decide whether the confrontation clause imposes a constitutional bar to otherwise admissible evidence.

It is submitted that the Louisiana Supreme Court should not require proof of unavailability in situations in which the requirement will not augment the reliability of the evidence. Although the United States Supreme Court has left the area of unavailability in a state of confusion, the Court has not required that unavailability be shown in instances in which such a showing is considered immaterial. By adopting the confrontation clause as its tool for applying these restrictions, the Louisiana Supreme Court cannot hope to find the clause any less confining and unwieldy than the United States Supreme Court has found it.[60] Should the United States Supreme Court abandon use of the confrontation clause, the Louisiana Supreme Court will be deprived of an important source of guidance in an area already fraught with confusion. The Louisiana Supreme Court can avoid these undesirable results by limiting the application of *Monroe* to coroner's reports.

Gordon L. James

THE DEATH PENALTY FOR RAPE—CRUEL AND UNUSUAL PUNISHMENT?

Defendant raped a woman and stabbed her to death. Eight months later he kidnapped another woman, raped her twice, and abandoned her to die after severely beating her. While serving multiple life terms for these offenses he escaped and kidnapped, raped, and robbed a third woman at knifepoint. He was found guilty of rape and sentenced to death. The United States Supreme Court *held* that the death penalty is a grossly disproportionate and excessive punishment for the rape of an adult woman and therefore violates the eighth amendment's prohibition of cruel and unusual punishment. *Coker v. Georgia*, 97 S. Ct. 2861 (1977).

Throughout its history the Supreme Court has dealt with many cases involving the death penalty, but only quite recently has it directly addressed the constitutionality of the death penalty per se. In the nineteenth and most of the twentieth centuries, the Court's scrutiny was limited to determining whether execution methods were "torturous" or

60. See text at notes 22-37, *supra*.