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## Constitutional Law—Sixth Amendment—Significance of Testimony Constitutes a Factor in Determining Right of Confrontation

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CONSTITUTIONAL LAW—SIXTH AMENDMENT—SIGNIFICANCE OF TESTIMONY CONSTITUTES A FACTOR IN DETERMINING RIGHT OF CONFRONTATION. *Lackey v. State*, 288 Ark. 225, 703 S.W.2d 858 (1986).

On November 11, 1982, Stanley and Susan Lackey drove fifteen-year-old Theresa Baraque to a secluded location where they allegedly raped her. A doctor who examined Theresa after the incident testified at the Lackeys' trial as to what Theresa had told him about the details of the rape. The doctor also testified about Theresa's physical and mental condition during the examination. The Lackeys were convicted of rape. The Arkansas Supreme Court reversed the conviction and ordered a new trial.<sup>1</sup>

During the interval between the Lackeys' initial conviction and the retrial, the doctor who had examined Theresa and testified at the first trial moved out of state. While preparing for the second trial, the State attempted to locate the doctor by contacting the hospital where he had previously worked. When this proved unsuccessful, the State contacted various clinics where he might have relocated. Eventually, the State located the doctor in Birmingham, Alabama. At first he indicated a desire to return for the second trial; however, when it was too late for compulsory measures, he changed his mind. Unable to secure the doctor's presence at the retrial, the State had his testimony read from the transcript of the first trial.

The jury convicted the Lackeys a second time, sentencing Stanley to forty years in prison and Susan to ten years. The Lackeys appealed, contending that the use of the transcript of the doctor's prior testimony violated their sixth amendment right of confrontation.

The Arkansas Supreme Court again reversed the convictions. The court held that the reading of the prior testimony to the jury violated the Lackeys' sixth amendment right of confrontation, since the witness' prior testimony was extensive and significant, and since the State had failed to sufficiently demonstrate that the witness was unavailable. *Lackey v. State*, 288 Ark. 225, 703 S.W.2d 858 (1986).

The right of confrontation originated at common law, long before the sixth amendment.<sup>2</sup> The purpose of confrontation at common law

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1. *Lackey v. State*, 283 Ark. 150, 671 S.W.2d 759 (1984).

2. F. HELLER, *THE SIXTH AMENDMENT* 104 (1951).

was two-fold. First, and most importantly, the right of confrontation was designed to eliminate hearsay testimony by allowing cross-examination of witnesses.<sup>3</sup> Second, it allowed judges and juries to observe the witness' demeanor while testifying, enabling them to weigh his credibility more effectively.<sup>4</sup>

Although the right of confrontation appeared absolute, there were exceptions. The most notable exception was that former testimony, which had been subject to cross-examination and taken in the presence of the accused, could be used if the witness was dead or otherwise unavailable.<sup>5</sup> The common law also allowed exceptions for dying declarations, testimony of witnesses who later became insane, and instances in which the accused prevented the witness from testifying.<sup>6</sup>

The sixth amendment to the United States Constitution insures that the accused in criminal prosecutions enjoys the right to confront the witnesses against him.<sup>7</sup> Almost all state constitutions embody this same principle of confrontation for criminal prosecutions.<sup>8</sup> These provisions in the state constitutions were necessary because the sixth amendment to the United States Constitution did not apply to the states.<sup>9</sup>

Early interpretations of the sixth amendment, and of similar provisions in state constitutions, indicated that the aim of these provisions was to secure the rights that existed at common law for citizens of the United States.<sup>10</sup> In *Mattox v. United States*<sup>11</sup> the Supreme Court made it clear that the Court was bound to interpret the Constitution in the light of the law that existed at the time of its adoption.

The Court in *Mattox* discussed the common law exceptions for dying declarations and prior testimony. It pointed out that the primary objective of the constitutional provision was to prevent depositions from being used against the accused in place of personal examination and cross-examination.<sup>12</sup> The Court held that a witness' testimony from a previous trial is admissible if, due to his death, the witness is unavaila-

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3. 5 J. WIGMORE, EVIDENCE § 1395 (Chadbourn rev. 1974).

4. *Id.*

5. C. McCORMICK, EVIDENCE § 253 (3d ed. 1984).

6. *Id.*

7. U.S. CONST. amend. VI.

8. 5 J. WIGMORE, *supra* note 3, § 1397 n.1.

9. *West v. Louisiana*, 194 U.S. 258, 262 (1904), *overruled*, 380 U.S. 400, 406 (1965).

10. *See, e.g.*, *Motes v. United States*, 178 U.S. 458 (1900); *Mattox v. United States*, 156 U.S. 237 (1895); *Reynolds v. United States*, 98 U.S. 145 (1878); *State v. Mc O'Blenis*, 24 Mo. 416 (1857); *Lambreth v. State*, 23 Miss. 32 (1852).

11. 156 U.S. 237 (1895).

12. *Id.* at 242-43.

ble at a later trial.<sup>13</sup>

The Court, in *Reynolds v. United States*,<sup>14</sup> applied another common law exception to the constitutional right of confrontation. The Court stated that the Constitution does not protect a defendant from an absent witness' earlier testimony if the witness is absent due to the defendant's wrongful actions.<sup>15</sup> However, if the witness is absent due to the negligence of the prosecution rather than the defendant's actions, his earlier testimony is not admissible.<sup>16</sup>

The early cases illustrate that the Court's focus concerning the confrontation clause is on cross-examination. Prior testimony of a deceased or absent witness was almost always admitted in criminal prosecutions when the right of cross-examination had been satisfied at the prior trial or deposition.<sup>17</sup> This rule applied not only in cases involving interpretation of the sixth amendment, but also in the states' interpretations of their own constitutional provisions.<sup>18</sup>

The right of confrontation remained relatively unchanged until 1965, when the Supreme Court held in *Pointer v. Texas*<sup>19</sup> that the sixth amendment is applicable to the states through the fourteenth amendment. The Court stated that the right of cross-examination, which is associated with confrontation, is an essential and fundamental requirement for a fair trial.<sup>20</sup> Because of the fundamental nature of the right of confrontation, the Court in *Pointer* held that the right was violated when testimony was used from a preliminary hearing in which the defendant had no opportunity to cross-examine the witness.<sup>21</sup> The fundamental right of confrontation is also violated when the prosecution introduces out-of-court statements of a witness who was not subject to cross-examination.<sup>22</sup> This right applies even though the witness is present at trial but refuses to be cross-examined.<sup>23</sup>

Although the Court in *Pointer* held that the right of confrontation is a fundamental and essential requirement for a fair trial,<sup>24</sup> it has al-

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13. *Id.* at 244.

14. 98 U.S. 145 (1878).

15. *Id.* at 158.

16. *Motes v. United States*, 178 U.S. 458, 474 (1900).

17. 5 J. WIGMORE, *supra* note 3, § 1398.

18. *Id.* at 186 n.4.

19. 380 U.S. 400 (1965).

20. *Id.* at 405.

21. *Id.* at 407.

22. *Douglas v. Alabama*, 380 U.S. 415 (1965).

23. *Id.*

24. 380 U.S. at 405.

lowed exceptions to the right in cases involving prior testimony.<sup>25</sup> In *Barber v. Page*<sup>26</sup> the Court stated that for a witness' prior testimony to fall within an exception to the confrontation clause, the State must prove that the witness is unavailable. The Court explained in *California v. Green*<sup>27</sup> that once the witness has been shown to be unavailable, the trial court should examine the testimony for indicia of reliability. Only when both of these requirements have been met will the Court allow an exception to the confrontation clause.<sup>28</sup>

The Court's decision in *Barber* established that the mere absence of the witness from the jurisdiction is not sufficient to show that the witness is unavailable.<sup>29</sup> The Court stated that the State must make a good faith effort to obtain the witness' presence at trial before he will be deemed unavailable.<sup>30</sup> The Court later stated in *Ohio v. Roberts*<sup>31</sup> that the lengths to which the State must go to produce a witness is a question of reasonableness.

A witness, whose location in another state is known, is not unavailable unless the State makes an attempt to secure his presence, using compulsory measures if necessary.<sup>32</sup> On the other hand, a witness whose location is known to be in another country may be deemed to be unavailable without requiring futile attempts by the State to produce him.<sup>33</sup> If a witness is thought to be in another state, but his location is unknown, a good faith effort by the State to locate the witness is sufficient.<sup>34</sup>

Even if a witness is unavailable, his statement will not be admissible unless it bears adequate indicia of reliability.<sup>35</sup> The Court in *Roberts* stated that reliability can be inferred in a case in which the evidence falls within a firmly rooted hearsay exception.<sup>36</sup> However, in

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25. *Ohio v. Roberts*, 448 U.S. 56 (1980); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Dutton v. Evans*, 400 U.S. 74 (1970), *vacated in part*, 408 U.S. 938 (1972); *California v. Green*, 399 U.S. 149 (1970); *Barber v. Page*, 390 U.S. 719 (1968).

26. 390 U.S. 719 (1968).

27. 399 U.S. 149 (1970). *See also Ohio v. Roberts*, 448 U.S. 56 (1980) (testimony from a preliminary hearing that was subject to cross-examination bore sufficient indicia of reliability to be admissible).

28. *Roberts*, 448 U.S. at 56; *Mancusi*, 408 U.S. at 204.

29. 390 U.S. at 722.

30. *Id.* at 724.

31. 448 U.S. at 74, (citing *California v. Green*, 399 U.S. at 789 n.22 (1970)).

32. *Barber*, 390 U.S. at 724.

33. *See Mancusi*, 408 U.S. at 211.

34. *Barber*, 390 U.S. at 725.

35. *Id.*

36. 448 U.S. at 57.

*Dutton v. Evans*,<sup>37</sup> the Court rejected the idea that the confrontation clause is nothing more than the codification of the hearsay rule.

The purpose of the search for indicia of reliability is to assure a satisfactory basis for evaluating the truth of a prior statement.<sup>38</sup> In its analysis of reliability, the Court has focused on whether the defendant had an opportunity to cross-examine the witness when the prior statement was given.<sup>39</sup> A statement made at a preliminary hearing or former trial, with an adequate opportunity and motive for cross-examination, will be considered reliable if its maker becomes unavailable.<sup>40</sup> The Court has also examined other factors affecting reliability, including personal knowledge of the witness, the role of the defendant, and whether the witness had a motive to lie.<sup>41</sup>

Arkansas historically has equated confrontation with cross-examination.<sup>42</sup> It is also well settled in Arkansas that the right of confrontation may be dispensed with when a witness, who is unavailable, has given testimony that is reliable.<sup>43</sup>

The Arkansas Supreme Court has adopted the United States Supreme Court's requirement of a good-faith effort to secure the presence of a witness before he is deemed to be "unavailable."<sup>44</sup> In *Satterfield v. State* the Arkansas Supreme Court held that because the State failed to contact a witness whose location was known, it had not made a good faith effort to obtain his presence.<sup>45</sup> Similarly, a lack of a good faith effort was found in *Looper v. State*,<sup>46</sup> when the State obtained a subpoena but failed to make any attempt to follow up on it.

The unavailable witness' testimony must also be reliable. In *Scott v. State* the court held that reliability, in the case of testimony from a previous trial or preliminary hearing, depends on the circumstances surrounding the taking of the testimony.<sup>47</sup> The court in *Scott* held that

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37. 400 U.S. 74, 89 (1970), *vacated in part*, 408 U.S. 938 (1972).

38. *Green*, 399 U.S. at 165.

39. *Roberts*, 448 U.S. at 73; *Mancusi*, 408 U.S. at 216. In his dissenting opinion in *United States v. Inadi*, 106 S. Ct. 1121, 1129-35 (1986), Justice Marshall pointed out that there is a split of opinion concerning what constitutes "indicia of reliability." He noted that some courts require an assessment of the circumstances of each statement, while others hold that any statement admitted under FEDERAL RULE OF EVIDENCE 801(d)(2)(E) qualifies as reliable.

40. *Roberts*, 448 U.S. at 73.

41. *Dutton*, 400 U.S. at 89.

42. *Smith v. State*, 200 Ark. 1152, 143 S.W.2d 190 (1940).

43. *Scott v. State*, 272 Ark. 88, 92, 612 S.W.2d 110, 112 (1981); *Satterfield v. State*, 248 Ark. 395, 398, 451 S.W.2d 730, 732 (1970).

44. *Scott*, 272 Ark. at 92, 612 S.W.2d at 112.

45. 248 Ark. at 400, 451 S.W.2d at 733.

46. 270 Ark. 376, 605 S.W.2d 490 (Ark. App. 1980).

47. 272 Ark. at 93, 612 S.W.2d at 113.

testimony taken at a preliminary hearing was reliable when a motive and opportunity existed to develop that prior testimony through cross-examination.<sup>48</sup> The court also examined other factors affecting reliability that have been enunciated by the United States Supreme Court.<sup>49</sup>

In 1980 the Arkansas Supreme Court in *Holloway v. State*<sup>50</sup> deviated from the accepted standards of availability and reliability. The court justified this deviation by its characterization of the witness' testimony as not critical.<sup>51</sup> The court in *Holloway* allowed the absent witness' testimony to be used, even though the State had failed to make a good faith effort to produce him.<sup>52</sup>

In *Lackey v. State* Justice Newbern began the Arkansas Supreme Court's analysis by noting that the State conceded that it did not make a good faith effort to obtain the doctor's presence at the second trial.<sup>53</sup> This concession saved the court the necessity of determining whether or not the witness was available. The court then compared *Lackey* with the factually similar case of *Holloway*.<sup>54</sup>

The court noted that in *Holloway* the doctor who examined the victims had moved out of the state after testifying in the first trial. The State was unable to locate him in time to compel him to testify at the second trial.<sup>55</sup> The court determined that the State did not make a good faith effort to secure the witness' presence.<sup>56</sup> The court concluded, however, that the doctor's testimony was not critical. Therefore, its use at the second trial was harmless error.<sup>57</sup> The court in *Holloway* also stated that the confrontation clause is not absolute and does not require that a criminal defendant be confronted by each witness against him every time he is tried.<sup>58</sup>

The court in *Lackey* distinguished *Holloway* by concentrating on the extent and significance of the doctor's testimony.<sup>59</sup> In *Holloway* the

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48. *Id.* at 95, 612 S.W.2d at 114.

49. *Id.* at 94-95, 612 S.W.2d at 113. See *Dutton v. Evans*, 400 U.S. 74 (1970) *vacated in part*, 408 U.S. 938 (1972).

50. 268 Ark. 24, 594 S.W.2d 2 (1980).

51. *Id.* at 28, 594 S.W.2d at 4.

52. *Id.*

53. 288 Ark. 225, 226, 703 S.W.2d 858, 859 (1986).

54. *Id.* at 227, 703 S.W.2d at 859-860 (citing *Holloway v. State*, 268 Ark. 24, 594 S.W.2d 2 (1980)).

55. *Lackey*, 288 Ark. at 227, 703 S.W.2d at 859 (citing *Holloway*, 268 Ark. at 28-29, 594 S.W.2d at 4).

56. *Lackey*, 288 Ark. at 227, 703 S.W.2d at 859.

57. *Lackey*, 288 Ark. at 227, 703 S.W.2d at 860 (citing *Holloway*, 268 Ark. at 28-29, 594 S.W.2d at 4).

58. *Holloway*, 268 Ark. at 28-29, 594 S.W.2d at 4.

59. *Lackey*, 288 Ark. at 227-28, 703 S.W.2d at 860.

doctor merely testified that the women had recently had sex. In *Lackey* the doctor testified not only about the alleged victim's physical and mental condition during the examination but also about what she had told him concerning the rape.<sup>60</sup>

The court in *Lackey* indicated that the right of confrontation is a trial right.<sup>61</sup> It stated that this witness' testimony was so significant that the jury, which was to decide the defendants' fate, should have observed the witness' demeanor while testifying.<sup>62</sup> The court then held that the reading of the testimony to the jury violated the defendants' right of confrontation, since the State's showing of the witness' unavailability was insufficient and the witness' prior testimony was significant.<sup>63</sup>

In a dissenting opinion, Justices Hays examined the State's efforts to locate the witness.<sup>64</sup> He determined that the State did act in good faith, even though it was too late to use compulsory process when the witness decided not to return.<sup>65</sup> In Justice Hays' opinion, the confessed lack of good faith was more tacit than real, and was made only in reliance on the precedent set in *Holloway*.<sup>66</sup> Justice Hays compared the doctor's testimony in *Holloway* to that in *Lackey*. He concluded that the testimony in *Lackey* was, due to its nature and extent, less damaging to the defendants than that which was admitted in *Holloway*.<sup>67</sup>

*Lackey* is significant because it follows the path set in *Holloway* in which the court based the right of confrontation on the importance of the witness. The court in *Holloway* based the right of confrontation on its own judgment of the witness' importance, rather than on the established standards of availability and reliability.<sup>68</sup> This allowed the court to use testimony that otherwise would have been inadmissible, since it was determined that the State did not act in good faith to produce the witness. In *Lackey* the State relied on *Holloway* and admitted that it had not made a good faith effort to locate the witness, believing that the testimony would be allowed anyway.<sup>69</sup> If the State had not relied upon *Holloway*, but had proven that the witness was unavailable, the

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60. *Id.*

61. *Id.* at 228, 703 S.W.2d at 860 (citing *Barber v. Page*, 390 U.S. 719, 725 (1968)).

62. *Lackey*, 288 Ark. at 228, 703 S.W.2d at 860.

63. *Id.*

64. *Id.* at 230, 703 S.W.2d at 861 (Hays, J., dissenting).

65. *Id.*

66. *Id.* at 229, 703 S.W.2d at 861.

67. *Id.*

68. *Holloway*, 268 Ark. at 24, 594 S.W.2d at 2.

69. *Lackey*, 288 Ark. at 229, 703 S.W.2d at 861.



result in *Lackey* should have been different. In *Holloway* the State failed to prove that the witness was unavailable. Only after the court found that the witness was available did it look at the importance of his testimony.<sup>70</sup> Finding the witness unavailable in *Lackey* would have distinguished *Holloway* and allowed the court to examine the reliability of the testimony.<sup>71</sup>

In the dissenting opinion in *Lackey*, Justice Hays examined the State's efforts and concluded that it did make a good faith effort to obtain the witness' presence at the second trial.<sup>72</sup> The State's efforts in *Lackey* were more comprehensive than in other cases in which the court found a lack of a good faith effort.<sup>73</sup> Therefore, had the State not confessed a lack of a good faith effort, the witness probably would have been found to be unavailable.

A finding that the witness was unavailable in *Lackey* would have allowed the State to use his testimony because it contained sufficient indicia of reliability.<sup>74</sup> The witness testified at the first trial, and the defendants had an adequate opportunity to cross-examine him.

Although the majority in *Lackey* characterized confrontation as a trial right,<sup>75</sup> observations by a jury are merely a method of ensuring the reliability of the testimony.<sup>76</sup> Because the reliability of the witness in *Lackey* was established through cross-examination and jury observation at the first trial, observation at the second trial was unnecessary.

The court's decision in *Lackey* makes the right of confrontation depend upon the court's judgment as to the importance of the witness' testimony. In *Lackey* and *Holloway*, the witness' testimony was similar; yet, the court reached different conclusions.<sup>77</sup> Rather than add this additional subjective consideration to the confrontation issue, the court should continue to use the traditional standards of availability and reliability.

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70. *Holloway*, 268 Ark. at 28, 594 S.W.2d at 4.

71. *See, e.g.*, *Ohio v. Roberts*, 448 U.S. 56 (1980) (even when declarant is unavailable, his statement is admissible if it bears "indicia of reliability"); *Scott v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981) (state evidentiary rules can come within exception to right of confrontation if witness is unavailable and evidence is reliable).

72. 288 Ark. at 230, 703 S.W.2d at 862 (Hays, J., dissenting).

73. *See Holloway*, 268 Ark. at 28-29, 594 S.W.2d at 4; *Satterfield*, 248 Ark. at 399, 451 S.W.2d at 733.

74. *See, e.g.*, *Roberts*, 448 U.S. at 66; *Scott*, 272 Ark. at 92, 612 S.W.2d at 113.

75. 288 Ark. at 228, 703 S.W.2d at 860 (citing *Barber v. Page*, 390 U.S. 719, 725 (1968)).

76. 5 J. WIGMORE, *supra* note 3, §§ 1395-99.

77. *Lackey*, 288 Ark. at 229, 703 S.W.2d at 861; *Holloway*, 268 Ark. 24, 594 S.W.2d 2.