Constitutional Constraints on the Admissibility of Grand Jury Testimony: The Unavailable Witness, Confrontation, and Due Process

Barbara L. Strack
University of Michigan Law School

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CONSTITUTIONAL CONSTRAINTS ON
THE ADMISSIBILITY OF GRAND JURY
TESTIMONY: THE UNAVAILABLE
WITNESS, CONFRONTATION, AND DUE
PROCESS

The grand jury plays a critical role in the administration of criminal
justice in both federal and state systems.1 It is used to investigate
suspected crimes and to determine whether sufficient evidence exists
to indict and proceed to trial.2 In addition, testimony heard at grand
jury proceedings often provides valuable assistance to parties during

1. For federal felony prosecutions, indictment by grand jury is required by the fifth amend-
ment. U.S. CONST. amend. V. Indictment may be waived for noncapital offenses and prosecu-
tion by information substituted. FED. R. CRIM. P. 7(a), (b). Indictment by grand jury is unusual
in that, unlike other guarantees in the Bill of Rights, it does not apply to state prosecutions
through the fourteenth amendment. Hurtado v. California, 110 U.S. 516 (1884); accord Gerstein
v. Pugh, 420 U.S. 103 (1975). About twenty states still require felony indictments by grand jury
(and five more require it for capital offenses), while the rest allow charges to be brought by
information and use grand juries only occasionally, usually for investigative purposes rather than
for screening prosecutions. Y. KAMISAR, W. LAFAYE & J. ISRAEL, MODERN CRIMINAL PROCEDURE
712-13, 1016 (5th ed. 1980) [hereinafter cited as CRIMINAL PROCEDURE].

2. CRIMINAL PROCEDURE, supra note 1, at 712.

Criticism of prosecution by indictment is largely responsible for the shift among states toward
prosecution by information. When the fifth amendment was ratified, all fifty states required
indictments in felony cases. Anti-indictment sentiment became strong in the early 1930's, but
the state trend toward prosecution by information has slackened. Debate on constitutional and
statutory reforms, however, continues. Id. at 1016. See generally M. FRANKEL & G. NAFTALIS,
THE GRAND JURY (1977); Antell, The Modern Grand Jury: Benighted Supergovernment, 51
A.B.A.J. 153 (1965); Arenella, Reforming the Federal Grand Jury, 78 MICH. L. REV. 463 (1980);
Campbell, Eliminate the Grand Jury, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973); Morris, Book

The grand jury is characterized as both a "sword" and a "shield." United States v. Cox,
342 F.2d 167, 174-75 (5th Cir. 1965). In its earliest English form, jurors were subservient to
the king. They could accuse based on their own knowledge as well as investigate charges brought
by outsiders. The evolution of the institution into a bulwark against government oppression was
dramatized five hundred years later, in 1681, when a grand jury refused to indict Lord Shaftesbury
for treason, despite pressure from Charles II. This protective function was imported to the New
World:

Historically, this body has been regarded as a primary security to the innocent against
hasty, malicious and oppressive persecution; it serves the invaluable function in our
society of standing between the accuser and the accused, whether the latter be an in-
dividual, minority group, or other, to determine whether a charge is founded upon
reason or was dictated by an intimidating power or by malice and personal ill will.
Wood v. Georgia, 370 U.S. 375, 390 (1962). Today, many argue that the grand jury has ceased
to screen effectively and serves instead as a weapon of the prosecution. See infra notes 65-76
and accompanying text. See generally M. FRANKEL & G. NAFTALIS, supra, at 6-17, 99-102; R.
YOUNGER, THE PEOPLE'S PANEL 1-4 (1963); Arenella, supra, at 474.
subsequent stages of litigation. Defendants, for example, may wish to review grand jury transcripts in order to challenge an indictment or to help prepare a defense. At the trial itself, if a grand jury witness appears, both prosecution and defense can use the prior testimony as substantive evidence, for impeachment purposes, or to refresh a witness's memory.

On occasion, grand jury testimony is introduced at trial when the grand jury witness is unavailable to testify in person. In this situation, the grand jury transcript is particularly useful to the prosecution, for it may represent the best evidence at its disposal. Although the absence of the witness renders the grand jury testimony hearsay, some courts have admitted it under an exception to the hearsay rule.

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3. Both the existence and availability of transcripts varies from jurisdiction to jurisdiction. Transcription of grand jury testimony is required in the federal system, FED. R. CRIM. P. 6(e), and in about thirty states. AMERICAN BAR ASSN PRINCIPLES 12 (1977). Transcription is fairly common in other jurisdictions, at the prosecutor's discretion. While some jurisdictions allow defendants access to the entire transcript following indictment, others disclose only the testimony of witnesses who testify at trial, absent a special showing of need. CRIMINAL PROCEDURE, supra note 1, at 1026 n.c., 1055. The grand jury transcript may figure prominently in collateral proceedings as well, particularly those involving the scope of a witness's immunity or perjury. Id. at 748.

4. CRIMINAL PROCEDURE, supra note 1, at 1167.


8. "Unavailable" is a term of art and the precise definition varies according to a particular jurisdiction's rules of evidence. FED. R. EVID. 804(a) provides that:

   '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 his statement; or (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of his 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 his statement has been unable to procure his attendance . . . by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.


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

11. The relevant federal provision is FED. R. EVID. 804(b)(5):
United States v. West,\textsuperscript{12} for example, the Fourth Circuit approved the admission of the grand jury testimony of a witness who had been slain before the trial. The court held that the testimony was "essentially trustworthy" despite its hearsay status.\textsuperscript{13}

Defendants, however, have raised serious constitutional objections to the introduction of grand jury testimony when the witness is unavailable to testify at trial. These claims have focused on the confrontation clause\textsuperscript{14} of the sixth amendment and the due process clauses\textsuperscript{15} of the fifth and fourteenth amendments. Defendants have contended that the introduction of testimony from a grand jury proceeding which cannot be subjected to cross-examination\textsuperscript{16} fatally compromises the defendant's right to a fair trial. Lower courts are split over admitting grand

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is not excluded as hearsay] 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.


Although interpreting this hearsay exception and comparable state provisions is an important issue, it is beyond the scope of this Note to determine whether grand jury testimony satisfies the statutory requirements of a particular jurisdiction. Rules of evidence are subject to revision within the limits imposed by the Constitution; it is those limits which this Note explores. See the discussion of the relationship between hearsay and the confrontation clause \textit{infra} notes 20-28 and accompanying text.

12. 574 F.2d 1131 (4th Cir. 1978).
13. \textit{See supra} note 11.

In a companion case, United States v. Garner, 574 F.2d 1141 (4th Cir.), \textit{cert. denied}, 439 U.S. 936 (1978), the Fourth Circuit upheld a conviction for the importation of heroin, relying in part on a co-conspirator's grand jury testimony. Although the co-conspirator was physically present, \textit{see supra} note 8, his refusal to answer questions prompted resort to the grand jury transcript.

14. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. The protection is applicable to the state prosecutions through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400 (1965).
15. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.
16. \textit{See infra} notes 65-85 and accompanying text.
jury testimony in these circumstances, and the Supreme Court has yet to rule on the issue. As a result, trial judges are left with little guidance as they grapple with evidentiary disputes amidst the pressures of criminal prosecutions. This Note argues that the confrontation clause normally bars grand jury testimony, but that it may be admissible when a defendant has waived his confrontation rights and an independent standard of due process is satisfied. Part I discusses the framework for confrontation analysis established by the Supreme Court in the context of preliminary hearings and applies it to the grand jury setting. This section concludes that grand jury testimony does not meet the Court’s test for reliability and therefore should not, as a general matter, be admissible at a later trial. Part II goes beyond the issue of confrontation and examines the additional considerations important for due process analysis if a defendant waives the right to confront.

17. The Fourth Circuit has approved the use of grand jury testimony on several occasions. United States v. Murphy, 696 F.2d 282 (4th Cir. 1982); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Garner, 574 F.2d 1141 (4th Cir.), cert. denied, 439 U.S. 936 (1978). The Second Circuit has held that grand jury testimony of an unavailable witness is not admissible, although that decision predates adoption of the Federal Rules of Evidence and was apparently based on an interpretation of the hearsay rule as well as the confrontation clause. United States v. Fiore, 443 F.2d 112 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973). Under special circumstances, grand jury testimony has been admitted by the Fifth, Sixth, Eighth, and Tenth Circuits. See United States v. Barlow, 693 F.2d 954 (6th Cir. 1982) (testimony met the confrontation clause’s “reliability” standard); United States v. Thevis, 665 F.2d 616 (5th Cir.) (evidence was “clear and convincing” that the defendant had waived his confrontation right and no due process violation existed), cert. denied, 103 S. Ct. 57 (1982); Tolbert v. Jago, 607 F.2d 753 (6th Cir. 1979) (acknowledging that although a jury may have considered the substantive content of grand jury testimony in violation of instructions, admission was constitutional due to special circumstances), cert. denied, 444 U.S. 1022 (1980); United States v. Balano, 618 F.2d 624 (10th Cir. 1979) (holding that a defendant’s threats on a witness’s life may constitute a waiver of confrontation rights, justifying the admission of grand jury testimony), cert. denied, 449 U.S. 840 (1980); United States v. Marks, 585 F.2d 164 (6th Cir. 1978) (admitting a co-defendant’s prior grand jury testimony violated the defendant’s confrontation right, which was not implicitly waived by his failure to move for a severance); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) (no need to reach confrontation issue because introduction of grand jury testimony violated the hearsay rule); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976) (grand jury testimony held properly admitted after a hearing determining that threats by the defendant were the likely cause of the witness’s refusal to testify at trial), cert. denied, 431 U.S. 914 (1977).

18. McKethan v. United States, 439 U.S. 936 (1978) (Stewart & Marshall, JJ., dissenting from denial of certiorari) (noting that the Courts of Appeals are split and that both the Federal Rules of Evidence and the sixth amendment may place limits on the use of grand jury testimony); see also Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 1019 (1978) (White & Blackmun, J., dissenting from denial of certiorari) (suggesting that McKethan was suitable for a grant of certiorari).

19. Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970). These preliminary hearing decisions are particularly helpful in exploring the issue of grand jury testimony because the two types of proceedings often serve the same function — screening cases to determine whether to proceed with a prosecution. See infra notes 60-98 and accompanying text.
I. THE CONFRONTATION REQUIREMENT

A. Ohio v. Roberts — Preliminary Hearing Testimony and the Reliability Test

A literal reading of the sixth amendment’s confrontation clause seems to preclude the admission of all hearsay in criminal trials because a defendant cannot confront the declarant, who is functioning as a “witness against him . . . .” The clause has not been interpreted so broadly, however. Historical analysis provides a persuasive basis for rejecting this absolute approach. Although the rule against hearsay evidence predates ratification of the sixth amendment, several well-established exceptions to the general prohibition also existed at that time. The use of some kinds of indirect evidence was therefore tacitly approved by the Framers, scholars and judges have concluded, reasoning that any major departure from evidentiary standards would have been expressed more explicitly. Once an interpretation of the confrontation clause as a blanket restriction on all indirect evidence is rejected, delimiting the scope of its protection is problematic.

20. “A ‘declarant’ is a person who makes a statement.” FED. R. EVID. 801(b).
21. U.S. CONST. amend. VI. But see Westen, The Future of Confrontation, 77 MICH. L. REV. 1185, 1200-02, 1206-07 (1979) (the literal reading appears impossible only because “witnesses against” has been incorrectly interpreted; it should be understood to include only witnesses who are available to appear in court and whom the prosecution can reasonably expect the defendant will wish to cross-examine immediately).
22. A literal reading of confrontation would “abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.” Ohio v. Roberts, 448 U.S. 56, 63 (1980).
23. The rule against admitting hearsay crystallized in the late 1600’s or early 1700’s, though its roots are much older. It was inspired by a desire to exclude unreliable evidence. See generally Read, The New Confrontation-Hearsay Dilemma, 45 S. CAL. L. REV. 1, 4-5 (1972); J. Wigmore, Evidence § 1364 (Chadbourn rev. ed. 1974) [hereinafter cited as Wigmore]; C. McCormick, Evidence §§ 244-45 (2d ed. 1972) [hereinafter cited as McCormick]. Legal historians disagree as to how many exceptions were part of the common law when the sixth amendment was drafted. Compare Wigmore § 1397 (“there was never a time when [the hearsay rule] was without exceptions” — though none are enumerated) with F. Heller, The Sixth Amendment To The Constitution of the United States 105 n.65 (1951) (only the dying declaration exception was recognized at common law).
24. See, e.g., Salinger v. United States, 272 U.S. 542, 547-48 (1926) (“The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.”) See also Dowdell v. United States, 221 U.S. 325 (1911) (no confrontation violation when judge and clerk certified the trial record to the appellate court without the accused’s presence); Kirby v. United States, 174 U.S. 47 (1899) (dying declarations admissible); Robertson v. Baldwin, 165 U.S. 275 (1897) (deposition of dead witness admissible); Mattox v. United States, 156 U.S. 237 (1895) (testimony of deceased witness from former trial admissible); Mattox v. United States, 146 U.S. 140 (1892) (dying declarations admissible); Note, Preserving the Right to Confrontation, 113 U. PA. L. REV. 741, 746-47 (1965).
and common law rules governing hearsay have changed since the sixth amendment was adopted, and it is now clear that the confrontation guarantee is not synonymous with any particular formulation of evidentiary law. Nevertheless, the Supreme Court's analysis of the confrontation clause has been informed by the rationale underlying common hearsay rules — excluding unreliable evidence.

Historically, the confrontation guarantee is linked with the need to prevent the government from conducting trials by affidavit, thereby denying defendants a reasonable opportunity to defend themselves. See California v. Green, 399 U.S. 149, 156-57 (1970). See also Read, supra note 23, at 5-6; Note, supra note 24, at 742-43. The popularization of this concern is often attributed to the abusive prosecution of Sir Walter Raleigh in 1603. See, e.g., Green, 399 U.S. at 157 n.10; Note, supra, at 746 n.31; Graham, The Right of Confrontation and the Hearsay Rule, 8 CRIM. L. BULL. 99, 99-100 (1972) (discussing the evidence used against Raleigh and reproducing some of the testimony). See generally F. Heller, supra note 23, at 104.

26. The most prominent example, at the federal level, was the adoption of the Federal Rules of Evidence in 1975. See also Read, supra note 23, at 11-15.

27. Although early cases tended to confuse or equate confrontation and hearsay, their independence is now well-established. Reluctance to equate confrontation and the hearsay rules is in part inspired by the widespread belief that the rules of evidence are badly in need of reform and that to constitutionalize them under the guise of "confrontation" would freeze a bad system into place. See, e.g., Ohio v. Roberts, 448 U.S. 56, 62 (1980). It is acknowledged, however, that confrontation and hearsay "stem from the same roots," Dutton v. Evans, 400 U.S. 74, 86 (1970), and "protect similar values." California v. Green, 399 U.S. 149, 155 (1970).

28. See infra notes 29-45 and accompanying text.

True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay 'exceptions.'" . . . But a general approach to the problem is discernible.


Early cases focused on cross-examination. In Pointer v. Texas, 380 U.S. 400 (1965), the Court held that use of testimony from a preliminary hearing where the defendant had not been represented by counsel would violate the confrontation clause. It noted that the right to confront includes the right to cross-examine, and that confrontation is applicable to the states through the fourteenth amendment's due process clause. The Court placed similar emphasis on cross-examination as a vital component of confrontation in Douglas v. Alabama, 380 U.S. 415 (1965). There, the prosecutor put an accomplice on the stand and read aloud his confession inculpating the defendant, purportedly to refresh the accomplice's memory. The defendant's rights had been violated, the Court held, because the witness's memory lapse precluded cross-examination. Again in Barber v. Page, 390 U.S: 719 (1968), the Court described confrontation as a trial right and noted that a past opportunity to cross-examine a witness — i.e., at a preliminary hearing — would not satisfy the constitutional requirement. That decision, however, turned on the fact that the prosecution had been lax in its efforts to secure the witness's presence at trial; thus, the cross-examination language is essentially dictum.

The Court began to back away from the absolute stance of Pointer in California v. Green, 399 U.S. 149 (1970), in which it allowed the admission of cross-examined preliminary hearing testimony when the witness professed a memory lapse at trial. A year later, in Dutton v. Evans, 400 U.S. 74 (1970), hearsay was permitted where there had been no prior opportunity for cross-examination. In Dutton a witness recounted the statement of the defendant's co-conspirator, a former cell-mate. The Court denied a writ for habeas corpus, noting that the defendant had been able to cross-examine twenty prosecution witnesses, although not the co-conspirator. The Court concluded that error, "if . . . [it] exists, is harmless beyond a reasonable doubt." Id. at 93.
In *Ohio v. Roberts*, the Supreme Court's most recent exploration of the parameters of confrontation, the defendant challenged the state's use of preliminary hearing testimony that had been properly admitted under the Ohio rules of evidence governing unavailable witnesses. Herschel Roberts had been convicted for receiving stolen property. His defense — that he was given the checks and credit cards by their owners' daughter with the understanding that he could use them — was rebutted by the prosecution's introduction of the daughter's testimony from the preliminary hearing. Roberts's appointed counsel had called the daughter as his only witness at the hearing and questioned her "at some length." Although she testified that she knew Roberts and had let him stay at her apartment while she was away, she denied having given him the checks and cards or permission to use them. By the time of trial, the daughter could not be located. The preliminary hearing transcript was admitted over the objections of Roberts's counsel.

In assessing Roberts's claim, the Court acknowledged that confrontation is an ill-defined concept. It considered both the policies underlying the confrontation clause and competing societal interests. On the one hand, the confrontation clause "reflects a preference for face-to-face confrontation at trial" and facilitates cross-examination. Allowing the fact-finder to observe the demeanor of the witness, thereby assessing credibility, promotes accuracy. The Court also recognized, however, that "every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence . . . in criminal proceedings." These latter interests, on occasion, "may warrant dispensing with confrontation at trial."

The Court reconciled these competing concerns with a two-step approach. As a threshold requirement, the Court held that the confrontation clause imposes a "rule of necessity": the prosecution must produce its witnesses or demonstrate their unavailability. This initial

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31. The preliminary hearing was followed by a county grand jury indictment for forgery, receiving stolen property, and possession of heroin. *Roberts*, 448 U.S. at 58.
32. Id.
33. Id. at 59-60.
34. Id. at 62-65.
35. Id.
36. Id. at 63.
37. Id. at 63-64.
38. Id. at 64.
39. Id.
40. Id. at 65. A qualification of this "rule" diminishes its significance. A demonstration of unavailability is not required where "the utility of trial confrontation [is] so remote" that a court finds it pointless to "require the prosecution to produce a seemingly available witness." *Id.* at 65 n.7.

There are two possible explanations for this exception to the *Roberts* test. First, it may be
requirement operates as a safeguard against the possibility of an abusive "trial by affidavit." Once a witness is deemed "unavailable," the Court’s second element comes into play. To be admissible, a statement made by an unavailable witness must bear "adequate 'indicia of reliability.' " Traditional hearsay rules are the touchstone for this reliability inquiry. When challenged evidence falls within a "firmly rooted" hearsay exception, reliability is simply inferred. Other types of evidence, however, must evince "particularized guarantees of trustworthiness" or be excluded.

Applying this test to the facts of Roberts, the Court held that the daughter's preliminary hearing testimony was admissible. The threshold requirement of the witness's unavailability at trial was satisfied by the prosecution's good faith efforts. The Court therefore concentrated on the reliability of the testimony, focusing on the characteristics of the hearing. The crucial factor in its finding that adequate "indicia of reliability" existed was vigorous questioning by the defense attorney.

understood as an effort to reconcile Roberts with the holding in Dutton v. Evans, 400 U.S. 74 (1970), where there was no discussion of why the declarant did not appear in person even though, as a prisoner, he was presumably "available" to the prosecution. The defendant in that case was clearly unwilling to concede the uselessness of trial confrontation. See also United States v. Perez, 658 F.2d 654, 661 (9th Cir. 1981) ("necessity" is not an absolute requirement under Roberts).

Second, a number of writers have expressed concern that an iron-clad rule of necessity would call into question well-established and non-controversial hearsay exceptions and needlessly overburden courts with unwieldy evidence. Compare California v. Green, 399 U.S. 149, 172-89 (1970) (Harlan, J., concurring), and Note, Confrontation and the Hearsay Rule, 75 Yale L.J. 1434, 1439 (1966) (confrontation requires only a good faith effort by the prosecution to produce all witnesses at trial), with Dutton v. Evans, 400 U.S. 74, 93-100 (Harlan, J., concurring) (repudiating his position in Green because requiring the production of available witnesses would curtail the development of the law of evidence). See also Westen, supra note 21 (confrontation requires the production of only those available witnesses whom the prosecution can reasonably expect the defendant will wish to cross-examine immediately); Read, supra note 23, (advocating a case-by-case examination of hearsay exceptions for compliance with the underlying values of confrontation); The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 194-96, (1971) (cases seem to focus on prosecution's conduct and not the nature of hearsay) [hereinafter cited as The Supreme Court].

Although a loose interpretation of this qualification to the "necessity" prong of the Roberts test threatens to render the confrontation guarantee meaningless, if conscientiously circumscribed it provides a reasonable accommodation by permitting the use of well-established and non-controversial hearsay exceptions. See, e.g., Fed. R. Evid. 803(6), (8) (business records, public reports).

Disagreement over whether the state had met its burden of proof on "necessity" prompted the dissent in Roberts. 448 U.S. at 77-82.

41. See supra note 25.
42. Id. at 66 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).
43. Roberts, 448 U.S. at 66.
44. But see infra note 117.
45. Roberts, 448 U.S. at 66.
46. Id. at 74-77. But see supra note 40.
47. Roberts, 448 U.S. at 67-73.
While the daughter technically testified on direct examination, the Court emphasized that the exchange amounted to "the equivalent of significant cross-examination." Counsel repeatedly used leading questions, formally the distinguishing characteristic of cross-examination. More importantly, the Court found that the purpose of the questioning was identical to that behind cross-examination. Defense counsel probed the witness's sincerity, perception, memory, and ability to communicate. Relying on the "guarantees of trustworthiness in the accouterments [sic] of the preliminary hearing itself," the Court held that the daughter's testimony satisfied the confrontation clause, refusing to distinguish Roberts from an earlier case involving cross-examined preliminary hearing testimony.

B. Roberts Reliability Test and Grand Jury Testimony

In Roberts the Supreme Court addressed the effect of the confrontation guarantee on the use of preliminary hearing testimony. Its two-step analysis applies more generally, however, and provides the framework for evaluating the use of grand jury testimony as well.

48. After the prosecution had called several witnesses, Roberts's lawyer called the complainant's daughter, whom he had seen in the courthouse hallway. He questioned her at length and attempted to elicit an admission that she had led the defendant to believe she had permission to use her parents' checks and credit cards. She denied the suggestion, and the attorney never asked to have her declared hostile or placed on cross-examination. The prosecutor did not examine the witness. Technically, therefore, the defense questioning took place on direct examination. Yet as a matter of form and purpose, it resembled cross-examination; neither the prosecutor nor the judge protested and the scope of the exchange was not limited. Id. at 58, 70-71.

49. Id. at 70.

50. Id. at 70-71. See FED. R. EVID. 611(c) ("Leading questions should not be used on direct examination . . . [but] should be permitted on cross-examination.").

51. Roberts, 448 U.S. at 71. The Court apparently failed to consider that the purposes of a preliminary hearing and a trial differ in that the former is concerned with probable cause and the latter with guilt or innocence. The extent and scope of defense cross-examination at the hearing stage is, therefore, not likely to be the same as at trial, regardless of formal limitations. Defense questioning at a hearing can be affected by the defendant's interests both in exploring the strength of the prosecution's case and protecting the details of its own. Lack of preparation (especially when, as in Roberts, the defendant's counsel is appointed) and the understandable expectation of another opportunity to cross-examine the witness at trial — despite local rules about the admissibility of prior testimony — may also restrict cross-examination at a preliminary hearing.

52. Id.

53. Id. at 73.


55. See, e.g., Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982) (unsworn statement to police); Lenza v. Wyrick, 665 F.2d 804 (8th Cir. 1981) (extrajudicial statements of murder victim and her mother); Black v. Woods, 651 F.2d 528 (8th Cir. 1981) (accomplice's unsworn statements to police and prior trial testimony); United States v. Fielding, 630 F.2d 1357 (9th Cir. 1980) (extrajudicial declaration of alleged co-conspirator).

56. See, e.g., United States v. Barlow, 693 F.2d 954 (6th Cir. 1982); United States v. Mur-
Once a grand jury witness is deemed "unavailable," the reliability inquiry determines whether admission of the grand jury transcript is constitutional.\(^{57}\) Because grand jury testimony does not fall within a well-established exception to the hearsay rule\(^{58}\) — which would trigger an inference of reliability under \textit{Roberts} — it must be scrutinized to determine whether it possesses adequate "indicia of reliability."\(^{59}\) Although the minimum threshold of reliability for confrontation purposes is an open question, the Supreme Court has determined that the characteristics of preliminary hearings are sufficient guarantees.\(^{60}\) Therefore, a comparison of the "accoutrements" of the grand jury setting and preliminary hearings provides insight into the reliability of grand jury transcripts for later use at trial.

1. \textbf{Similarities} — Grand jury testimony does share certain attributes with preliminary hearing testimony that contribute to reliability.\(^{61}\) Like

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\(^{57}\) See supra notes 40-45 and accompanying text.

\(^{58}\) For example, grand jury testimony does not qualify under the federal rules as a "former testimony" exception to the hearsay rule.

\(^{59}\) 448 U.S. at 66.

\(^{60}\) \textit{Roberts}, 448 U.S. 56; \textit{California v. Green}, 399 U.S. 149 (1970). The \textit{Roberts} Court, however, specifically reserved the question whether testimony from a preliminary hearing characterized by little or no defense questioning would violate the confrontation clause. \textit{Roberts}, 448 U.S. at 70.

\(^{61}\) Reflecting this fact, grand jury testimony is admissible as substantive evidence of guilt — not merely as a means of refreshing memory or impeachment — when the witness is present at trial and subject to cross-examination. \textit{See Fed. R. Evid. 801(d)(1)}, providing, inter alia, that [a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, \textit{or other proceeding}, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . . (Emphasis added).

preliminary hearing testimony, grand jury testimony is elicited under oath in surroundings likely to impress the witness with the solemnity of the proceedings, and the sanction of perjury looms for false statements. In both proceedings, the witness's account is given at a point which is closer in time to the events described than is the trial, minimizing the chances of forgetfulness or embellishment. In addition, the contemporaneous creation of a verbatim transcript in each setting contributes to reliability because it ensures that the record of the proceedings will be accurate and complete.

2. Differences—Despite these similarities, significant differences between preliminary hearings and grand jury proceedings exist which compromise the reliability of grand jury testimony for use at a later trial when the witness is unavailable.

a. The absence of defense counsel—Preliminary hearings are like trials in that the defendant, counsel, and judge are all present. Grand juries, on the other hand, are not traditional adversary proceedings: they are one-man shows orchestrated by the prosecutor, with defense counsel generally restricted to the anteroom. This difference affects the reliability of the resulting testimony in several ways. First, the prosecutor calls and examines all grand jury witnesses, without opposing counsel to monitor the questioning and to object when appropriate. The lack of this usual adversarial balance creates the potential for

63. Cf. United States v. Distler, 671 F.2d 954 (6th Cir. 1981) (grand jury testimony properly admitted under judge's discretion pursuant to FED. R. EVID. 801(d)(1) where there was a year and a half delay before trial). But see R. LEMPETT & S. SALTBURG, A MODERN APPROACH TO EVIDENCE 474 n.66 (2d ed. 1982) (“Studies indicate that most forgetting occurs within a few days after an event. Thus an individual who testifies at a hearing three months after an event is likely to remember very little more about the event than an individual who testifies a year later.”).
64. In 1979, FED. R. CRIM. P. 6(e) was amended to require that all grand jury proceedings, except the jurors' deliberation and voting, be recorded. Many states transcribe grand jury testimony as well. See supra note 3.
65. The defendant's right to be present at trial is considered a component of the confrontation right. See, e.g., M. FRANKEL & G. NAFTALIS, supra note 2, at 30; Read, supra note 23, at 49; Westen, Confrontation & Compulsory Process: A Unified Theory, 91 HARV. L. REV. 567 (1978). The right may be forfeited, however, and a defendant excluded from the courtroom, for continued “disruptive behavior” after a warning. Illinois v. Allen, 397 U.S. 337, 343 (1970).
66. Generally, the only parties in the grand jury room are the jurors, the prosecutor, the witness, and a stenographer. The federal rules do not allow witnesses to have counsel present, FED. R. CRIM. P. 6(d), though about a dozen states permit putative defendants to bring their lawyers into the chamber. M. FRANKEL & G. NAFTALIS, supra note 2, at 24, 59-69. Witnesses are permitted to interrupt their testimony to confer with counsel. Id. at 62-69. Even the few jurisdictions which permit putative defendants to have counsel within the grand jury room restrict their role to advising the witness, not questioning. See generally CRIMINAL PROCEDURE, supra note 1, at 782. Future defendants cannot always be identified at the grand jury stage, however, and they have no right, in any case, to attend grand jury proceedings. See infra notes 77-81 and accompanying text (grand jury secrecy).
As a trained advocate, the prosecutor may intimidate witnesses or ask misleading questions.69

Second, and more important, the absence of defense counsel precludes the opportunity for cross-examination of grand jury witnesses. Although cross-examination is not an absolute constitutional requirement under the confrontation clause,70 it is the primary mechanism for ensuring "substantial compliance with the purposes behind the confrontation requirement."71 Cross-examination promotes reliability by providing an opportunity to test the accuracy of direct testimony72 and by rendering the testimony more complete.73 Because the grand jury setting, unlike

68. This "inquisitorial" procedure represents a relatively rare exception to the adversary method that is fundamental to the American judicial system.

Inquisitorial systems view the criminal process as an official inquiry where state officials take primary responsibility for determining whether the defendant has committed a crime . . . [S]tate officials direct the official investigation, determine the appropriate charges, and conduct the course of a nonadversarial trial that offers a public recapitulation of the official investigation.

In contrast:

our accusatorial system structures criminal proceedings not as an official inquiry but as a dispute between two parties, the state and the accused . . . [I]t encompasses not only adversarial trial procedure but other fundamental norms taken from constitutional law that regulate the balance of advantage between the state and the accused throughout the criminal process.


69. The pro-government bias is inherent in grand jury proceedings, despite the "presumption of fair and orderly conduct by . . . state officials." In re Groban, 352 U.S. 330, 334 (1957). American Bar Association standards require that the prosecutor, as legal advisor to the grand jury, "give due deference to its status as an independent legal body" and "not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury." PROSECUTION AND DEFENSE FUNCTION § 3-3.5 (1978). Yet even if the prosecutor complies with these standards, the grand jury receives a skewed perception of the evidence because the prosecutor's goal is to establish probable cause or a prima facie case, not to convey the full story. See infra note 75.

70. See, e.g., Ohio v. Roberts, 448 U.S. 56 (1980) (direct examination may serve as the equivalent of cross-examination); Dutton v. Evans, 400 U.S. 74 (1970) (use of absent co-conspirator's statement does not violate the confrontation clause). See also Baker, The Right to Confrontation, the Hearsay Rule, and Due Process — A Proposal for Determining When Hearsay May Be Used in Criminal Trials, 6 CONN. L. REV. 529 (1974) (no absolute right to cross-examination if policies are otherwise protected).

71. California v. Green, 399 U.S. 149, 166. See also Chambers v. Mississippi, 410 U.S. 284, 295 (1973); WIGMORE, supra note 23, § 1367 ("[C]ross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth.").

72. Roberts, 448 U.S. at 63-64.

73. It is impossible to assess the utility of cross-examination that never occurred. United States v. Murphy provides an interesting illustration. The witness's grand jury testimony was admitted in two separate trials of the same defendants for different bank robberies. At the first trial, the witness also testified in person, on cross-examination, that he had named the defendants only after suggestions by an FBI agent; his refusal to be sworn at the second trial kept that information from the jury. 696 F.2d 282 (4th Cir. 1982). Cf. United States v. Nixon, 418 U.S. 683, 709 (1974):
a preliminary hearing, excludes precisely those parties — the defendant and his lawyer — who would be most motivated to probe the weaknesses of a witness’s account, point out gaps, and seize on facts that fail to support the government’s charges, testimony elicited before the grand jury may be neither accurate nor complete. When a witness is unavailable to testify at trial, the defendant is denied the opportunity to “cure” this deprivation of contemporaneous cross-examination. As a result, the reliability of grand jury testimony is fatally compromised for confrontation purposes.

b. Secrecy — Preliminary hearings are held in open court. This exposure to public view makes witnesses accountable for their statements, thereby encouraging true and complete testimony. Grand jury proceedings, on the other hand, are closed to everyone except the prosecutor, jurors, the witness, and a stenographer. This system’s secrecy provides little incentive for rigorous and complete truth-telling, for it conveys the impression to witnesses that they will be able to avoid unpleasant grilling by defense counsel and that their testimony will never

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgment were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

74. This exclusion is arguably justified at the grand jury, where the issue is whether there is enough evidence to go to trial; its importation into the trial itself, where the issue is guilt or innocence, raises a more serious challenge to the adversary model. See supra note 68. In some jurisdictions, prosecutors are under a duty to present exculpatory evidence. M. FRANKEL & G. NAFTALIS, supra note 2, at 30-31, 70-72.

75. See, e.g., United States v. Balano, 618 F.2d 624, 628 (10th Cir. 1979) (usefulness of cross-examination for clarifying damaging yet ambiguous grand jury testimony), cert. denied, 449 U.S. 840 (1980).

Indirect support for the proposition that the absence of defense counsel substantively affects grand jury evidence can be found in statistics: grand juries refuse to issue indictments in only about three to eight per cent of the cases presented to them. CRIMINAL PROCEDURE, supra note 1, at 22. See also Morse, A Survey of the Grand Jury System, 10 OR. L. REV. 101 (1931). But see Dession, From Indictment to Information — Implications of the Shift, 42 YALE L.J. 163, 178-79 (1932) (the grand jury’s high rate of concurrence with the prosecutor demonstrates excellent pre-screening). A third possibility is that the burden of showing probable cause or a prima facie case, as opposed to guilt beyond a reasonable doubt, is so low that the rate of indictment is naturally high.

76. See supra note 61.


78. See In re Oliver, 333 U.S. 257, 273 (1948) (historical distrust of secret proceedings). Compare FED. R. CRIM. P. 6(e)(2) (general rule of secrecy for federal grand juries) with FED. R. CRIM. P. 26 (general rule that trial testimony shall be taken orally in open court).

79. See supra note 66.
be revealed to anyone outside the government. The reliability of grand jury testimony suffers as a result of this enhanced opportunity for exaggerations and omissions. These defects may be as damning to the defendant as outright lies, yet harder to detect and to rebut with a cold record.

c. **Evidentiary standards**— Differences in evidentiary standards at preliminary hearings and before grand juries also render testimony from the latter proceeding suspect for use at trial. First, while preliminary hearings usually follow trial rules on the admissibility of evidence, grand jury indictments may be based entirely on hearsay. As a result, a grand jury transcript used at trial could be double hearsay and its

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80. See supra note 3. Under the Jencks Act, 18 U.S.C. § 3500(e)(3) (1970), and FED. R. CRIM. P. 26.2, federal defendants cannot discover the grand jury testimony of a prosecution witness for possible use in impeaching the witness until the time of trial. When a witness will not be available at trial, however, FED. R. EVID. 804(b)(5) requires pretrial disclosure as a precondition for government use of the testimony:

[A] statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it. . . .

*But see* United States v. Garner, 574 F.2d 1141 (4th Cir.) (allowing use of grand jury testimony at trial without prior notice when the witness's refusal to testify was unexpected), *cert. denied*, 459 U.S. 936 (1978).

State procedures on disclosure vary; many formerly required a stringent showing for discovery, but most provisions today treat grand jury testimony like other recorded statements given by a witness. *See generally Criminal Procedure, supra* note 1, at 1167.

81. The Supreme Court has articulated five reasons for the grand jury secrecy rule:

1. To prevent the escape of those whose indictment may be contemplated;
2. To insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
3. To prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it;
4. To encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes;
5. To protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

*United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958) (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)). *See also* M. FRANKEL & G. NAFTALIS, supra note 2, at 23 ("Secrecy is a dark notion with Americans . . . [b]ut the secrecy of the grand jury is basically a good idea, as abused and perverted as it often is.").

82. See Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978) (procedural advantages for defendants at hearings contrasted with grand juries). *But see* FED. R. CRIM. P. 5.1(a) (finding of probable cause at the preliminary examination may be based entirely on hearsay).

83. The rules applicable to grand juries vary among jurisdictions. *See, e.g.*, Costello v. United States, 350 U.S. 359 (1956) (federal indictment based entirely on hearsay). *Cf.* United States v. Wander, 601 F.2d 1251, 1260 (3d Cir. 1979) (indictment to be dismissed if (1) non-hearsay evidence was readily available, (2) the jurors were misled to believe they were hearing testimony from personal knowledge, and (3) there is a high probability the jurors would not have voted for indictment had they heard the eyewitness); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (indictment dismissed based on government's needless use of hearsay); United States v. Arcuri, 405 F.2d 691 (2d Cir. 1968) (unjustified use of hearsay before grand jury disapproved).
reliability consequently diminished. In addition, prosecutors may ask leading questions before a grand jury, a technique which helps to mold a witness's answers along lines desired by the questioner. The resulting testimony will inevitably bear the traces of this pro-government bias, more or less overtly, and its reliability for trial use is dubious.

The similarities between grand jury proceedings and preliminary hearings — oath requirements, formal surroundings, and the contemporaneous creation of a verbatim transcript — encourage reliable testimony, but they constitute only meager guarantees, especially when witnesses have personal interests at stake. The factor most critical to safeguard reliability is the opportunity for cross-examination. Oath requirements may deter a witness from being less than candid on the stand, but only the presence of defense counsel and the opportunity for cross-examination can ensure that questionable testimony will be examined and exposed. Prosecutors cannot be expected to perform zealously the defense counsel's function. When a defense lawyer elects not to pursue cross-examination at a preliminary hearing or a trial for tactical reasons, a professional strategy judgment has been made based on the total circumstances surrounding a case: either the testimony does not appear very damaging, or there are other ways to attack it, or the potential for harm exceeds the likelihood of eliciting useful information. But in the grand jury setting, where all opportunity for

84. See generally McCormick, supra note 23, § 310; R. Lempert & S. Saltzburg, supra note 63, at 370.

If a witness's statements before the grand jury are hearsay and the transcript of that proceeding is admitted at trial, the trier of fact is twice removed from the declarant and ill-equipped to judge credibility. Double hearsay is admissible only when each level satisfies some exception to the hearsay rule. See, e.g., Fed. R. Evid. 805.

85. See, e.g., United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977) (leading questions can distort testimony). See also McKethan v. United States, 439 U.S. 936 (1978) (Stewart & Marshall, JJ., dissenting from denial of certiorari). Cf. Fed. R. Evid. 611(c) advisory committee note ("The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable.").


87. See supra notes 70-76 and accompanying text. See also Pointer v. Texas, 380 U.S. 400 (1964) (admitting prior testimony at trial held to violate the confrontation clause when the lack of appointed counsel at the preliminary hearing precluded effective cross-examination).

88. See supra note 69 and accompanying text.

89. Wigmore, supra note 23, § 1371.

Inferring this rational weighing of the utility of cross-examination at a preliminary hearing seems somewhat unrealistic, however, even if defense counsel is charged with the knowledge that the testimony may be admissible at a later trial. Given time pressures, counsel is likely to be less well prepared at the preliminary hearing stage and so less able to cross-examine meaningfully. Even if counsel is adequately prepared, discovery and plea-bargaining concerns may influence the choice whether to cross-examine or not at a pretrial hearing. See infra note 98.
cross-examination is denied, no similar inference of a calculated choice by the defense mitigates the testimony's possible unreliability.90

The secrecy91 of grand jury proceedings and the added flexibility of evidentiary rules92 might not, by themselves, fatally compromise the reliability of grand jury testimony if the opportunity existed for contemporaneous cross-examination. Although secrecy and flexible rules increase the possibility of unreliable testimony,93 the effectiveness of cross-examination as a tool for highlighting inaccuracy and incompleteness would offset these other defects.94

Thus, the overriding importance of the opportunity for cross-examination as a guarantor of reliable testimony outweighs the few "indicia of reliability" that grand jury and preliminary hearing proceedings share.95 Although the Roberts Court adopted a flexible and pragmatic approach for assessing reliability,96 vigorous defense counsel participation at the preliminary hearing was the key to its decision.97 Such participation is impossible before the grand jury, and when a grand jury witness is subsequently unavailable at trial, defense counsel cannot supplement the deficient record with live testimony. The admission of such evidence cannot be justified under the Roberts confrontation test.98

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90. The line drawn by courts has been whether there was an opportunity for cross-examination, not whether cross-examination was full and effective rather than de minimus. See, e.g., United States ex rel. Haywood v. Wolff, 658 F.2d 455 (7th Cir. 1981); United States v. Zurosky, 614 F.2d 779, 793 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980); United States v. Amaya, 533 F.2d 188 (5th Cir. 1976), cert. denied, 429 U.S. 1101 (1977). Cf. Ohio v. Roberts, 448 U.S. 56, 70, 73 n.12 (1980) (reserving the question whether de minimus questioning is sufficient to satisfy confrontation and rejecting an "effectiveness" inquiry except in unusual circumstances); Mancusi v. Stubbs, 408 U.S. 204, 214-15 (1972) (exploring the adequacy of cross-examination).

91. See supra notes 77-81 and accompanying text.
92. See supra notes 82-85 and accompanying text.
93. See supra notes 77-85 and accompanying text.
94. See supra note 71.
96. See supra notes 34-54 and accompanying text.
97. Roberts, 448 U.S. at 70-73.
98. See supra notes 40-45 and accompanying text. The striking difference in the degree of defense counsel participation at preliminary hearings and grand juries is difficult to justify in functional terms, because both proceedings serve to screen prosecutions. They are clearly not perfect equivalents — for example, grand juries are important investigative tools and preliminary hearings facilitate discovery — yet their functional similarity is substantial. See also supra note 89.
II. BEYOND ROBERTS

The Roberts confrontation analysis cannot always determine the admissibility of grand jury testimony when a witness is unavailable at trial. In United States v. Thevis,\textsuperscript{99} for example, the court found that the defendant had waived his confrontation rights by murdering a grand jury witness in order to prevent his testimony at trial. The deceased man’s testimony was therefore admitted.\textsuperscript{100} Similarly, the defendant’s waiver mooted confrontation analysis in United States v. Balano,\textsuperscript{101} where the grand jury witness was frightened into silence by threats and phone calls. A finding that confrontation has been waived,\textsuperscript{102} however,

\begin{itemize}
  \item \textsuperscript{99} 665 F.2d 616 (5th Cir.), cert. denied, 102 S. Ct. 3489 (1982).
  \item \textsuperscript{100}  Id. at 630-31.
  \item \textsuperscript{101} 618 F.2d 624, 628-30 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980).
  \item \textsuperscript{102}  The frequency with which defendants are found to have waived confrontation rights suggests some judicial impatience with the exclusion of relatively reliable grand jury testimony. Although it is clear that constitutional rights may be waived, Brookhart v. Janis, 384 U.S. 1 (1966), an “intentional relinquishment of a known right or privilege” is required, Johnson v. Zerbst, 304 U.S. 458 (1938). This standard encompasses implied as well as explicit waivers, but there is always a presumption against waiver. Glasser v. United States, 315 U.S. 60 (1942); Snyder v. Massachusetts, 291 U.S. 97 (1934). Settings in which confrontation waiver has been found effective include guilty pleas, see Boykin v. Alabama, 395 U.S. 238, 243 (1969); FED. R. CRIM. P. 11(c)(3) & (4), and repeated disruptive behavior by the defendant, Illinois v. Allen, 397 U.S. 337 (1970).

Confrontation waivers as prerequisites for the admission of grand jury testimony of unavailable witnesses have all been implied, based on evidence (or suspicion) that the defendant was responsible for the unavailability. Defendants have been deemed to “waive” the right either when they have intimidated a witness who has become too fearful to testify, United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977), or when they have caused the witness’s death, United States v. Thevis, 665 F.2d 616 (5th Cir.), cert. denied, 103 S. Ct. 57 (1982). The waiver determination is usually made at an evidentiary hearing and the standard of proof varies. Compare Thevis, 665 F.2d at 630-31 (“clear and convincing”), with United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) (“preponderance of the evidence”), cert. denied, 449 U.S. 840 (1980). The underlying premise of these cases is the equitable principle that a wrongdoer should not profit from his misdeeds. See Motes v. United States, 178 U.S. 458 (1900); F. Heller, supra note 23, at 105-06.

Even where holdings have not turned on a finding of confrontation waiver, discussion of the defendant’s responsibility for a witness’s unavailability often arises and seems to influence outcomes. See, e.g., United States v. Murphy, 696 F.2d 282 (4th Cir. 1982) (“strong indication” but no proof of defendants’ pressure; testimony admitted); Tolbert v. Jago, 607 F.2d 753 (6th Cir.) (grand jury testimony held admissible where the shooting of a key prosecution witness strongly suggested his purported loss of memory at trial was due to threats), cert. denied, 444 U.S. 1022 (1979); United States v. West, 574 F.2d 1131 (4th Cir. 1978) (deceased witness’s grand jury testimony held admissible in a drug prosecution where circumstances suggested a “contract” killing and the testimony was corroborated); United States v. Garner, 574 F.2d 1141 (4th Cir.) (grand jury testimony found admissible because of substantial guarantees of trustworthiness; reliance on threats to find waiver would be “speculative”), cert. denied, 439 U.S. 936 (1978); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) (grand jury testimony found inadmissible where there was no claim by the unavailable witness that the defendant threatened him); United States v. Mastrangelo, 533 F. Supp. 389 (E.D.N.Y. 1982) (no need to prove waiver by clear and convincing evidence where the government adequately demonstrated its particularized guarantees of
does not automatically mean that grand jury testimony is admissible. The due process clause imposes an independent check on the use of all evidence at a criminal trial, including grand jury testimony. This section focuses on what the nature and extent of this due process scrutiny should be.

Fairness is the fundamental concern of the due process clause. Those accused of a crime are assured a reasonable opportunity to defend themselves. In the context of evidentiary rules, for example, due process bars the use of evidence which is so unreliable that it fails to “afford the trier of fact a satisfactory basis for evaluating its truth.” Due process also requires that convictions be based only on evidence that, in the aggregate, establishes guilt beyond a reasonable doubt. Although the Supreme Court has never applied a due process analysis to the problems posed by grand jury testimony when the witness is unavailable, it has held that the appropriate approach to due process analysis in analogous areas requires an examination of the “totality of the circumstances.”

trustworthiness). Cf. Steele v. Taylor, 684 F.2d 1193, 1200-04 (6th Cir. 1982) (unavailable co-conspirator’s prior unsworn statement properly admitted where the defendants caused the unavailability through threats; court “must consider how far the standard of reliability and trustworthiness should be relaxed when the defendants are at fault”); United States v. Peacock, 654 F.2d 339 (5th Cir. 1981) (declarations of dead co-conspirators and murder victim admissible under the “lenient” Roberts standard). See generally Graham, supra note 25, at 140-43.

103. See supra note 15.


105. “[I]nflexible rules of exclusion [of evidence] that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm. . . . The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment.” Manson v. Brathwaite, 432 U.S. 98, 113 (1977) (citations omitted).

106. Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. . . .”)


108. Estelle v. Williams, 425 U.S. 501, 503 (1976) (“In the administration of criminal justice, courts must carefully guard against the dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.”) (citing In re Winship, 397 U.S. 358 (1970)).

109. See supra notes 17 & 18 and accompanying text.

By its very nature, the "totality of the circumstances" approach cannot be reduced to a neat formula yielding predictable results. A court's determination on admissibility must be informed by "reason, principle, and common human experience." A careful examination of the reliability of evidence is necessary even when the defendant is held to have waived his constitutional right under the confrontation clause. For although the defendant's decision to intimidate or even murder the witness suggests that the defendant believed the witness's trial testimony would have been damning and difficult to refute — and therefore is a factor to be considered — the act of waiver is not dispositive of the reliability of the unavailable witness's testimony. Waiver bears no logical relationship to the accuracy and completeness of the testimony elicited before the grand jury. The defendant's right to a fair trial under the due process clause, as well as society's institutional concern with fair and accurate criminal adjudications, requires a detailed inquiry into the probative value of the proffered grand jury testimony. The court's task is not to render a definitive pronouncement on the reliability of the grand jury testimony, but rather to determine whether it bears sufficient "indicia of reliability" for consideration by a properly instructed jury. Thus the threshold for admissibility is comparatively low.

The scope of the due process inquiry into reliability is significantly broader than the Roberts confrontation analysis. For confrontation

113. Berger v. United States, 295 U.S. 78, 88 (1935) ("[T]he two-fold aim [of criminal justice] is that guilt shall not escape or innocence suffer.").
115. "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Mason v. Brathwaite, 432 U.S. 98, 116 (1977). The Court has concluded that, within limits, jury instructions are a dependable safeguard. But see infra note 137.
116. See Simmons v. United States, 390 U.S. 377, 384 (1968) (exclusion required only if there is a "very substantial likelihood of irreparable misidentification"); United States v. Bernett, 495 F.2d 943, 967 (D.C. Cir. 1974) ("Trustworthiness is not a constitutional question at all; it is the classical question for the jury, under adequate instructions of course, unless the evidence is so blatantly unreliable that it should be excluded on the grounds of competence or prejudice."); Westen, supra note 21, at 1190, 1199. The check always remains that, in the aggregate, evidence must support a guilty verdict beyond a reasonable doubt to comport with due process. See supra note 108.
117. There is some ambiguity in the Roberts opinion as to the proper scope of the reliability inquiry. Initially, Justice Blackmun argued that if evidence does not fall within a "firmly rooted
purposes, traditional hearsay rules guide the assessment of reliability. The investigation is circumscribed, comporting with the practical need for precise and workable rules of evidence in criminal trials. In Roberts, for example, the Court explicitly declined to consider the parties' relationships or the inherent plausibility of the particular testimony at issue; it looked instead to the "accouterments [sic] of the preliminary hearing itself." This categoric approach provides trial judges with a rule of thumb. Due process, on the other hand, requires a full exploration of surrounding circumstances when a defendant is found to have waived the right to confront a grand jury witness. It is of course impossible to compile an exhaustive list of factors a court should consider under the due process approach. In every case, however, the witness, the nature of the testimony, corroboration, and subsequent events are significant areas of concern.

hearsay exception," it "must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66 (footnote omitted). His opinion proceeds to discuss the reliability of the preliminary hearing testimony at issue, comparing it with California v. Green, 399 U.S. 149 (1970), and focusing on the existence of vigorous defense questioning. This analysis seems to be an acknowledgment that this case, involving uncross-examined preliminary hearing testimony, is not governed by a "firmly rooted hearsay exception." See supra note 58. Later in the opinion, however, Justice Blackmun wrote: "[W]e reject [Roberts's] attempt to fall back on generalized principles of confrontation, and his argument that this case falls among those in which the Court must undertake a particularized search for 'indicia of reliability.'" Rather, the proper approach was to focus on the "guarantees of trustworthiness in the accouterments [sic] of the preliminary hearing itself," not on the "inherent reliability or unreliability" of the unavailable witness and her story. Roberts, 448 U.S. at 72-73. Applying the Court's analysis to the admissibility of grand jury testimony, the correct method for assessing compliance with confrontation seems to be an examination of its "accoutrements," i.e., a categoric approach. Lower courts, however, have focused on Roberts' "particularized guarantees" language and, after considering a broad range of factors, have often found grand jury testimony sufficiently reliable to meet the confrontation test in a particular case. See, e.g., United States v. Barlow, 693 F.2d 954 (6th Cir. 1982); United States v. Murphy, 696 F.2d 282 (4th Cir. 1982); United States v. Thevis, 665 F.2d 616 (5th Cir.), cert. denied, 103 S. Ct. 57 (1982); United States v. Mastrangelo, 533 F. Supp. 389 (E.D.N.Y. 1982). The problem with this interpretation of the Roberts test is that it renders the second step—reliability analysis—virtually indistinguishable from due process scrutiny. See supra note 110. A number of authors have, in fact, argued that confrontation encompasses only the first prong of the Roberts test—necessity—and that reliability is properly understood as a due process concern. See, e.g., California v. Green, 399 U.S. 149, 172-89 (1970) (Harlan, J., concurring); Westen, supra note 21; Note, supra note 40. Although this approach is conceptually sound, it has been specifically rejected by the Supreme Court. Roberts, 448 U.S. at 66-68 n.9.

119. Id. at 64.
120. Id. at 73. See also supra note 117.
121. See supra note 110.
122. This examination need not unduly burden the administration of justice. A due process hearing can often be combined with a hearing to determine whether confrontation has been waived. See supra note 102. See also Baker, supra note 70, at 549-55 (advocating a short due process hearing, with the burden of proof on the defendant if the hearsay falls within an exception). But see Natali, Green, Dutton and Chambers: Three Cases in Search of a Theory, 7 RUT.-CAM. L. REV. 43, 58-59 (1975) (arguing that due process hearings are an unworkable solution).
A. The Witness

The trier of fact must evaluate a declarant’s credibility whether or not he ever appears as a witness at trial. When the witness is unavailable, there are simply fewer tools for performing the job. Indirect indicators of credibility can satisfy the requirements of due process, however. Many judgments about the various elements of witness credibility — sincerity, perception, memory, and ability to communicate — can be formulated on the basis of information available to a judge at a due process hearing on admissibility. If circumstances suggest that the grand jury testimony is false or that the trier of fact will have no effective means of assessing the witness’s credibility, it should be excluded. If an examination reveals that the testimony is merely questionable, it should be admitted for consideration by the trier of fact along with the rest of the evidence, and weighted appropriately.

The relationship of the unavailable witness to the defendant and to the alleged crime is a key element under a due process “totality of the circumstances” approach because it can influence the assessment of the witness’s credibility. For example, a grand jury witness without personal ties to the defendant and who is not under investigation for a crime is more likely to testify accurately than a witness who is implicated in the crime or connected with the defendant. In United States v. Mastrangelo, the grand jury testimony of an unavailable witness was needed to identify the defendant as the purchaser of four

123. See Westen, supra note 65, at 598-99 (no absolute correlation exists between direct or indirect testimony and reliability; both should be evaluated under a single test). Considerations include consistency with other information in the case, internal consistency, and conformance with the trier of fact’s pre-existing knowledge. Weinstein, Probatve Force of Hearsay, 46 IOWA L. REV. 331 (1960).

124. A witness’s unavailability removes the opportunities for observation and cross-examination. Weinstein, supra note 123, at 333. But see United States v. Barlow, 693 F.2d 954 (6th Cir. 1982) (although the witness invoked the marital privilege and so was “unavailable,” her live testimony in a companion case gave the trial judge an opportunity to observe her; two juries had been empaneled to hear most of the evidence in both cases simultaneously).

125. Davenport, supra note 114; Weinstein, supra note 123, at 331; The Supreme Court, supra note 40, at 188-89.

126. See supra note 122. Examples of evidence bearing on credibility for which the declarant need not be present include information concerning reputation, inconsistent statements, prior acts, and motive to falsify.

127. See supra notes 115 & 116. Weinstein, supra note 123, at 336, 350 (courts should highlight hearsay for the untrained jury; where excludable hearsay is admitted without objection at trial, it should be given whatever weight it is entitled to under the circumstances). See also Westen, supra note 65, at 598-99 (juries are well-equipped to evaluate hearsay because its limitations are self-evident).

128. See United States v. Barlow, 693 F.2d 954 (6th Cir. 1982).

trucks in which drugs had been found. The court noted, in deciding
to admit the testimony, that the unavailable man was not under in­
vestigation as a participant in the crime and had not been granted
immunity. Thus, the witness “had no motive to testify falsely.”

Victims, in comparison, constitute a somewhat less reliable category
of witnesses because they were involved in the crime and are interested
in the trial outcome. The possible desire for revenge makes a victim
less trustworthy than the Mastrangelo “third party” witness. Never­
theless, victims may simply testify truthfully and rely on the criminal
justice system to punish wrongdoers. As a general rule, a victim’s
testimony is not so inherently unreliable that it violates due process.
In Stovall v. Denno, for example, the Supreme Court upheld the
admissibility of a suspect identification which was conducted at a
hospital because the victim was too severely injured to make the trip
to jail.

Accomplices, co-defendants, and paid informants constitute the least
reliable category of witnesses. Although it is difficult to assess the
degree to which their personal interests — both financial and penal
— will influence testimony before the grand jury, the accuracy and
completeness of their testimony is suspect. Such witnesses are likely
to shift blame or try to curry the prosecutor’s favor. If immunity is
granted, the total or qualified insulation from future criminal sanc­

130. Id. at 391. The witness had been murdered only hours before he was due to testify.
The judge declared a mistrial and a second trial was scheduled for ten months later. The pretrial
ruling on the admissibility of the grand jury testimony was based on a Roberts confrontation
analysis, not due process grounds; the court specifically rejected the argument that a finding
of confrontation waiver was necessary. Id. at 390 n.5.

131. Id. at 391.

132. See, e.g., Lenza v. Wyrick, 665 F.2d 804 (8th Cir. 1981); Morrow v. Wyrick, 646 F.2d
1229 (8th Cir.), cert. denied, 454 U.S. 899 (1981); United States v. Peacock, 654 F.2d 339
(5th Cir. 1981); United States v. Blakey, 607 F.2d 779, 786 (7th Cir. 1979).

133. See supra notes 128-131 and accompanying text.

134. See infra notes 135-136 and accompanying text.


136. The special status of victims is also recognized when assessing probable cause for search
and seizure under the fourth amendment. Information received from victims is considered more
trustworthy than that received from ordinary informants. CRIMINAL PROCEDURE, supra note 1,
at 289. The analogy is imperfect, however, because while a victim may be highly motivated to
be truthful in order to help police apprehend a wrongdoer, there is less disincentive to lie to
ensure conviction once the accused is in custody.

tain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount,
that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever
instructions the trial judge might give.” (citations omitted). This case involved a co-defendant’s
confession).

138. See, e.g., United States v. Murphy, 696 F.2d 282 (4th Cir. 1982); Black v. Woods,
651 F.2d 528 (8th Cir. 1981); United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977).
tions may encourage embellishment by the witness. Moreover, close connections to the defendant’s allegedly criminal activities may compromise reliability by making the witness more fearful of retaliation by the defendant or his associates. When these sorts of witnesses are involved, the court’s due process review must be especially scrupulous, for it is the testimony of accomplices and informants which is likely to be most incriminating and to play a vital role in meeting the government’s burden of proof.

The problems associated with the grand jury testimony of co-conspirators were explored in United States v. Gonzalez, where a convicted drug smuggler refused to testify at the trial of the man who allegedly hired him. The court characterized the witness’s dilemma as “either testifying and exposing his family and himself to retaliatory injury by other criminals, or not testifying and incurring prolonged confinement . . . for contempt.” “[T]he important thing to him,” the court concluded, “was that he gave an answer, be it truth or not.”

Even under the comparatively lenient due process standard, the high probability that such grand jury testimony will be unreliable makes it a likely candidate for exclusion at trial.

B. The Testimony

The substance of the grand jury testimony, and the manner in which it is elicited, can be a useful indication of its reliability. If the transcript reveals few leading questions, for example, a judge may reasonably conclude that the witness had sufficient opportunity to express fully and impartially all the facts within his knowledge. Although contemporaneous cross-examination is the preferred method for ensuring accuracy and completeness, a comprehensive and unbiased account may be worthy of consideration.

139. United States v. Thevis, 665 F.2d 616, 629 (5th Cir.), cert. denied, 103 S. Ct. 57 (1982). See also United States v. Barlow, 693 F.2d 954 (6th Cir. 1982) (embellishment is unlikely when it would harm the witness’s boyfriend).

140. See supra note 108 and accompanying text.

141. 559 F.2d 1271 (5th Cir. 1977).


143. See supra notes 115-16 and accompanying text.

144. This, of course, assumes that countervailing factors — such as the degree of detail and corroboration — fail to compensate for the questionable source. See infra notes 145-169 and accompanying text.

145. See supra note 85.

146. See California v. Green, 399 U.S. 149, 160-61 (1970) (contemporaneous cross-examination is not required if “the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.”). Cf. supra note 9 (cases finding grand jury testimony adequately reliable for admission, relying on theories other than due process).
A statement’s reliability is also enhanced if it is detailed and reflects first-hand experiences of the witness. In Spinelli v. United States, the Court focused on the degree of detail present in hearsay offered to establish probable cause for a search warrant. It noted that “when confronted with such detail, [a magistrate] could reasonably infer that the informant had gained his information in a reliable way.” Moreover, in a series of suspect identification cases, the Court has considered the level of certainty demonstrated by a witness and the length of time that elapsed between the events in question and the witness’s identification. These factors may also provide insight into the perception, memory, and sincerity of unavailable grand jury witnesses.

C. Corroboration and Subsequent Events

Examining the “totality of circumstances” requires looking beyond the witness’s identity and the characteristics of the testimony itself to events subsequent to the grand jury proceedings, including those occurring during the trial, and to the overall scheme of proof.


148. See, e.g., United States v. Barlow, 693 F.2d 954 (6th Cir. 1982). While detailed testimony from personal knowledge suggests that the witness’s perception and memory are trustworthy, it is not a guarantee of sincerity. Cf. FED. R. EVID. 602 (“personal knowledge” requirement); MCCORMICK, supra note 23, § 10 (observation requirement is “[o]ne of the earliest and most pervasive manifestations” of the common law’s “insistence upon the most reliable sources of information.”). See also supra notes 83-84 (double hearsay is less reliable).


150. Id. at 417 (discussing Draper v. United States, 358 U.S. 307 (1959)).


153. The Supreme Court has suggested that different standards would apply when assessing confrontation clause challenges, depending on whether or not evidence is “crucial” or “devastating.” Dutton v. Evans, 400 U.S. 74, 87 (1970) (plurality opinion). Although the Court never elaborated on this point and has not used the distinction in its later confrontation analysis, the “crucial/devastating” language (or a paraphrase) often appears in lower court opinions. See, e.g., United States v. Perez, 658 F.2d 654, 662 (9th Cir. 1981) (noting that the function of the characterization is “unclear”); Morrow v. Wyrick, 646 F.2d 1229, 1231, 1234 (8th Cir.), cert. denied, 454 U.S. 899 (1981); United States v. Marks, 585 F.2d 164, 168-69 (6th Cir. 1978); United States v. Roberts, 583 F.2d 1173, 1176 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); United States v. Rogers, 549 F.2d 490, 500-01 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); United States v. Yates, 524 F.2d 1282, 1286 n.10 (D.C. Cir. 1975); United States v. Leonard, 494 F.2d 955, 969-70 (D.C. Cir. 1974); Park v. Huff, 493 F.2d 923, 925 (5th Cir. 1974), cert. denied, 423 U.S. 824 (1975); United States v. Adams, 446 F.2d 681, 684 (9th Cir.), cert. denied, 404 U.S. 943 (1971).
Events occurring after grand jury proceedings may influence an assessment of the trustworthiness of testimony. In some cases, witnesses have reaffirmed or recanted their previous testimony; in others they have disappeared, died, or refused to be sworn at trial. Although definitive conclusions about the accuracy of the testimony or the credibility of the witness cannot be drawn from such developments, failure to testify under suspicious circumstances inevitably suggests that credible and damaging testimony would have been elicited at trial. The plausibility of an explanation for a witness’s change of heart or absence — or the lack of an explanation — may reflect on the trustworthiness of his earlier testimony before the grand jury. Such developments are therefore a factor relevant to due process analysis.

More importantly, the significance of a grand jury transcript will vary from trial to trial. It may be offered to prove a key element of the offense, or only to establish some subsidiary fact. The meanings of “crucial” and “devastating” are unclear. Evidence might be “crucial” in that it relates directly to an essential element of the offense, rather than merely to some relevant but peripheral point. Or, evidence relating to any fact might be “crucial” because it is the sole way to prove that fact. Given this second interpretation, it is anomalous to require more corroboration to establish the reliability of “crucial” evidence, because the very existence of corroboration renders the disputed evidence less “crucial.” “Devastating” may be synonymous with “crucial” in this context, although it suggests a concern with prejudice as well as with sufficiency.

In light of the Roberts approach to confrontation, the “crucial/devastating” characterization seems irrelevant: evidence that meets the threshold of the reliability test ought to be admitted, whether “crucial” or cumulative. See supra notes 40-54 and accompanying text. In contrast, the significance of a particular piece of evidence is important for due process purposes. Due process imposes a requirement that guilt be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Therefore, if evidence of questionable reliability plays a minimal role in the overall scheme of proof and is corroborated, the due process standard may be satisfied, while if it is crucial or devastating, it may offend due process. This interpretation of the crucial/devastating characterization also solves a practical problem. When a party seeks to introduce a particular item of evidence, the judge may find it difficult to evaluate its significance immediately. Once the prosecution has presented its entire case, however, the relative value of the evidence will become apparent. See generally The Supreme Court, supra note 40, at 196-99.

Cf. United States v. Barlow, 693 F.2d 954 (6th Cir. 1982) (comprehensive discussion of relevant considerations, applying Roberts confrontation analysis).


159. The problem of completeness remains as well. See supra note 73.

160. See supra note 102.

161. Compare United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) (grand jury testimony
be corroborating evidence, or the grand jury testimony may be the sole item of support for a particular point.\textsuperscript{162} When corroborating evidence establishes the accuracy of factual assertions contained in the testimony, its reliability is enhanced. In \textit{United States v. Garner},\textsuperscript{163} for example, an unavailable\textsuperscript{164} co-conspirator's grand jury testimony concerning joint travel was corroborated by a traveling companion's live testimony as well as by airline tickets, customs declarations, passport endorsements, and hotel registrations.\textsuperscript{165} In many cases, however, the corroboration will be only partial, and it will not ensure that the uncorroborated parts of the testimony are equally accurate or that the testimony is complete and unbiased. Nevertheless, corroborating evidence militates in favor of admitting grand jury testimony.\textsuperscript{166} It indicates that at least some aspects of the testimony are accurate and it provides the defendant with alternative opportunities to attack the government's case\textsuperscript{167} when one of the usual mechanisms — cross-examination — is limited.\textsuperscript{168} The ability to defend is an essential component of due process fairness.\textsuperscript{169}

CONCLUSION

The admission of the grand jury testimony of a witness who is unavailable at trial implicates competing values that are fundamental to the criminal justice system. On the one hand, society has a strong interest in pursuing criminal prosecutions and assuring that the best evidence

\textsuperscript{162} Compare \textit{United States v. Barlow}, 693 F.2d 954 (6th Cir. 1982) (grand jury testimony used to rebut defendant's alibi).

\textsuperscript{163} 574 F.2d 1141 (4th Cir. 1978), \textit{cert. denied}, 449 U.S. 936 (1980).

\textsuperscript{164} The witness in this case did take the stand and answered some questions posed by defense counsel, though he refused to respond to others posed by both the defense and the prosecution. \textit{Id.} at 1143.

\textsuperscript{165} \textit{Id.} at 1144-45.


\textsuperscript{167} See, \textit{e.g.}, \textit{United States v. West}, 574 F.2d 1131, 1135 (4th Cir. 1978) (although the grand jury witness had died, the government agents who had supervised his undercover work appeared and were subject to cross-examination; defense counsel also presented evidence of his past criminal record to impeach the missing witness).

\textsuperscript{168} \textit{See supra} notes 70-76 and accompanying text.

\textsuperscript{169} \textit{See supra} note 106.
will be available for the prosecution to use at trial. On the other hand, the Constitution assures defendants of a fair opportunity to defend themselves within the adversary model. This represents both a symbolic commitment to basic notions of justice and a practical concern for accurate and efficient criminal adjudication. Applying the confrontation test of the Roberts Court, however, the grand jury testimony of an unavailable witness must be excluded at trial. Even if a defendant waives the right to confront, due process requires that evidence lacking minimal guarantees of reliability not be admitted.

There is little reason to fear that this understanding of Roberts will result in many lost convictions, for alternatives to the use of grand jury transcripts exist: the prosecutor can memorialize critical testimony by holding preliminary hearings\(^\text{170}\) or by taking depositions.\(^\text{171}\) Ultimately, convictions must be based on proof of guilt beyond a reasonable doubt; given the requirements of confrontation and due process, the grand jury testimony of an unavailable witness has a limited role to play in tipping the balance.

—Barbara L. Strack

\(^{170}\) In Roberts, for example, Ohio conducted the preliminary hearing in addition to a grand jury proceeding. See supra note 31. See also supra note 2 (states tending to switch from indictment to information). See generally Criminal Procedure, supra note 1, at 20-21 (jurisdictional variations in the use of preliminary hearings, grand juries, and double review).

\(^{171}\) The right to take depositions in criminal cases is usually more limited than in civil litigation. Compare, e.g., Fed. R. Crim. P. 15(a) with Fed. R. Civ. P. 26(a). See generally Criminal Procedure, supra note 1, at 1168-70.