

***Idaho v. Wright*: Is It a Step in the Wrong Direction in Determining the Reliability of Hearsay Statements for the Confrontation Clause?**

I. INTRODUCTION

In *Ohio v. Roberts*¹ the Supreme Court held that the admission of hearsay statements into evidence against a criminal defendant did not violate the Confrontation Clause² under two circumstances: when the statements were within “firmly rooted” hearsay exceptions, in which case the Court inferred their reliability “without more”, or when they otherwise indicated reliability through “particularized guarantees of trustworthiness.”³ The Court in *Roberts* focused on the trustworthiness of hearsay statements, stating that “augment[ing] accuracy”⁴ at trials was the underlying purpose of the Confrontation Clause.⁵ A decade later, in *Idaho v. Wright*,⁶ the Court continued to rely on the holding of the *Roberts* case⁷ in determining the admissibility of “firmly rooted” hearsay statements under the Confrontation Clause and continued the *Roberts*’ focus on the trustworthiness of hearsay statements.⁸ Unfortunately, the Court still has not defined which exceptions to the hearsay rule are “firmly rooted.”⁹ Further,

¹ *Ohio v. Roberts*, 448 U.S. 56 (1980).

² “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

³ *Roberts*, 448 U.S. at 66 (“[C]ertain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’” The Court mentioned dying declarations, “cross-examined prior-trial testimony” and business and public records as potential “firmly rooted” hearsay exceptions.).

⁴ *Id.* at 65.

⁵ *Id.* at 65-66 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 109 (1934), “Reflecting [the Confrontation Clause’s] underlying purpose to augment accuracy in the factfinding process . . . the Clause countenances only hearsay marked with such trustworthiness that ‘there is no material departure from the reason of the general rule.’”; also quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972), “The focus of the Court’s concern has been to insure that there ‘are indicia of reliability, . . .’ *Dutton v. Evans* [400 U.S. 74 (1970)] and to ‘afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.’ *California v. Green* [399 U.S. 149, 161 (1970)].”).

⁶ 110 S. Ct. 3139 (1990).

⁷ *Id.* at 3147.

⁸ *Id.* at 3150.

⁹ Stanley A. Goldman, *Not So “Firmly Rooted”: Exceptions to the Confrontation Clause*, 66 N.C.L. REV. 1, 3, 7, 12 (1987). In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Court gave the unsatisfactory definition that a “firmly rooted” hearsay exception was one that has “a long tradition of being outside the compass of the general hearsay

the trustworthiness of exceptions to the hearsay rule that may be called "firmly rooted" is open to question.¹⁰ In judging the reliability of statements not falling under "firmly rooted" hearsay exceptions, however, the *Wright* case made a significant change. The Court excluded the use of corroborating evidence in determining the reliability of hearsay offered as evidence.¹¹

This Comment questions the holding of the Court in the *Wright* case with respect to the use of corroborating evidence. The holding conflicts with the underlying purpose of the Confrontation Clause, augmenting accuracy, as defined by the Court in *Roberts*. Secondly, the undebated continuation in *Wright*, in dicta, of the automatic admission into evidence of "firmly rooted" hearsay exceptions also is challenged as this automatic admission conflicts with the Confrontation Clause purpose of augmenting the accuracy of trials. In combination, the *Wright* holding on the use of corroborating evidence and the continued automatic admission into evidence of "firmly rooted" hearsay exceptions raises a serious question as to whether the rules now governing the admission of hearsay statements into evidence satisfy the purpose and spirit of the Confrontation Clause. First, this Comment will examine the purpose of the Confrontation Clause. Next, this Comment will examine the use of corroboration in federal courts of appeals prior to *Wright*. Then, the *Wright* case and its holding on corroboration will be examined. The continuing presumption of reliability for "firmly rooted" hearsay exceptions will then be discussed. Finally, this Comment will support a return to the use of corroboration in judging the reliability of hearsay evidence.

II. THE PURPOSE OF THE CONFRONTATION CLAUSE

While the origins and full intent of the Confrontation Clause may not be clear,¹² the Court has suggested that the Confrontation Clause and the rules on the admission of hearsay evidence both were based in the reaction to hearsay abuses at the trial of Sir Walter Raleigh.¹³ The Court asserts that the Confrontation Clause now has an existence and purpose apart from that of the

exclusion." There are 37 hearsay exceptions listed in the Federal Rules of Evidence, but which the court will ultimately determine to have had a long enough tradition to be "firmly rooted" is unknown.

¹⁰ Goldman, *supra* note 9, at nn.60-100 and accompanying text; see *infra* notes 85-100 and accompanying text.

¹¹ *Wright*, 110 S. Ct. at 3150.

¹² Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 569 n.46 (1988); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 59 (1987); James W. Jennings, Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 746-49 (1965).

¹³ *Dutton v. Evans*, 400 U.S. 74, 86 n.16 (1970).

hearsay rules. The Court has stated that while the Confrontation Clause and the hearsay rules

are generally designed to protect similar values, it is a quite 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 as they existed historically at common law. . . . [W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.¹⁴

In a discourse on the Confrontation Clause in *California v. Green*,¹⁵ the Court noted "our own decisions seem to have recognized at an early date that it is the literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."¹⁶

In *Mattox v. United States*, the Supreme Court had discussed the benefits and intentions of the Confrontation Clause, holding the Clause's object

[is] to prevent depositions or ex parte affidavits . . . 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 or not he is worthy of belief.¹⁷

Similarly, more recently in *Delaware v. Van Arsdall*, the Court held that a defendant could state a violation of the Confrontation Clause by showing that he was "prohibited from engaging in otherwise appropriate cross-examination designed to show . . . bias on the part of the witness and thereby 'to expose to the jury the facts from which the jurors . . . could appropriately draw inferences relating to the reliability of the witnesses.'"¹⁸

The Court's emphasis on cross-examination, reading literal confrontation into the Confrontation Clause, has never prevented the Court from shifting its focus when the need arose. Nearly a century ago, faced with the need to use

¹⁴ *California v. Green*, 399 U.S. 149, 155-56 (1970). For a view that the Confrontation Clause has not been kept sufficiently separate from hearsay rules, see David E. Seidelson, *The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News*, 17 HOFSTRA L. REV. 51, 80 (1988) (suggesting that the hearsay rule and its legislative exceptions threaten to engulf the constitutional right to confrontation).

¹⁵ *Green*, 399 U.S. at 149.

¹⁶ *Id.* at 157 (citing *Mattox v. United States*, 156 U.S. 237 (1895)).

¹⁷ *Mattox*, 156 U.S. at 242-43.

¹⁸ *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (citing *Davis v. Alaska*, 415 U.S. 539 (1974)); see also *Coy v. Iowa*, 487 U.S. 1012 (1988).

the statement of a witness who had died prior to the defendant's retrial, the Court stated, "general rules of law of this kind [requiring confrontation], however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."¹⁹ The Court's focus would shift to identifying an underlying purpose for the Confrontation Clause away from the emphasis on literal confrontation as the manifestation of that purpose. In *Roberts*, the Supreme Court stated that "augment[ing] accuracy" was the underlying purpose of the Confrontation Clause.²⁰ The Court has rephrased this statement of the purpose of the Confrontation Clause in other cases, saying its purpose was to advance "the accuracy of the truth determining process in criminal trials."²¹ The Court in *Wright* continued this focus on the reliability and trustworthiness of evidence admitted as hearsay exceptions when addressing Confrontation Clause concerns.²²

III. A REVIEW OF CIRCUIT COURT OF APPEALS CASES USING CORROBORATION TO JUDGE THE RELIABILITY OF HEARSAY FOR ADMISSION UNDER THE CONFRONTATION CLAUSE

Prior to the Supreme Court's holding in *Wright*, federal circuit courts almost uniformly looked for corroboration when judging, for the Confrontation Clause, the reliability of hearsay statements admitted under "non-firmly rooted" exceptions. The First Circuit, in *United States v. Fields*,²³ a case involving statements against penal interest, did not decide whether corroborating evidence was always needed to show reliability under the Confrontation Clause, but in holding that the hearsay statement at issue was reliable, did so at least partly because of the availability of corroborating evidence.²⁴ The Second Circuit, in *United States v. Katsougrakis*,²⁵ held that a

¹⁹ *Mattox*, 156 U.S. at 243.

²⁰ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

²¹ *See, e.g., Lee v. Illinois*, 476 U.S. 530, 540 (1986) (As noted in *Jonakait*, *supra* note 12, at 576-77); *United States v. Inadi*, 475 U.S. 387, 396 (1986); *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 84 (1970)).

²² *Idaho v. Wright*, 110 S. Ct. 3139, 3150 (1990).

²³ *United States v. Fields*, 871 F.2d 188, 192 (1st Cir.), *cert. denied*, 493 U.S. 955 (1989). The cases involving statements against penal interest appearing in notes 20-55 generally did not consider these statements to be "firmly rooted" hearsay exceptions. The courts looked for corroboration of the statements in order to judge reliability for the Confrontation Clause.

²⁴ *See also United States v. Zannino*, 895 F.2d 1, 6-7 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990) (corroboration was cited as one indicium of reliability).

²⁵ *United States v. Katsougrakis*, 715 F.2d 769, 775-76 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (The court held that the declarant's nodding head indicated assertive

statement against penal interest was a "firmly rooted" hearsay exception, thus reliable without a further showing of trustworthiness. However, the court noted that corroborating circumstances confirmed their finding of trustworthiness for the statement against penal interest for purposes of the Confrontation Clause.

The Third Circuit, in *United States v. Boyce*,²⁶ required the reliability of hearsay statements to "be corroborated by the 'totality of circumstances' in the case", examining "both the context in which the declaration was made, as well as its content." The Third Circuit's decision to look beyond corroboration alone relied upon their earlier decision in *United States v. Bailey*,²⁷ in which the court stated that "the trustworthiness of a statement should be analyzed by evaluating not only the facts corroborating the veracity of a statement, but also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely." The *Boyce* court finally rejected the use of a statement against interest, largely due to the absence of reliability in the circumstances of the making of the statement.²⁸ The court noted the absence of information in the record on the declarant's arrest and interrogation—during which the statement was obtained—and the absence of anything in the record to indicate that the statement was made with some purpose other than to curry favor with authorities.²⁹ The court held, "[d]espite the fact that the content of [the declarant's] statement was corroborated by other evidence in the case, the context in which the statement was given indicates that it was unreliable."³⁰ The Third Circuit, though holding corroboration to be a necessary factor in finding statements to be reliable for the Confrontation Clause, also looked to additional factors to judge reliability.

The Fourth Circuit, in deciding *Gregory v. North Carolina*³¹ just months before *Idaho v. Wright*, explicitly required contemporaneous corroboration for the admission of a child's statement in a sexual abuse case. Finding no contemporaneous corroboration of a disputed out of court statement made for medical diagnosis, the court held the admission of the statement at the district

statements in response to questions. While the court held that a statement against penal interest was a "firmly rooted" hearsay exception, and therefore did not have to consider the reliability of the hearsay statements further, it stated that "corroborating circumstances confirm the trustworthiness of the statement." Among the corroborating evidence noted were economic troubles, expert testimony indicating an intentionally set fire, and payment for the setting of a fire. The corroboration noted was extrinsic to the making of the statement.).

²⁶ *United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988) (Boyce's counsel had objected at trial to the admission of a statement against interest made by a codefendant to police while the codefendant was in custody on, *inter alia*, Confrontation Clause grounds).

²⁷ *United States v. Bailey*, 581 F.2d 341, 349 (3d Cir. 1978).

²⁸ *Boyce*, 849 F.2d at 836.

²⁹ *Id.*

³⁰ *Id.* at 837.

³¹ 900 F.2d 705, 706-08, 710 (4th Cir.), *cert. denied*, 111 S. Ct. 211 (1990).

court violated the Confrontation Clause and ordered a new trial. The court held contemporaneous corroboration was "a requirement implicit in the Roberts insistence on 'particularized' guarantees of reliability."³² In requiring extrinsic corroboration, the court appeared to question whether statements made by young children about sexual abuse could ever be intrinsically reliable.³³ *United States v. Smith*, an earlier Fourth Circuit case, noted the role of corroboration in establishing the reliability of a codefendant's statement in an arson conspiracy case.³⁴

The Fifth Circuit, in the pre-*Ohio v. Roberts* case of *United States v. Ward*,³⁵ found that strong corroboration alone was sufficient to supply the "equivalent circumstantial guarantees of trustworthiness" needed for a residual hearsay exception. Later, the Fifth Circuit required corroboration to support the reliability of hearsay evidence for admission under the Confrontation Clause. In *United States v. Sarmiento-Perez*,³⁶ the Fifth Circuit declared that when a party makes an inculpatory statement against his or her penal interest the statement must be corroborated to meet the Confrontation Clause standard for reliability. In *United States v. Robinson*,³⁷ a Fifth Circuit case decided a year after *Sarmiento-Perez*, the court required a declarant's inculpatory non-custodial statement to be corroborated in order to be found trustworthy, though it apparently contained no attempt to shift blame and was made voluntarily. Thus, the court required corroboration even when a statement looked intrinsically trustworthy. In *United States v. Vernor*,³⁸ the court initially mentioned the circumstances in which a statement against interest was made as an indication of the statement's reliability, but went on to rely on corroboration as the primary circumstance indicating reliability for the Confrontation Clause.

The Sixth Circuit, in *United States v. Barlow*,³⁹ looked at corroborating evidence, among other factors, in judging the reliability of grand jury testimony challenged under the Confrontation Clause. The testimony in *Barlow*

³² *Id.* at 708.

³³ *Id.* at 709 (The court held the child involved here was less likely to make a reliable statement because she was bright, and so may have gotten information on which to base her statement alleging sexual abuse from an outside source such as television.).

³⁴ *United States v. Smith*, 792 F.2d 441, 443-44 (4th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987).

³⁵ 552 F.2d 1080, 1083 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977).

³⁶ 633 F.2d 1092, 1098-1101 (5th Cir. 1980) (The Confrontation Clause issue was not directly reached as the court held the evidence was too unreliable for admission even under evidentiary principals.).

³⁷ 635 F.2d 363, 364 (5th Cir. 1981).

³⁸ *United States v. Vernor*, 902 F.2d 1182, 1187-88 (5th Cir.), *cert. denied*, 111 S. Ct. 301 (1990) (The case involved the inculpatory statement of an accomplice which incriminated the defendant also. Due to the incriminating portions of the statement the court judged the reliability of the statement as "non-firmly rooted" evidence.).

³⁹ 693 F.2d 954, 965 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983).

was admitted as hearsay evidence due to the declarant's unavailability after an assertion of marital privilege. In *Nelson v. Farrey*,⁴⁰ *United States v. Snyder*,⁴¹ and *United States v. Guinan*,⁴² the Seventh Circuit considered corroboration, among many other factors, in assessing the reliability of hearsay statements for Confrontation Clause challenges. In 1990, the Seventh Circuit decided *United States v. Garcia*,⁴³ a case involving the admission of a codefendant's statement against interest. The court indicated that the corroboration of a statement may provide, on its own, a sufficient guarantee of the trustworthiness of the statement for Confrontation Clause purposes. The court, however, did not clearly indicate whether corroboration must be present in order for hearsay statements to be judged trustworthy, or whether other factors could also establish a statement's trustworthiness.

The Eighth Circuit, in *United States v. Riley*,⁴⁴ held that corroboration was needed for an inculpatory statement against interest in order for the statement to show the reliability required by the Confrontation Clause. In *United States v. Roberts*,⁴⁵ the Eighth Circuit admitted a statement partly in reliance on the degree of corroboration present, though the court looked at other factors supporting reliability. The court questioned whether corroboration standing alone would demonstrate the type of trustworthiness required by the Confrontation Clause.⁴⁶ *Berrisford v. Wood*⁴⁷ involved Confrontation Clause challenges to several hearsay exceptions: excited utterances, adoptive admissions, and statements against penal interest. The court held all the hearsay statements to be within "firmly rooted" exceptions (though it acknowledged that adoptive admissions were not even hearsay, per se) and hence presumptively reliable for Confrontation Clause purposes under the *Roberts* rule. However, the court also held that as the statements were supported by

⁴⁰ *Nelson v. Farrey*, 874 F.2d 1222, 1229 (7th Cir. 1989), *cert. denied*, 493 U.S. 1042 (1990) (statement made to a psychologist by the child-victim of a sexual assault).

⁴¹ 872 F.2d 1351, 1356 (7th Cir. 1989) (grand jury testimony admitted under a residual hearsay exception).

⁴² 836 F.2d 350, 358 (7th Cir.), *cert. denied*, 487 U.S. 1218 (1988) (relying on *United States v. Boulahanis*, 677 F.2d 586 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982) (grand jury testimony admitted under a residual hearsay exception)).

⁴³ 897 F.2d 1413, 1421 (7th Cir. 1990).

⁴⁴ 657 F.2d 1377, 1383 n.7 (8th Cir. 1981) (cases requiring corroboration of inculpatory hearsay statements, to provide the "indicia of reliability" required by the Confrontation Clause).

⁴⁵ 844 F.2d 537, 547 (8th Cir.), *cert. denied*, 488 U.S. 983 (1988) (evidence admitted under a residual hearsay exception).

⁴⁶ *Id.* at 546.

⁴⁷ 826 F.2d 747 (8th Cir. 1987), *cert. denied*, 484 U.S. 1016 (1988); *see also* *United States v. Dorian*, 803 F.2d 1439, 1445-47 (8th Cir. 1986) (*dicta*).

corroborating evidence, they were supported by adequate indicia of reliability even for "non-firmly rooted" hearsay exceptions under the *Roberts* rule.⁴⁸

The Ninth Circuit, in *Barker v. Morris*,⁴⁹ stated that "corroboration is a recognized indicium of reliability in Confrontation Clause analysis."⁵⁰ The *Barker* court, however, did not restrict the factors they could use in judging trustworthiness, holding, "[t]he test . . . is whether the factors surrounding the making of the out-of-court statement, taken as a whole, indicate trustworthiness, not whether some mechanical list of factors indicating reliability is met."⁵¹ In *United States v. Marchini*,⁵² the court referred to the Sixth Circuit's holding in *Barlow*,⁵³ and used corroboration to support the reliability of a hearsay statement. In *United States v. Candoli*,⁵⁴ which involved an inculpatory statement against penal interest, the court held the presence of corroborating evidence made the challenged statement reliable for the Confrontation Clause.⁵⁵ In *United States v. Holland*,⁵⁶ another case involving declarations against penal interest, the court held that circumstances must indicate the reliability of hearsay exceptions in order for the hearsay evidence to satisfy the Confrontation Clause. Among the circumstances the court looked at was the presence of corroboration. In judging the reliability of a statement the court used a balancing approach, looking at a variety of factors supporting the reliability of the statement (corroboration, voluntariness and spontaneity being some of the factors considered) and comparing these factors with factors that tended to show a lack of reliability in the statement (such as evidence of an attempt to curry favor or to shift blame and custodial detention when a statement was made).⁵⁷ The balancing approach used by the *Holland* court to judge the reliability of hearsay statements had been set forth earlier in the Ninth Circuit case of *United States v. Layton (Layton II)*.⁵⁸ The Eleventh Circuit, in

⁴⁸ *Wood*, 826 F.2d at 750-51.

⁴⁹ 761 F.2d 1396 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986) (citing *United States v. Garner*, 574 F.2d 1141, 1144 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978) (evidence admitted under a residual hearsay exception)).

⁵⁰ *Id.* at 1402.

⁵¹ *Id.* at 1403; *see also* *United States v. Fleishman*, 684 F.2d 1329, 1340 (9th Cir. 1982) (citing corroboration as a factor indicating reliability).

⁵² 797 F.2d 759, 764-65 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (grand jury testimony).

⁵³ *United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983).

⁵⁴ 870 F.2d 496, 509-10 (9th Cir. 1989).

⁵⁵ *Id.* at 510 (note that the court also refused to decide whether a statement against interest was a "firmly rooted" exception to the hearsay rule, and therefore within the reliability presumption of *Roberts*).

⁵⁶ 880 F.2d 1091 (9th Cir. 1989).

⁵⁷ *Id.* at 1094.

⁵⁸ 855 F.2d 1388, 1405-06 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989).

United States v. Chapman, looked primarily, though not exclusively, to the presence of corroborating evidence in judging the reliability of hearsay evidence under a Confrontation Clause challenge.⁵⁹ The *Chapman* court noted they had relied upon corroboration in an earlier case in judging a statement's reliability.⁶⁰

The cases discussed above show the circuit courts' considerable use of corroboration, prior to *Wright*, in judging reliability for the Confrontation Clause of hearsay evidence admitted under "non-firmly rooted" exceptions. The Fourth and Fifth Circuit Courts affirmatively required corroboration of hearsay statements to satisfy the reliability requirement of the Confrontation Clause. The other circuit courts discussed considered corroboration along with other factors in judging the reliability of hearsay evidence. The courts may have placed differing values upon corroboration's usefulness in judging reliability in relation to other factors indicating reliability, but it is noteworthy that all these courts did consider corroboration as a factor in assessing reliability.

IV. IDAHO V. WRIGHT

Idaho v. Wright involved a criminal charge of lewd conduct with a minor, brought against the child's parents.⁶¹ The trial court concluded that the two-and-a-half-year-old daughter involved was incapable of testifying at trial, and statements she had made to a pediatrician were admitted under Idaho's residual hearsay exception.⁶² The victim's father, Giles, challenged the admission of the doctor's testimony under Idaho's residual exception, but the Idaho Supreme Court upheld his conviction.⁶³ The victim's mother, Wright, challenged her conviction as a violation of the Confrontation Clause, and the Idaho Supreme Court reversed her conviction. The Supreme Court of Idaho held that a lack of procedural safeguards for the doctor's interview, particularly the lack of a tape recording of the interview which the defense could review, indicated a lack of the "particularized guarantees" of trustworthiness needed to satisfy the Confrontation Clause. The court stated that "[t]he circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview

⁵⁹ *United States v. Chapman*, 866 F.2d 1326, 1330-31 (11th Cir.), *cert. denied*, 493 U.S. 932 (1989) (The statement by the defendant's wife to police, which implicated the defendant in a bank robbery, was admitted under a residual exception.).

⁶⁰ *Williams v. Melton*, 733 F.2d 1492, 1496 (11th Cir. 1984) (The court examined the admission of a *res gestae* statement, in spite of *res gestae* being a "firmly rooted" hearsay exception.).

⁶¹ *Idaho v. Wright*, 110 S. Ct. 3139, 3143 (1990).

⁶² *Id.* at 3144.

⁶³ *State v. Giles*, 772 P.2d 191, 195 (Idaho 1989).

was not recorded, can never be fully assessed.”⁶⁴ The Supreme Court of Idaho also expressed concern with what they believed to be leading questions and with their perception that the interviewer had a preconceived idea of what the child would be disclosing.⁶⁵ The court looked for “particularized guarantees” of trustworthiness only in the actual making of the statement.⁶⁶

The United States Supreme Court, with Justice O’Connor writing for a five justice majority, upheld the lower court’s finding of a Confrontation Clause violation.⁶⁷ The Court started by restating its holding in *Ohio v. Roberts*⁶⁸ that the Confrontation Clause prevents statements from being admitted under exceptions to the hearsay rule unless the statements bear adequate indicia of reliability. The Court reasoned that the necessary indicia of reliability is met when the statement falls under a “firmly rooted” hearsay exception,⁶⁹ but said that statements outside of “firmly rooted” hearsay exceptions were “presumptively unreliable and inadmissible for Confrontation Clause purposes . . . and must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”⁷⁰ The Court held that a Confrontation Clause violation existed, not due to the lack of procedural safeguards that the Idaho Supreme Court noted, but rather due to a lack of intrinsic reliability in the making of the hearsay statement admitted into evidence.⁷¹

A. Wright’s Holding on Corroboration

The significance of the *Wright* case lies in the Court’s holding that evidence corroborating a hearsay statement could not be used to support the needed finding of trustworthiness for Confrontation Clause purposes. The Court said that it wanted to bar the “admission of a presumptively unreliable statement, by bootstrapping on the trustworthiness of other evidence at trial.”⁷² To avoid bootstrapping of evidence, the Court held: “Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is

⁶⁴ *State v. Wright*, 775 P.2d 1224, 1227 (Idaho 1989), *aff’d*, 110 S. Ct. 3139 (1990); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

⁶⁵ *Wright*, 110 S. Ct. at 3145.

⁶⁶ *Id.*

⁶⁷ *Id.* at 3153. Justice O’Connor was joined by Justices Brennan, Marshall, Stevens and Scalia. Joining Justice Kennedy in dissent were Chief Justice Rehnquist, Justices White and Blackmun.

⁶⁸ *Roberts*, 448 U.S. at 56.

⁶⁹ *Wright*, 110 S. Ct. at 3146.

⁷⁰ *Id.* at 3148 (quoting *Lee v. Illinois*, 476 U.S. 530, 543 (1986) and *Roberts*, 448 U.S. at 66).

⁷¹ *Id.* at 3148–49.

⁷² *Id.* at 3150.

not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement."⁷³

The Supreme Court limited the admission of hearsay to evidence possessing "indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."⁷⁴ The Court reasoned that corroboration might be limited in its scope but may be accepted by a jury as corroboration of the truth of the entire statement at issue.⁷⁵ The Court would limit the use of corroborating evidence to indicating whether the admission of a hearsay statement may have been harmless error.⁷⁶

Justice Kennedy, in dissent, challenged the Court's restrictions on the use of corroboration to support the trustworthiness of statements for the Confrontation Clause. He noted the daughter's statements were corroborated in at least four respects:

- (1) physical evidence that she was the victim of sexual abuse; (2) evidence that she had been in the custody of the suspect at the time the injuries occurred; (3) testimony of the older daughter that their father abused the younger daughter . . . and, (4) the testimony of the older daughter that she herself was abused by their father.⁷⁷

Justice Kennedy urged that corroboration be considered together with the circumstances surrounding the making of a statement when judging the reliability of admitted hearsay statements for the Confrontation Clause.

B. *Wright Does Not Increase the Reliability of Hearsay Statements Admitted Into Evidence*

The *Wright* case, in continuing the *Roberts* presumption of reliability for statements falling under a "firmly rooted" hearsay exception,⁷⁸ continues to admit statements that may not be trustworthy⁷⁹ only because they fall within the realm of a "firmly rooted" evidentiary exception for hearsay. *Wright*, by preventing the consideration of corroborating evidence, also has eliminated a useful tool for scrutinizing the truthfulness of evidence sought to be admitted under a "non-firmly rooted" hearsay exception. If increasing the trustworthiness of statements admitted into evidence is the purpose the Court

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 3151.

⁷⁶ *Id.* at 3150-51.

⁷⁷ *Id.* at 3156.

⁷⁸ *Id.* at 3147; *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

⁷⁹ See *infra* notes 88-105 and accompanying text.

intends to define for the Confrontation Clause,⁸⁰ it is questionable whether the Court's holdings have been helpful.

V. THE UNRELIABILITY OF FIRMLY ROOTED EXCEPTIONS

A. *The Presumption of Reliability for Firmly Rooted Hearsay Exceptions*

In *Ohio v. Roberts*,⁸¹ the Court ruled that the reliability of a hearsay statement could be inferred without further support if the evidence fell within a "firmly rooted" hearsay exception.⁸² The Court cited the "truism" that hearsay rules and the Confrontation Clause are generally designed to protect similar values, in supporting its uncritical admission into evidence of certain hearsay exceptions as "comport[ing] with the 'substance of the constitutional protection.'"⁸³

In *Wright*, the Court continued without debate this automatic acceptance of "firmly rooted" hearsay exceptions as reliable, reasoning that the preference was warranted by "the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."⁸⁴ The Court's generous deference to legislative enactment and court experience in admitting "firmly rooted" hearsay exceptions has resulted in a mechanical rule. If a statement is labeled "firmly rooted," it is presumed to be in conformity with the Confrontation Clause, and is generally admitted without further consideration of its reliability. When a statement is labeled as "non-firmly rooted," admission is conditioned on further indicia of reliability. Labeling takes the place of individual consideration of each statement's reliability. Mechanical application of any rule prevents the consideration of any special circumstances that may be present in the matter at hand. A mechanical rule has advantages in that it is easy to apply, predictable, and less susceptible to an abuse of discretion;⁸⁵ however, the application of a mechanical rule to a constitutional right may occasionally promote injustice.

It is surprising that a Court which has stated, "where constitutional [due process] rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice,"⁸⁶

⁸⁰ *Wright*, 110 S. Ct. at 3150.

⁸¹ 448 U.S. 56 (1980).

⁸² *Id.* at 66 (It is also worthwhile to note again that the Court gave examples of "firmly rooted" hearsay exceptions, then and since, but they have failed to define or delineate exactly which hearsay exceptions are "firmly rooted").

⁸³ *Id.* (citation omitted).

⁸⁴ *Wright*, 110 S. Ct. at 3147.

⁸⁵ See generally, George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747; Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

⁸⁶ *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

continues to allow a mechanical presumption of reliability for “firmly rooted” hearsay statements. This willingness of the *Wright* Court to continue a mechanical presumption of reliability for “firmly rooted” hearsay statements is also internally inconsistent with their unwillingness to form mechanical tests to determine the trustworthiness of “non-firmly rooted” hearsay exceptions.⁸⁷ Admission of “firmly rooted” hearsay exceptions only because of past practice, without giving real consideration to the reliability of the statements for the Confrontation Clause, is not only weak constitutional analysis and interpretation but in the case of some “firmly rooted” exceptions also difficult to defend on a logical basis. Statements made under “firmly rooted” hearsay exceptions can be as untrustworthy as any other hearsay statement.⁸⁸ Exceptions rooted in the past⁸⁹ can provide custom or practice to follow, but age alone does not assure reliability. The two examples of “firmly rooted” hearsay exceptions that follow serve to illustrate the potential unreliability resulting from a mechanical admission of “firmly rooted” hearsay exceptions.

1. *Dying Declarations*

Dying declarations are mentioned in *Roberts* as being a “firmly rooted” exception.⁹⁰ However, McCormick states, “[t]he doctrine relating to dying declarations is the most mystical in its theory and traditionally the most arbitrary in its limitations.”⁹¹ Common law presumed that “No person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips.”⁹² The common law exception for dying declarations rests on a number of untenable assumptions. The doctrine assumes that all persons believe in a Maker⁹³ and in punishment for “sin”; assumes the declarant is virtuous or sufficiently wary of punishment in an afterlife that he will abstain from harming his enemies one last time before dying; and assumes that persons speak coherently and rationally when facing death. The exception was adopted by the Federal Rules of Evidence even though the advisory committee note mentions that “the original religious justification for the exception may have lost its conviction . . . over the years.” The Advisory Committee noted that “it can scarcely be doubted that powerful psychological pressures are present.”⁹⁴

⁸⁷ *Wright*, 110 S. Ct. at 3148–50.

⁸⁸ Goldman, *supra* note 9, at 16–25 nn.60–100 and accompanying text.

⁸⁹ As an example, Goldman, *supra* note 9, notes that the exception for dying declarations “dates back as far as the first half of the 1700s.” *Id.* at 24.

⁹⁰ *Ohio v. Roberts*, 448 U.S. 56, 66 n.8 (1980).

⁹¹ 2 MCCORMICK ON EVIDENCE § 309 (John William Strong ed., 4th ed. 1992).

⁹² *Queen v. Osman*, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881), *quoted in Idaho v. Wright*, 110 S. Ct. 3139, 3149 (1990).

⁹³ 2 MCCORMICK, *supra* note 91, § 309; Goldman, *supra* note 9, at 1.

⁹⁴ FED. R. EVID. 804(b)(2) advisory committee’s note.

Realistically there is a "probability that the declarant will have been under great stress before, during and after the homicidal attack [or other cause of impending death]", but rather than advancing accuracy, "[s]tress . . . interferes with accurate perception and can lead to memory or narration problems."⁹⁵ The admission of dying declarations rests on an illogical and unsupportable proposition that the statements of persons facing death, those persons most likely to be in fear, anguish, and a state of confusion, are somehow likely to be more truthful and accurate than the statement of a person who speaks calmly or with time for reflection.⁹⁶

2. *Statements Against Interest*

An exception that has been considered firmly rooted by some lower courts⁹⁷ offers another example of the inherent untrustworthiness of some "firmly rooted" hearsay exceptions. The premise of allowing statements against interest is that "persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."⁹⁸ The Advisory Committee proposing Federal Rule of Evidence 804(b), to admit statements against interest, would have broadly defined statements that were against the interest of the declarant, expanding the scope of the definition to its "full logical limit."⁹⁹ The Advisory Committee would have included declarations

⁹⁵ RICHARD O. LEMPert & STEPHEN SALTZBURG, A MODERN APPROACH TO EVIDENCE 483 (2d ed. 1982).

⁹⁶ See generally, Goldman, *supra* note 9, at 24-26. Similarly, spontaneous statements and excited utterances may be admitted as forms of *res gestae* (in the Federal Rules of Evidence, an exception is provided to the hearsay rule in FED. R. EVID. 803(2)). The admission of these statements rests on the same general proposition that excitement will somehow bring about more reliable statements than those statements coming after calm reflection. See 2 MCCORMICK, *supra* note 91, § 268. The presumption of enhanced reliability may be similarly attacked, see, e.g., I. Daniel Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1.

⁹⁷ See, e.g., *United States v Katsougrakis*, 715 F.2d 769, 775-76 (2d Cir.) (statement against penal interest), *cert. denied*, 464 U.S. 1040 (1983); *United States v. Peacock*, 654 F.2d 339, 349 (5th Cir. 1981) (statement against penal interest); *United States v. West*, 574 F.2d 1131, 1138 (4th Cir. 1978); *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989) (statement against penal interest); see also *Lee v. Illinois*, 476 U.S. 530, 551-52 and n.4 (1980) (Blackmun, J., dissenting) ("The hearsay exception for declarations against interest is firmly established. . . . The old view that the interest must be proprietary or pecuniary, not penal, . . . has been fully discredited. . . . The rationale for allowing admission of declarations against interest applies no less forcefully when the declarant concedes criminal instead of civil liability.").

⁹⁸ FED. R. EVID. 804 (b)(3) advisory committee's note.

⁹⁹ *Id.*

that exposed the maker to tort liability, hatred, ridicule, or disgrace, among other declarations that have been retained in the rule of evidence.¹⁰⁰ Misgivings over statements against interest as a general hearsay exception arose in the Advisory Committee itself. The Committee had expressed concern about the possibility of statements being made to "curry favor" with authorities.¹⁰¹ This concern immediately brings into question the central premise of the exception, that persons will not make statements damaging to themselves unless they are true. The concern over statements made to "curry favor" acknowledges that persons may make untrue statements, even ones harmful to themselves, if they believe they may escape a greater harm or gain other benefits which they desire.

It may be very difficult to decide which statements were made predominantly to "curry favor" with authorities, as opposed to statements made without this desire for benefit. The House Judiciary Committee rejected the Advisory Committee's recommendation to accept statements exposing the maker to hatred, ridicule, or disgrace as being as reliable as those made against the maker's financial or penal interests, and eliminated these statements from the rule's coverage.¹⁰² The House Judiciary Committee's decision impliedly acknowledges that all statements against interest are not uniformly trustworthy: community scorn will not prevent lies, but prison or financial loss will. Mechanical compartmentalization of this nature is of limited usefulness in predicting the reliability of statements against interest as it does not address the values different persons put on different types of sanctions. In *Lee v. Illinois*,¹⁰³ the Supreme Court rejected the reliability of at least one type of statement against interest, confessions which implicate codefendants, calling them presumptively unreliable. In this case, the Court noted the possible motive of the declarant to spread the blame to mitigate the appearance of his own culpability or to overstate the codefendant's involvement in retaliation for the co-defendant having implicated the declarant in murder.¹⁰⁴ The Court noted the reality that "once partners in crime recognize that the 'jig is up,' they tend to . . . immediately become antagonists."¹⁰⁵

The Court's holding leaves in doubt what statements against interest, if any, are still firmly rooted, and which of such statements can be considered trustworthy. The two examples noted above of "firmly rooted" hearsay exceptions, both of which are mechanically admitted into evidence, serve to illustrate the unreliability inherent in allowing a rule to mechanically govern the admission of evidence. While many "firmly rooted" hearsay statements

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² FED. R. EVID. 804 (b)(3) House Judiciary Committee Report, no. 93-650.

¹⁰³ *Lee v. Illinois*, 476 U.S. 530, 541 (1986).

¹⁰⁴ *Id.* at 544.

¹⁰⁵ *Id.* at 544-45.

admitted into evidence may indeed be reliable, the mechanical approach to these exceptions established by the *Roberts* Court allows the admission of some hearsay statements which may be highly unreliable. Similarly, *Wright's* flat rejection of the use of corroborating evidence in judging the reliability of "non-firmly rooted" exceptions increases the risk of unreliable evidence being admitted into evidence and of reliable evidence being barred.

VI. THE USE OF CORROBORATING EVIDENCE TO SHOW THE RELIABILITY OF HEARSAY

It can be argued that all hearsay, whether arbitrarily classified as coming under a "firmly rooted" exception or not, should be equally suspected as being of questionable reliability.¹⁰⁶ The Supreme Court in the *Roberts* and *Wright* line of cases chooses to look more carefully at hearsay evidence sought to be admitted under a "non-firmly rooted" exception, requiring a showing of particularized guarantees of trustworthiness in the making of the statement for the Confrontation Clause.¹⁰⁷ It is illogical for the Court to continue to carve out a large group of statements for exemption from a determination of reliability—statements falling within a "firmly rooted" exception—if the Court believes looking at the circumstances of a statement's making generally is needed to judge the statement's reliability. Presuming the reliability of "firmly rooted" hearsay exceptions prevents the examination of this evidence on an individual basis. Hearsay falling under the label of "firmly rooted" is not a monolithic or static group; certainly not all "firmly rooted" hearsay admitted will be equally reliable and different courts may label different types of hearsay as "firmly rooted." "[N]ot all statements admissible under a particular hearsay exception . . . possess the same degree of trustworthiness and reliability."¹⁰⁸ Since a mechanical presumption prevents a court from using its discretion and from critically examining the evidence in each case, such a presumption should be disfavored for determining reliability for the Confrontation Clause.¹⁰⁹

It is likewise illogical for the Court to remove a potentially valuable tool for determining the reliability of "non-firmly rooted" hearsay. Were all statements to be subject to close scrutiny, in order to advance accuracy in the truth-determining process in trials, corroboration should surely be available for use in the process. Prior to *Wright*, the Supreme Court and the courts of appeals¹¹⁰ had accepted the value of corroboration in judging the reliability of

¹⁰⁶ See *supra* notes 88–105 and accompanying text.

¹⁰⁷ *Ohio v. Roberts*, 448 U.S. 56; 65–66 (1980) (if the hearsay does not fall within a "firmly rooted" exception, reliability must be supported by a showing of "particularized guarantees of trustworthiness"); *Idaho v. Wright*, 110 S. Ct. 3139, 3147–49 (1990).

¹⁰⁸ Goldman, *supra* note 9, at 44 n.184.

¹⁰⁹ *Roberts*, 448 U.S. at 65–66 (1980).

¹¹⁰ See *supra* notes 23–60 and accompanying text.

hearsay for the Confrontation Clause. The Supreme Court had said the use of corroboration was a "traditional means of assessing accuracy."¹¹¹ The Court has cited corroboration as an indicium of the reliability of hearsay evidence in *Chambers v. Mississippi*,¹¹² *Cruz v. New York*,¹¹³ and *Parker v. Randolph*.¹¹⁴ In *Parker v. Randolph*, the Court said, "Conceivably, corroborating . . . circumstances surrounding otherwise inadmissible hearsay may so enhance its reliability that its admission in evidence is justified in some situations."¹¹⁵ In *Bourjaily v. United States*, the Court commented that "a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence."¹¹⁶ In light of the wide recognition of the value of corroboration in the past, the Court's limited explanation for the removal of corroboration as a tool is disappointing. The Court, for example, noted that a statement which was supported by some corroborating evidence could still be a false statement, prompted by duress at the time of the making of the statement.¹¹⁷ The Court, however, failed to consider the inverse possibility, that a statement not supported by circumstances indicating reliability in the making of the statement could still be a true statement, revealed as such by an abundance of corroborating evidence available.

Further, the Court offered insufficient support for its holding barring the use of corroboration. In looking at "non-firmly rooted" hearsay exceptions, or any evidence, corroboration of the evidence intuitively would seem to be a valuable factor to consider in judging the reliability of the evidence. Justice Kennedy, writing in support of the use of corroboration in *Wright*, said that "[i]t is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence."¹¹⁸ "[U]nlike other indicators of

¹¹¹ *Rock v. Arkansas*, 483 U.S. 44, 61 (1987).

¹¹² 410 U.S. 284, 300 (1973).

¹¹³ 481 U.S. 186, 192-94 (1987) (The Court specifically stated corroboration was useful in judging the reliability of evidence, as opposed to limiting its use to judging the weight of the evidence stating: "[T]he 'interlocking' nature of the codefendant's confession pertains to . . . not its *harmfulness* but rather its *reliability*.").

¹¹⁴ 442 U.S. 62 (1979).

¹¹⁵ *Id.* at 87.

¹¹⁶ *Bourjaily v. United States*, 483 U.S. 171, 180 (1987); *see also Lee v. Illinois*, 476 U.S. 530, 554-57 (1986) (Blackmun, J., dissenting) (He noted corroboration, in this case physical evidence and a confession by the petitioner which mirrored the statement against penal interest at issue, as an indicator of reliability. Then-Justice Rehnquist joined in this dissent. Justices Blackmun and Rehnquist also dissented in *Wright*.); *Dutton v. Evans*, 400 U.S. 74, 88, 91 (1970) (plurality); *see generally*, Jay L. Hack, Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U. L. REV. 148, 176 (1975) (noting the value of corroboration as an indicator of reliability).

¹¹⁷ *Idaho v. Wright*, 110 S. Ct. 3139, 3150 (1990).

¹¹⁸ *Id.* at 3153 (Kennedy, J., dissenting).

trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way."¹¹⁹ In *Wright*, the Court holds that the truth of a statement is best judged from the circumstances in which it was made.¹²⁰ Even assuming that this is true, the Court did not need to go beyond this to bar altogether the use of corroborating evidence in the determination. If the majority in *Wright* saw a need for increased reliance on some tools for determining reliability, this should not have required the exclusion of other valid tools. Emphasis on the circumstances of the making of a statement should not prevent consideration of corroborating evidence.

Justice Kennedy, dissenting in *Wright*, commented that the Court's apparent misgivings about the weight to be given to corroborating evidence did not "justify the wholesale elimination of this evidence from consideration, in derogation of an overwhelming judicial and legislative consensus to the contrary."¹²¹ For example, after *Wright*, in cases in which the motives of a declarant in making a statement are suspect, limiting consideration to the circumstances of the making of the statement may bar the admission of a statement even though corroborating evidence shows the statement to have been unquestioningly reliable. If augmenting accuracy is the underlying purpose of the Confrontation Clause, factors surrounding the making of a statement should not even be of concern to a court once the objective truth is arrived at by any means. In some cases, corroboration may provide the best means for arriving at the truth. As Justice Kennedy says in his dissent in *Wright*:

If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And if this were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence . . . unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way.¹²²

VII. CONCLUSION

Hard questions on the desirability of admitting certain hearsay statements into evidence, under federal rules and the Confrontation Clause, pose a major challenge to courts who must create rules that will advance the cause of justice in trials. The volumes of writing on the topic of hearsay convinces a reader that "no rule will perfectly resolve all possible problems."¹²³ As any new rule is

¹¹⁹ *Id.* at 3156.

¹²⁰ *Id.* at 3150.

¹²¹ *Id.* at 3154 (Kennedy, J., dissenting).

¹²² *Id.* at 3156 (Kennedy, J., dissenting).

¹²³ *Ohio v. Roberts*, 448 U.S. 56, 66 (1988).

likely to present new problems, the Court is understandably reluctant to make any major revision. Regarding the Confrontation Clause, the Court previously has said that it “reject[s] the invitation to overrule a near-century of jurisprudence. [The Court’s] reluctance to begin anew is heightened by . . . the Court’s demonstrated success in steering a middle course among proposed alternatives.”¹²⁴ The holding in *Wright*, by eliminating the use of corroborating evidence that had been accepted by most courts, made a major revision in the way that the reliability of evidence is judged for the Confrontation Clause. In *Wright*, the Court did not steer the middle course. The Court could have expressed a preference for the consideration of factors related to the making of hearsay statements over corroboration in judging the trustworthiness of statements for the Confrontation Clause, without eliminating the use of corroboration entirely. As corroboration is potentially a valuable aid in determining reliability in some situations, and one which many courts had used and trusted prior to *Wright*,¹²⁵ the Court should consider limiting the holding of *Wright* or reversing it.

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¹²⁴ *Id.*

¹²⁵ See *supra* notes 23–60 and accompanying text.

