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## RESURRECTING THE CONFRONTATION CLAUSE IN VIRGINIA

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ing the importance of channeling the sentencer's discretion so as to minimize the "risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake.'"<sup>59</sup> Based upon such principles, defense counsel in Virginia should argue that a defendant has an Eighth Amendment right to introduce evidence of his or her parole ineligibility—regardless of whether the Commonwealth argues future dangerousness—in order to minimize the risk that the death penalty is imposed on the basis of juror misconceptions about parole law.

In concurring with the plurality's decision in *Simmons* that the defendant was entitled to present evidence of his or her parole ineligibility, Justice Souter wrote separately to emphasize his belief that such an outcome was also mandated by the Eighth Amendment because it requires a heightened standard of reliability in capital cases. As part of this heightened standard, jurors must fully comprehend their sentencing options. However, as recognized by the plurality in *Simmons*, most juries lack accurate information about the precise meaning of a sentence of life imprisonment, and many surveys support the notion that there is a reasonable likelihood of juror confusion about the meaning of a "life" sentence.<sup>60</sup> Most importantly, the studies demonstrate that potential jurors often believe that a defendant sentenced to life imprisonment will be in prison for a much shorter period of time than is actually the case.<sup>61</sup> Furthermore, the studies reveal that parole eligibility and the likely period of incarceration are key factors for jurors in determining a sentence.<sup>62</sup>

The Supreme Court has emphasized that reliability is a requirement which compels the court to err on the side of giving the jury more information rather than less.<sup>63</sup> Furthermore, the requirement of reliabil-

ity in sentencing has provided the foundation upon which the Court has structured the right to introduce all relevant evidence in mitigation.<sup>64</sup> In order to satisfy the constitutional mandate of reliability in the capital sentencing decision, defense counsel should therefore argue that the defendant has an Eighth Amendment right to introduce evidence of his or her parole ineligibility to the jury—regardless of whether the Commonwealth argues future dangerousness as a predicate to the death sentence. Allowing jurors to operate under their misconceptions and misinformation on parole in assessing the appropriate punishment of life or death offers no reliability in sentencing and as such is in violation of the Eighth Amendment.

## VI. Conclusion

The Virginia legislature abolished parole for those convicted of capital murder two years ago. However, when defense counsel does not seek the introduction of parole ineligibility evidence or an instruction regarding parole ineligibility, and when the Commonwealth does not argue future dangerousness, Virginia judges continue to instruct sentencing juries that their choice is between "life" and "death," not between "life without the possibility of parole" and "death." Given the probability that most potential Virginia jurors continue to labor under the misconception that a life sentence does not mean "life" imprisonment, it is imperative that defense counsel insist upon the introduction of parole ineligibility evidence in the sentencing phase of any capital trial, regardless of which aggravating factor(s) are argued by the Commonwealth. Given the common sense emphasis that jurors place upon the length of the defendant's probable incarceration, any evidence that the defendant will never be released from prison could, quite literally, mean the difference between a life sentence and a death sentence for the defendant.

<sup>64</sup> See, e.g., *Lockett*, 438 U.S. at 604-05. In holding that the Eighth and Fourteenth Amendments require that the sentencer be allowed to consider all relevant mitigating evidence, the Court reviewed the holdings in *Furman* and *Woodson*, stating "[w]e are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Id.* at 604.

be vacated if the jurors erroneously believed that, in order to give a mitigating factor any weight, they had to agree unanimously on the existence of the factor); *Beck v. Alabama*, 447 U.S. 625 (1980) (holding that a death sentence cannot stand if the jury was misled to believe that it had no alternative but to convict the defendant of capital murder although the evidence might have supported a conviction for the lesser included offense of felony-murder).

<sup>59</sup> *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring) (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)).

<sup>60</sup> *Simmons*, 512 U.S. at 169, 170. See *supra* notes 5-7 and accompanying text.

<sup>61</sup> See *supra* notes 5-6 and accompanying text.

<sup>62</sup> *Id.*

<sup>63</sup> *California v. Ramos*, 463 U.S. 992, 1001 (1983).

## RESURRECTING THE CONFRONTATION CLAUSE IN VIRGINIA

BY: JOSEPH D. PLATANIA

### I. Introduction

Frequently, in capital murder trials, the Commonwealth attempts to introduce codefendant's statements that inculpate the defendant as the triggerman. Virginia trial courts sometimes find this evidence admissible under the against interest exception to the hearsay rule, arguably violating the defendant's Sixth Amendment rights of confrontation and cross-examination. This article examines what the Confrontation Clause of the Sixth Amendment provides, how it is affected by hearsay excep-

tions, and where its future lies as a constitutional doctrine. Although courts do not necessarily apply the language of the Confrontation Clause literally, it still affords significant protections to defendants who know how to utilize it properly.

### II. The Confrontation Clause: What It Is

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall . . . be confronted

with the witnesses against him."<sup>1</sup> The Confrontation Clause is such an important fundamental right that the United States Supreme Court has recognized its applicability to the States through the Fourteenth Amendment.<sup>2</sup> In addition, the Court has generally construed the Confrontation Clause to include the right to cross-examine witnesses in the presence of the fact finder.<sup>3</sup> In order to provide a criminal defendant with a fair trial, it is vital that counsel be afforded the opportunity to cross-examine adverse witnesses so that the veracity of their statements may be tested.<sup>4</sup> "The word 'confront,' after all, . . . means a clashing of forces or ideas, thus carrying with it the notion of adversariness."<sup>5</sup> The United States Supreme Court has described cross-examination as "the 'greatest legal engine ever invented for the discovery of truth.'"<sup>6</sup>

Confrontation promotes reliability and trustworthiness at trials in several different ways. Witnesses must be physically present and give their statements under oath during the course of a formal judicial proceeding. This formality, along with the possibility of a perjury prosecution, impresses upon testifying individuals the importance and seriousness of the matter. In addition, witness confrontation allows the jury to better assess credibility by observing the testifying witness' demeanor as he or she makes the statement.<sup>7</sup> It is much more difficult to tell an untruth about a person in their presence.<sup>8</sup> The importance of confrontation and the policies it furthers are not just reflected in federal authority, however. The Virginia Constitution guarantees "[t]hat in criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses."<sup>9</sup>

Oftentimes the Confrontation Clause is implicated by the introduction of codefendant statements. The United States Supreme Court has found the Confrontation Clause violated when a codefendant's confession implicated the accused and was introduced at trial. In *Douglas v. Alabama*,<sup>10</sup> the defendant, Douglas, and an alleged accomplice were charged with and tried separately for assault with intent to murder. The alleged accomplice, Loyd, had confessed and named Douglas as the individual who had fired the gun and injured the victim. At Loyd's trial, which occurred first, he was found guilty. At Douglas' trial, the State called Loyd as a witness. Loyd was appealing his conviction and, therefore, when questioned, invoked his Fifth Amendment privilege against self-incrimination. The trial judge allowed the prosecutor to treat Loyd as hostile and, "[u]nder the guise of"<sup>11</sup> refreshing Loyd's recollection, in front of the jury, read from his confession which directly implicated Douglas. The statement was marked as an exhibit but never offered into evidence. The jury found Douglas guilty.<sup>12</sup>

The United States Supreme Court held that Douglas' Sixth Amendment right of confrontation was denied because he was unable to cross-examine Loyd regarding the alleged confession. The Court further held that Douglas' opportunity to cross-examine the law enforcement officers

that witnessed the confession was insufficient to remedy the constitutional violation.<sup>13</sup>

Similarly, the Court found a violation of the Confrontation Clause in *Bruton v. United States*.<sup>14</sup> *Bruton* involved a joint trial of codefendants Bruton and Evans for armed postal robbery. During its case-in-chief, the State called a postal inspector who testified that Evans had orally admitted that he and Bruton had committed the armed robbery. Evans never took the stand, invoking his Fifth Amendment right against self incrimination. The jury was instructed by the trial judge that although Evans' confession was admissible against Evans, it was inadmissible hearsay against Bruton and was to be disregarded in determining his guilt or innocence. Both were convicted and appealed to the United States Court of Appeals, Eighth Circuit. That court ruled that Evans' confession was not admissible evidence against him and set aside his conviction. The court then affirmed Bruton's conviction because it found that the jury had been properly instructed to disregard the confession when it determined his guilt or innocence.<sup>15</sup>

The United States Supreme Court held that the admission, at a joint trial, of an unavailable codefendant's confession implicating the other codefendant, violates the right of confrontation that is secured by the Confrontation Clause of the Sixth Amendment to the United States Constitution.<sup>16</sup> Especially troublesome to the Court was the risk of prejudice to Bruton. By introducing Evans' confession that inculpated Bruton, the State's case was given "substantial, perhaps even critical, weight . . . in a form not subject to cross-examination."<sup>17</sup> The Court found this to be constitutionally impermissible. Besides finding an uncrossable confession of a non-testifying codefendant prejudicial, the Court implicitly held that such evidence may be presumptively unreliable and incredible. Testifying accomplices generally have a motive to shift the blame from themselves.<sup>18</sup> The danger is magnified when an accomplice does not take the stand and his or her statements are not subjected to cross-examination.<sup>19</sup> "It was against such threats to a fair trial that the Confrontation Clause was directed."<sup>20</sup>

The United States Supreme Court slightly modified the application of *Bruton* in *Richardson v. Marsh*.<sup>21</sup> In *Richardson*, the Court held that the constitutional rule set forth in *Bruton* is satisfied if, along with a proper limiting instruction,<sup>22</sup> the nontestifying codefendant's confession is redacted to eliminate any reference to the defendant's existence.<sup>23</sup> In a more recent decision, *Williamson v. United States*,<sup>24</sup> the Court interpreted Federal Rule of Evidence 804 (b)(3), the statement against interest hearsay exception, to not allow the "admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."<sup>25</sup> Unfortunately for Virginia defense counsel, the Court grounded their ruling on the Federal Rules of Evi-

<sup>1</sup> U.S. Const. amend. VI.

<sup>2</sup> *Douglas v. Alabama*, 380 U.S. 415, 418 (1965), citing *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

<sup>3</sup> *Pointer*, 380 U.S. at 404. But see *New Mexico v. Earnest* 477 U.S. 648, 649-50 (1986) (Rehnquist, J., concurring) (the Confrontation Clause no longer requires an opportunity for cross-examination prior to the admission of a codefendant's out-of-court statement).

<sup>4</sup> *Id.*

<sup>5</sup> *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

<sup>6</sup> *California v. Green*, 399 U.S. 149, 158 (1970), quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940).

<sup>7</sup> *Id.* at 158.

<sup>8</sup> *Maryland v. Craig*, 497 U.S. at 846.

<sup>9</sup> Va. Const. art. I § 8 (1971).

<sup>10</sup> 380 U.S. 415 (1965).

<sup>11</sup> *Id.* at 416.

<sup>12</sup> *Id.* at 416-17.

<sup>13</sup> *Id.* at 419-420.

<sup>14</sup> 391 U.S. 123 (1968).

<sup>15</sup> *Id.* at 123-125.

<sup>16</sup> *Id.* at 137.

<sup>17</sup> *Id.* at 128.

<sup>18</sup> In *Lee v. Illinois*, 476 U.S. 530, 541 (1986), the Court stated that "[o]ver the years since *Douglas*, the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."

<sup>19</sup> 391 U.S. at 136.

<sup>20</sup> *Id.*, citing *Pointer v. Texas*, 380 U.S. 400 (1965).

<sup>21</sup> 481 U.S. 200 (1987).

<sup>22</sup> The Court found an instruction admonishing the jury not to use the confession in any way against the defendant as properly limiting. *Richardson*, 481 U.S. at 211.

<sup>23</sup> *Id.*

<sup>24</sup> 512 U.S. 594 (1994).

<sup>25</sup> *Id.* at 600-01.

dence rather than the United States Constitution. States are not obligated to follow the Court's interpretation of the Federal Rules of Evidence.

Notwithstanding these variations, *Bruton's* basic holding was recently reaffirmed. In *Cruz v. New York*,<sup>26</sup> the United States Supreme Court considered whether *Bruton* applied to a case in which a nontestifying codefendant's confession that inculpated the defendant, but was not directly admissible against the defendant, was introduced. In *Cruz*, defendant and codefendant were tried jointly for the felony murder of a gas station attendant. The codefendant had confessed on videotape to shooting the attendant but did not testify at trial. The trial court allowed the State to introduce the confession against the codefendant only. Although both defendants had the same jury, the jury was instructed that the confession was to be used against the codefendant, but not the defendant. The State also called a witness who testified that the defendant had admitted to attempting to rob the gas station and to being present when the codefendant shot and killed the attendant.<sup>27</sup>

The United States Supreme Court upheld the basic command of *Bruton* and found that at a joint trial, the Confrontation Clause bars admission of a nontestifying codefendant's confession that incriminates the defendant and is not directly admissible against the defendant, even if the defendant's own confession is admitted against him.<sup>28</sup> In a joint trial of two or more defendants, "the pretrial confession of one of them that implicates the others is not admissible against the others unless the confessing defendant waives his Fifth Amendment rights so as to permit cross-examination."<sup>29</sup>

In sum, *Douglas* and *Bruton* are still good law. *Douglas* stands for the proposition that if a defendant is unable to confront and cross-examine a declarant regarding the declarant's alleged confession that incriminates defendant, the confession violates the Sixth Amendment's Confrontation Clause and is inadmissible.<sup>30</sup> If the defendant is being tried at a joint trial, *Bruton* instructs the trial judge to exclude an unavailable codefendant's confession that implicates the defendant. If the trial is nonjoint, but the confession implicates the defendant and the declarant is unavailable, counsel should argue that *Bruton's* policy objectives and concerns still apply with full and equal force. *Richardson* modified *Bruton* and deemed admissible a confession of a nontestifying codefendant, but only with redaction and a proper limiting instruction. *Williamson* augmented *Bruton* on Federal Rules' grounds by finding non-self-inculpatory portions of a confession inadmissible.

On motions and on appellate review of cases involving confrontation issues, defense counsel should cite all of these cases and their holdings. Counsel should assert the Sixth Amendment's guarantee to criminal defendants of the right to confront and cross-examine the witnesses, and should argue that the admission into evidence of any confession by an unavailable codefendant violates the Confrontation Clause.

### III. The Confrontation Clause: What It Isn't

What happens when the Commonwealth wants to introduce the confession of a nontestifying codefendant at trial under a state exception to the hearsay rule over a defense objection on Confrontation Clause

<sup>26</sup> 481 U.S. 186 (1987).

<sup>27</sup> *Id.* at 188-189.

<sup>28</sup> *Id.* at 193.

<sup>29</sup> *Id.* at 190.

<sup>30</sup> Notably, in *Douglas*, the written confession was not admitted into evidence under an exception to the hearsay rule. Rather, it was admitted under the guise of refreshing recollection when the declarant invoked his Fifth Amendment rights. Although not technically testimony, the Court treated the Solicitor's reading of the confession as the equivalent in the jury's mind of testimony. *Douglas v. Alabama*, 380 U.S. 415, 416-417, 419 (1965).

grounds? The United States Supreme Court has attempted to answer this question through a series of five cases, but portions of their decisions are vague and unclear. The Court seems to make broad constitutional pronouncements without considering the effects on the application of the Confrontation Clause. As a result, much room for argument and analysis remains. What follows is a brief summary of the cases and how Virginia defense attorneys can most effectively interpret them.

The summary begins with *Ohio v. Roberts*.<sup>31</sup> In that case the Court noted that the Confrontation Clause was clearly meant to exclude at least some hearsay evidence.<sup>32</sup> The Court stated that the Clause "reflects a preference for face-to-face confrontation at trial,"<sup>33</sup> and that "[a] primary interest secured by [the provision] is the right of cross-examination."<sup>34</sup> In *Roberts*, the Court found that the Confrontation Clause limited admissible hearsay in two different ways. The first limiting principle is unavailability of the declarant. The State has the burden of either producing the declarant whose statement it wishes to use or demonstrating the declarant's unavailability.<sup>35</sup> A court cannot find a witness unavailable for purposes of the Sixth Amendment unless the State has made a good faith effort to locate the individual prior to trial.<sup>36</sup> What constitutes a good faith effort must be determined on a case by case basis as there is no bright line test. Defense counsel should be aware that the prosecution bears the burden of establishing good faith.<sup>37</sup> If the State cannot meet its burden, *Roberts* held that the constitutional command of the Sixth Amendment has been violated and the evidence must be excluded.

Once the first hurdle has been surmounted, the State must then satisfy the court that the hearsay statement is trustworthy and bears adequate indicia of reliability.<sup>38</sup> The Court broadened the test in favor of the prosecution by adding that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."<sup>39</sup> The reliability requirement can also be met by showing "particularized guarantees of trustworthiness."<sup>40</sup> To satisfy this requirement, the court must find that the evidence is "so trustworthy that adversarial testing would add little to its reliability."<sup>41</sup> Virginia defense counsel should be aware that the *Roberts* Court found that the mere opportunity to cross-examine the declarant at the preliminary hearing, even when no actual cross took place, satisfied the Confrontation Clause.<sup>42</sup> Thus, counsel should beware of a codefendant who testifies at a preliminary hearing, but who later may decide to invoke Fifth Amendment rights.

The two step analysis of unavailability and reliability set forth in *Roberts* was altered by three subsequent United States Supreme Court cases. In *United States v. Inadi*,<sup>43</sup> the Court held that *Roberts* was a very narrow decision. While the unavailability rule applied in *Roberts*, which dealt with former testimony, it did not necessarily apply to every other hearsay exception. *Inadi* dealt with coconspirator statements which,

<sup>31</sup> 448 U.S. 56 (1980).

<sup>32</sup> *Id.* at 63.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (alteration in original).

<sup>35</sup> *Roberts*, 448 U.S. at 65.

<sup>36</sup> *Id.* at 74.

<sup>37</sup> *Id.* at 75.

<sup>38</sup> *Id.* at 65-66.

<sup>39</sup> *Roberts*, 448 U.S. at 66, quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972).

<sup>40</sup> *Id.*

<sup>41</sup> *Idaho v. Wright*, 497 U.S. 805, 821 (1990).

<sup>42</sup> *Ohio v. Roberts*, 448 U.S. 56, 70 (1980).

<sup>43</sup> 475 U.S. 387 (1986).

under the Federal Rules, are not hearsay.<sup>44</sup> The Court held that the Confrontation Clause did not require the State to prove declarant's unavailability as a condition of admissibility when the out of court statement was made by a nontestifying coconspirator.<sup>45</sup> It is important to note the narrow scope of the Court's actual holding though. *Inadi* only abolished the unavailability analysis for Federal Rule of Evidence 801(d)(2)(E) cases involving nonhearsay statements by coconspirators. Unavailability was NOT explicitly removed as a condition for admissibility in other instances.

In *Bourjaily v. United States*,<sup>46</sup> the Court held that an inquiry into reliability is not constitutionally mandated where the evidence falls within a firmly rooted hearsay exception.<sup>47</sup> The Court went on to hold that Federal Rule of Evidence 801 (d)(2)(E) was a firmly rooted rule<sup>48</sup> and courts need not inquire into the reliability of such evidence.<sup>49</sup> Making *Bourjaily* less clear is the fact that the Court has not defined firmly rooted. In its decision, the Court seemed to look to the rather vague and ambiguous principles of tradition and established precedent.<sup>50</sup> Again, Virginia defense counsel should recognize the limited scope of *Bourjaily*: only Federal Rule of Evidence 801 (d)(2)(E) was found to be firmly rooted.

The Court adhered to *Robert's* two part unavailability/reliability analysis in *Idaho v. Wright*.<sup>51</sup> In *Wright*, the Court found a state residual hearsay exception not firmly rooted for Confrontation Clause purposes.<sup>52</sup> Since the State could not establish that the statement fit under a firmly rooted exception, it needed to demonstrate that the statement was supported by particularized guarantees of trustworthiness. The Court held that the State had failed, and that the hearsay evidence was barred by the Confrontation Clause.<sup>53</sup> *Wright* is an important case for defense counsel because it stands for the proposition that not all state hearsay exceptions are firmly rooted for Confrontation Clause purposes. Since there is no definitive "firmly rooted" test, most state hearsay exceptions are still fair game for argument.

In *White v. Illinois*,<sup>54</sup> the Court relied on *Inadi* to severely narrow the unavailability analysis adhered to in *Idaho v. Wright*.<sup>55</sup> The Court

<sup>44</sup> Federal Rule of Evidence 801 (d)(2)(E) provides that "a statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

<sup>45</sup> *Inadi* 475 U.S. at 400.

<sup>46</sup> 483 U.S. 171 (1987).

<sup>47</sup> *Id.* 182-183.

<sup>48</sup> Although the Court spoke in terms of "the coconspirator exception to the hearsay rule," under the Federal Rules, statements by coconspirators are not hearsay.

<sup>49</sup> *Bourjaily* 483 U.S. at 183.

<sup>50</sup> *Id.*

<sup>51</sup> 497 U.S. 805 (1990).

<sup>52</sup> *Id.* at 817. Idaho's residual hearsay exception provides in relevant part that:

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. Idaho R. Evid. 803(24).

<sup>53</sup> *Id.* at 827.

<sup>54</sup> 502 U.S. 346 (1992).

<sup>55</sup> In *White*, the Court presumed unavailability based on the trial

confined *Roberts* to its facts holding that "unavailability . . . is a necessary part of the Confrontation Clause inquiry" when the hearsay statements were made in the course of a prior judicial proceeding.<sup>56</sup> The Court then analyzed the statement's reliability and reaffirmed its earlier rulings that held "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied."<sup>57</sup>

#### IV. The Confrontation Clause: What It Should Be

The purpose of this section is to set forth the steps Virginia defense counsel should follow when, under the against interest exception to the hearsay rule, the Commonwealth attempts to admit statements by a codefendant inculcating the defendant. It is vital that defense counsel be able to properly identify, articulate, and preserve this crucial pretrial admissibility issue. This analysis only applies in cases in which a capital defendant has one or more codefendants and when the Commonwealth seeks to introduce codefendant statements, inculcating the defendant, under the against interest exception.

First, counsel should argue that in Virginia, the against interest hearsay exception requires that the declarant be unavailable. "The prerequisite of unavailability is firmly established in Virginia law."<sup>58</sup> In *Chandler v. Commonwealth*,<sup>59</sup> the Supreme Court of Virginia held that "[t]o be an admissible declaration against penal interest, the statement must . . . be made by an unavailable declarant."<sup>60</sup> Thus, there is little doubt, under Virginia state law, that if the Commonwealth cannot prove the unavailability of the declarant, the statement is inadmissible at defendant's trial and the inquiry ends.

A second inquiry, should the Commonwealth prove unavailability,<sup>61</sup> is whether the defendant is being tried jointly with an unavailable codefendant. If so, *Bruton* mandates exclusion of the codefendant's confession. While the Commonwealth may argue that *Richardson* allows admission of the confession in redacted form with a limiting instruction, counsel can argue that even redacted admission will prejudice the defendant.

court's finding which was not addressed by the appellate court.

<sup>56</sup> 502 U.S. at 354.

<sup>57</sup> *Id.* at 356.

<sup>58</sup> 2 Charles E. Friend, *The Law of Evidence in Virginia* 128 (4th ed. 1993).

<sup>59</sup> 249 Va. 270, 455 S.E.2d 219 (1995).

<sup>60</sup> *Id.* at 279 n.1, 455 S.E.2d at 224 n.1.

<sup>61</sup> Federal Rule of Evidence 804 provides:

(a) Definition of unavailability. 'Unavailability as a witness' includes situations in which the declarant- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

If there are separate trials, counsel should argue that the codefendant's confession that inculpates the defendant does not fall under the Virginia against interest hearsay exception. Virginia's against interest exception to the hearsay rule was set forth in *Hines v. Commonwealth*<sup>62</sup> and further refined in *Ellison v. Commonwealth*.<sup>63</sup> In *Ellison*, the Virginia Supreme Court held that declarations against penal interest are admissible at trial only if the Commonwealth can prove that those declarations are reliable.<sup>64</sup> Although the issue of reliability is left to the discretion of the trial judge, "the crucial issue is whether the *content* of the confession is trustworthy."<sup>65</sup> One of the determining factors of trustworthiness is whether corroborating evidence, other than the confession, connects the declarant to the alleged offense.<sup>66</sup> Therefore, in order to properly lay the foundation for the exception, the prosecutor must offer more than just the "bare bones" confession.

In a capital murder trial, a codefendant's pretrial statement that implicates the defendant as the triggerman is inherently unreliable since, in Virginia, only the triggerman can be tried capitally. Virginia Code Section 18.2-18 states that "an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree." Therefore, confessions of codefendant's, ostensibly against their interest, that implicate the defendant as the triggerman actually favor the codefendant's penal interest. Such statements are wholly self-serving. A codefendant that can successfully shift the blame for the actual killing to another has insulated himself or herself not only from a sentence of death, but also from ever being convicted of capital murder. Additionally, the United States Supreme Court has declared that accomplices' confessions that incriminate defendants are presumptively unreliable.<sup>67</sup>

If the trial judge nonetheless determines that the statement is admissible hearsay, defense counsel must then raise the federal Confrontation Clause issue. Admitting non-self-inculpatory statements, even if "made within a broader narrative that is generally self-inculpatory,"<sup>68</sup> is a clear violation of the Confrontation Clause. This argument simply couches the *Williamson* holding, which was based on the Federal Rules of Evidence, in constitutional terms. The fact that *Williamson* was based on the Federal Rules of Evidence rather than the United States Constitution does not diminish this argument. It simply illustrates the general practice of the Court to avoid constitutional pronouncements when there is a narrower ground for the ruling. Counsel should argue that the Confrontation Clause requires the *Williamson* holding and that the United States Supreme Court would have so ruled had the Federal Rules of Evidence not provided a sufficient basis for the decision.

Once the Confrontation Clause is cited, the Commonwealth will rely on the line of cases discussed in Part III of this article to argue that they have proven unavailability and that Virginia case law establishes that the against interest exception is firmly rooted. In addressing the firmly rooted claim, counsel should point out that the United States Supreme Court has never found the against interest exception to the hearsay rule to be firmly rooted for Confrontation Clause purposes. The only exceptions to the hearsay rule that the Court has labeled as firmly rooted are spontaneous declarations<sup>69</sup> and statements made for medical treatment.<sup>70</sup> Unfortunately, and hopefully incorrectly, in *Raia v. Com-*

*monwealth*,<sup>71</sup> the Virginia Court of Appeals recognized a statement against interest of an unavailable witness as a firmly rooted exception to the hearsay rule.<sup>72</sup> If the Commonwealth relies on this case, Virginia defense counsel should object on Confrontation Clause grounds, suggest that *Raia* was incorrectly decided, and argue that the against interest exception is not firmly rooted for Confrontation Clause purposes. Since declarations against interest, particularly in a capital murder proceeding, are inherently unreliable and untrustworthy, they should not be considered as a firmly rooted hearsay exception for Confrontation Clause purposes.

The Commonwealth will likely claim that *White v. Illinois* is dispositive. *White* held that when proffered hearsay comes within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.<sup>73</sup> The Commonwealth will argue that since Virginia labeled the against interest exception firmly rooted in *Raia*, the analysis ends and the Confrontation Clause is satisfied.

As an initial response, Virginia defense counsel must argue that in *White* the Court did not intend such a sweeping pronouncement. A broad interpretation of *White* would effectively eviscerate the Confrontation Clause and admit all hearsay evidence that is tapped with a "firmly rooted" label. Counsel must suggest that, regardless of what exceptions a state labels as firmly rooted, the test of unavailability and reliability should apply to every hearsay exception for Confrontation Clause purposes except spontaneous declarations and statements for medical treatment.

If this argument is not accepted by the trial court, counsel might suggest that *Wright* supports the proposition that a state's decision about which exceptions are firmly rooted is inconclusive for Confrontation Clause purposes. What satisfies the Confrontation Clause is a federal question and, therefore, the United States Supreme Court is the final arbiter. There is no binding federal decision on whether the against interest exception is firmly rooted for Confrontation Clause purposes and, therefore, the issue remains open for debate.

Defense counsel must conclude by arguing that a capital murder trial is inherently unique from all other criminal proceedings. A sentence of death "is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."<sup>74</sup> As was noted in *Simmons v. South Carolina*,<sup>75</sup> the Eighth Amendment requires "heightened reliability" in capital trials.<sup>76</sup> In *Ohio v. Roberts*, the Court stated that the Confrontation Clause clearly was meant to exclude some hearsay evidence.<sup>77</sup> At a capital murder trial, hearsay under the against interest exception is just the type of unreliable and untrustworthy evidence that *Roberts* was contemplating.

## V. Conclusion

Someday, the Supreme Court may decide to reemphasize defendant's constitutional rights to confrontation and cross-examination. If that day does come, only in those cases where the issue was properly preserved will defendants be able to petition for relief. Until then, Virginia defense counsel must zealously litigate the admissibility of codefendant statements under the against interest exception.

prior testimony involved in that case, while not necessarily firmly rooted, bore sufficient indicia of reliability.

<sup>71</sup> 478 S.E.2d 328 (Va. Ct. App. 1996).

<sup>72</sup> *Id.* at 331.

<sup>73</sup> 502 U.S. 346, 356-57 (1992).

<sup>74</sup> *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

<sup>75</sup> 512 U.S. 154 (1994).

<sup>76</sup> *Id.* at 172 (Souter, J., concurring).

<sup>77</sup> 448 U.S. 56, 63 (1980).

<sup>62</sup> 136 Va. 728, 117 SE 843 (1923).

<sup>63</sup> 219 Va. 404, 247 S.E.2d 685 (1978).

<sup>64</sup> *Id.* at 408, 247 S.E.2d at 688.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 409, 247 S.E.2d at 688.

<sup>67</sup> *Lee v. Illinois*, 476 U.S. 530, 541 (1986).

<sup>68</sup> *Williamson v. United States* 512 U.S. 594, 600-01 (1994).

<sup>69</sup> *White v. Illinois* 502 U.S. 346 (1992).

<sup>70</sup> *Id.* Note that the Court has also recognized Federal Rule of Evidence 801 (d)(2)(E), which states that coconspirator statements are not hearsay, as firmly rooted. The Court also found in *Roberts* that the

