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PRELIMINARY HEARING AND THE RIGHT TO CONFRONTATION: *DISHEROON v. STATE*

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In all criminal cases the defendant has the right to be confronted by the prosecution's witnesses.[1] This right to confrontation has ancient roots[2] and has long been held to be "one of the fundamental guarantees of life and liberty."[3] The Supreme Court in *Pointer v. Texas*,[4] held that a defendant's right to confrontation was made obligatory on the states by the fourteenth amendment. The Court declared that the sixth amendment right of an accused to confront the witness against him is a fundamental right, essential to a fair trial, and to deprive an accused of this right is a denial of the fourteenth amendment's guarantee of due process of law.[5]

The requirement of confrontation is said to have two main purposes which are (1) to secure to the defendant an opportunity for cross-examination, and (2) to allow the trier of fact to observe the demeanor of the witness while testifying. Of the two, the opportunity for cross-examination is more important. While courts are cognizant of the import of this right of confrontation they have also held that neither the presence of the witness nor the ability to cross-examine at trial is constitutionally required in every case.[6] The courts have long held that the sixth amendment cannot be literally construed.[7] The primary reason given for holding that the right of confrontation is not

1. U.S. CONST., amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . ."

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

3. Kirby v. United States, 174 U.S. 47, 55 (1898).

4. 380 U.S. 400 (1968).

5. *Id.* at 403; *See, e.g.*, Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971) [hereinafter cited as Griswold].

6. C. MCCORMICK, EVIDENCE 484 (1954).

7. Pointer v. Texas, 380 U.S. 400, 404 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); Mattox v. United States, 156 U.S. 237 (1895); Gov't of Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967).

absolute is that a literal interpretation would exclude all hearsay evidence, allowing only evidence presented by witnesses present in open court.[8] A defendant's right of confrontation is subject to certain exceptions. Most, if not all, of these exceptions are based on the idea of protecting the public interest and preventing a "manifest failure of justice"[9] where evidence offered is subjected to and meets certain tests of reliability. The recognized exceptions to a defendant's right of confrontation are aligned closely with the exceptions to the rule against admission of hearsay evidence.[10] Recognized exceptions to a defendant's right of confrontation include the admissibility against an accused of dying declarations,[11] admissions of co-conspirators,[12] and former testimony of a now unavailable witness when an opportunity for cross-examination has been afforded.[13]

The nature of the criminal system in our courts is to favor the accused yet some courts in dealing with the accused's right of confrontation have denied him this right on the same basis that they would allow evidence to be introduced in a civil case as an exception to the hearsay rule.[14] Although both such exceptions exist because of the inherent reliability of the evidence offered, confrontation, unlike the numerous exceptions to the hearsay rule, is more than a direct guarantee of reliability; it incorporates an element of fairness, of affording the defendant an opportunity to test the evidence against him, no matter how reliable that evidence may seem.[15] "The orthodox principles supporting the admission of certain types of hearsay evidence do not satisfy the policies underlying the right of confrontation."[16]

Extensive litigation has arisen over the admission of testimony taken at a former judicial proceeding. The requirements for its admissibility are that the testimony must have been given under circumstances affording the defendant a "complete and adequate opportunity" to cross-examine the witness against him,[17] that the witness whose testimony is offered in evidence must be shown to be actually unavailable

8. 378 F.2d at 547; Griswold, *supra* note 5.
9. 156 U.S. at 244.
10. *See, e.g., The Supreme Court, 1967 Term,* 82 HARV. L. REV. 63, 236 (1968); Note, *Confrontation and the Hearsay Rule,* 75 YALE L.J. 1434, 1436 (1966).
11. Mattox v. United States, 156 U.S. 237 (1895).
12. Dutton v. Evans, 400 U.S. 74 (1970).
13. Mattox v. United States, 156 U.S. 237 (1895).
14. *Id.* at 240.
15. Note, 56 GEO. L.J. 939 (1968).
16. *Id.* at 941.
17. Pointer v. Texas, 380 U.S. 400, 407 (1968).

to give testimony at the present trial, and that the prosecution has made a diligent effort to locate such witness.[18] This criteria has been applied to testimony elicited at varying stages of the judicial process, including a former trial[19] and a preliminary hearing.[20] There is a sharp distinction between the nature and functions of these two steps in the legal process and courts should not be too quick to view the reported testimony from each as equally satisfying a defendant's right of confrontation. In *Barber v. Page*, the Court stated:

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.[21]

Witnesses who have testified against the defendant in a former trial of the same case have been subjected to cross-examination by the same party, with the same motive, and in the same forum. Aside from the absence of demeanor evidence, these similarities make the prior testimony virtually identical to present live testimony.[22] To exclude the reported testimony from a former trial of the same case "would be carrying . . . constitutional protection to an unwarrantable extent."[23] However, is the preliminary hearing a sufficient forum for confrontation such that testimony taken and recorded therein may be used at the defendant's trial and not be violative of his constitutional right of confrontation?

In *Disheroon v. State*,[24] the defendant was convicted for the offense of unlawful delivery of marijuana and was sentenced to ten years imprisonment. The state's case against the defendant rested primarily on the testimony of one witness, an undercover police officer, who allegedly had purchased marijuana from the defendant. After the defendant's arrest, a preliminary hearing was held at which the undercover police officer testified; the defendant's attorney waived cross-examination. At trial, this witness had disappeared and the state was unable to produce him to testify. The trial court, over defendant's ob-

18. Mattox v. United States, 156 U.S. 237 (1895); Barber v. Page, 390 U.S. 719 (1968).
19. Mattox v. United States, 156 U.S. 237 (1895).
20. Barber v. Page, 390 U.S. 719 (1968).
21. *Id.* at 725.
22. Mattox v. United States, 156 U.S. 237 (1895).
23. *Id.* at 243.
24. 518 P.2d 892 (Okla. Crim. App. 1974), *cert. denied*, 419 U.S. 881 (1974).

jection, permitted the state to introduce into evidence the testimony of the witness which was given at the preliminary hearing, holding that the defendant had been afforded an "opportunity" to cross-examine the witness at the earlier hearing and that the state had used "due diligence" in an effort to produce the witness. Since the defendant had waived cross-examination at the hearing, no cross-examination went before the jury.

The Oklahoma Court of Criminal Appeals affirmed the lower court decision, relying heavily on the language of an earlier Oklahoma decision, *In re Bishop*.[25] There, the court held that the defendant's failure to cross-examine the witness at the preliminary hearing may have constituted a waiver of the right of confrontation at trial because the court found that the prosecution had made a diligent effort to locate the witness and such witness was actually unavailable.[26] The court further reasoned that since the witness was unavailable the "proper circumstances" existed and there was "justification" for holding that defendant's opportunity to cross-examine at the preliminary hearing sufficiently satisfied his constitutional right of confrontation;[27] but in so holding it did not clearly define what those "circumstances"[28] were which justified allowing such testimony other than that the state had made a "diligent effort" to locate the now missing witness.

In Oklahoma it has long been held that testimony of a witness taken at a preliminary hearing, where opportunity for cross-examination was afforded (whether or not exercised), can be used against the defendant at a subsequent trial without violating the accused's constitutional right to confrontation.[29] Such evidence has been treated much the same as the "reported testimony" exception to the hearsay rule. The requirements for admissibility are very similar, with one exception: in the criminal case there must be a showing by the state of "due diligence" in trying to locate the witness.[30]

25. 443 P.2d 768 (Okla. Crim. App. 1968).
26. *Id.* at 769.
27. *Id.* at 772.
28. Barber v. Page, 390 U.S. 719 (1968).
29. Newton v. State, 403 P.2d 913 (Okla. Crim. App. 1965); Rath v. State, 56 Okla. Crim. 179, 38 P.2d 963 (1935); Bailey v. State, 55 Okla. Crim. 349, 30 P.2d 714 (1934); Rich v. State, 51 Okla. Crim. 418, 1 P.2d 805 (1931); Tobin v. State, 49 Okla. Crim. 412, 293 P. 575 (1931); Valentine v. State, 16 Okla. Crim. 76, 194 P. 254 (1921).
30. The right of confrontation, guaranteed by the sixth amendment, was obviously thought of by the framers of the Constitution as an essential right of every individual so as to insure him a fair trial. By including it in the Bill of Rights, the framers surely did not intend such a right could be overcome without just cause and overwhelming necessity. Griswold, *supra* note 5.

By allowing the introduction at trial of testimony taken at a preliminary hearing upon the state's proof of compliance with those requirements set out in *Disheroon*,[31] confrontation becomes more nearly a rule of evidence rather than a constitutionally guaranteed right. The court's decision, equating a face-to-face encounter at the preliminary hearing with confrontation at trial, apparently rests on the fact that the witness' testimony was elicited in a courtroom atmosphere at the hearing, under oath, subject to the penalty for perjury, and available to be cross-examined by the accused. These factors are presumed to establish its reliability. "These factors are not insignificant but by themselves they fall far short of satisfying the demands of constitutional confrontation."[32] To satisfy the requirements of confrontation, the accused must be afforded a "complete and adequate opportunity" to cross-examine the witnesses against him.[33] The bare existence of an opportunity for cross-examination supplies only a limited indicator of the opportunity's adequacy, especially where the prior proceeding was a preliminary hearing.

The character of the witness and his connection with the offense with which the accused is charged are vital qualitative factors in determining the adequacy of the opportunity to cross-examine. This is particularly so when the witness is a police informer or an undercover police officer; his cross-examination is vital to the defense, for he and the accused may have been the only participants in the transaction constituting the alleged offense, the remainder of the prosecution's evidence consisting only of circumstantial support for the witness' testimony.[34] In such a situation, it is of prime importance to the defense that the ultimate trier of fact be able to view the witness' demeanor upon cross-examination in order that proper weight may be given to his testimony. "The informer's veracity may be the only chink in the prosecution armor, attack on his credibility the only method of piercing it."[35]

The court in *Disheroon* implied that the defendant's failure to cross-examine the witness at the preliminary hearing may have constituted a waiver of his right of confrontation at a subsequent trial; such waiver was deemed to be "an intentional relinquishment of a known

31. 518 P.2d at 894.

32. California v. Green, 399 U.S. 149, 199 (1970) (dissenting opinion); People v. Gibbs, 255 Cal. App. 2d 739, 63 Cal. Rptr. 471 (Cir. Ct. App. 1967).

33. Pointer v. Texas, 380 U.S. 400 (1968).

34. People v. Gibbs, 255 Cal. App. 2d 739, 63 Cal. Rptr. 471, 475 (Cir. Ct. App. 1967).

35. *Id.* at 476.

right."[36] However, the court apparently overlooked the language of the Supreme Court in *Barber:*

> The State argues that petitioner waived his right to confront Woods at trial by not cross-examining him at the preliminary hearing. That contention is untenable. . . . To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court's definition of a waiver as an "intentional relinquishment or abandonment of a known right or privilege."[37]

Further, in *Motes v. United States*,[38] the Court held that the mere unavailability of a witness who had testified at the preliminary hearing was insufficient to overcome the accused's right of confrontation unless such unavailability was procured or fostered by or on the behalf of the defendant.[39] In that case, the witness' unavailability was due to the negligence of the prosecution. It would seem appropriate for the state to use recognizance or surety as a means of assuring a witness' appearance at trial in order that the rights of a defendant be more adequately protected, especially if the courts are inclined to admit into evidence the transcript of a witness' testimony taken at a preliminary hearing.[40]

It is conceded that in situations of necessity the importance of the public interest may qualify the right of a defendant to be condemned only by witnesses the jury can see and appraise;[41] however, the accused's right to confrontation cannot be justly qualified or denied simply on the basis that the state has shown a diligent effort to locate the witness and that such witness is actually unavailable. This is especially so where the testimony was taken at a preliminary hearing, the nature of cross-examination at which has been recognized as being less searching than that engaged in at trial. The court must go beyond the unavailability and due diligence tests in allowing prior testimony into evidence. It must consider a number of important factors, which include the intended purpose of the confrontation clause, the nature of

36. 518 P.2d at 894; *cf.* Commonwealth v. Mustone, 233 N.E.2d 1 (Mass. 1968). The court held that by failing to cross-examine a witness at preliminary hearing, the defendant was deemed to have "assumed the risk" that the witness would die or become otherwise unavailable before trial.

37. 390 U.S. at 725 (citations omitted). Waiver of a federally guaranteed right is a federal question controlled by federal law. Brookhart v. Janis, 384 U.S. 1, 6 (1966).

38. 178 U.S. 458 (1900).

39. *Id.* at 471.

40. Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164 (1965).

41. Case cited note 9 *supra.*

the former proceeding, the manner in which that proceeding was actually conducted, the character of background of the unavailable witness, and the circumstances or the efficient cause of his unavailability.

The general purpose and the extent of the confrontation clause have been interpreted in differing language by the courts. The most widely accepted statement of the purpose of the confrontation clause is found in *Mattox v. United States*:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[42]

It is recognized that the above cited right of confrontation is not absolute,[43] and that the constitutional guarantee has, in cases permitting reported testimony to be introduced into evidence against the accused, been limited to the assurance of the right to cross-examine the witness before his testimony may be used at a later trial.[44] However, is merely a "complete and adequate" opportunity for cross-examination at the prior proceeding sufficient to overcome a defendant's constitutional right to confrontation where such prior proceeding was a preliminary hearing?[45]

The right to confrontation is a trial right.[46] This principle was set forth by the Court in *Turner v. Louisiana* in which it was held:

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial pro-

42. 156 U.S. 237, 242-43 (1895).

43. Cases cited note 7 *supra*.

44. Pointer v. Texas, 380 U.S. 400 (1968); Douglas v. Alabama, 380 U.S. 415 (1968).

45. *See, e.g.*, 5 J. WIGMORE, EVIDENCE §§ 1396, 1397 (3d ed. 1940). Professor McCormick noted that the constitutional guarantees of confrontation only state that the accused must be confronted with witnesses against him, not that the accused must be confronted with the witnesses against him at final trial. C. MCCORMICK, EVIDENCE 484 (1954).

46. *In re* Bishop, 443 P.2d 768 (Okla. Crim. App. 1968); Barber v. Page, 390 U.S. 719 (1968).

> tection of the defendant's right of confrontation, of cross-examination, and of counsel.[47]

A preliminary hearing is not a trial;[48] it is merely a step toward other proceedings[49] and whether it can ever provide "full judicial protection" to the accused is subject to dispute. The purpose of a preliminary hearing is to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it.[50] If the reviewing magistrate finds that the prosecution has shown "probable cause," the accused is bound over for trial. It often appears that the magistrates allow effectuation of the binding over function of a preliminary hearing to override all other considerations, apparently reasoning that the hearing is only preliminary to trial and not of crucial importance to the accused since he will be given an opportunity to establish his innocence at trial.[51] "Consequently, magistrates and reviewing courts tend to deal with matters at the preliminary hearing mechanically without considering the interests or functions involved."[52] By making "binding over" (upon a showing of probable cause) the main purpose of the preliminary hearing, the courts tend to limit their scope of analysis to the interest of the prosecution while giving only lip service to the phrase that the hearing is held "primarily for the benefit of the accused."[53] In *People v. Gibbs* it was stated:

> [In preliminary examination,] the prosecution need only show "probable cause," a burden vastly lighter than proof beyond a reasonable doubt. Committing magistrates usually accept the prosecution evidence at face value, leaving credibility judgments for the trial of guilt.[54]

The use of reported testimony from a former trial has long been recognized as an exception to the right of the accused to confront a

47. 379 U.S. 466, 472 (1968).

48. Application of Melton, 342 P.2d 571 (Okla. Crim. App. 1959) (dictum); Inverarity v. Zumwalt, 97 Okla. Crim. 294, 262 P.2d 725 (1953); State v. Harris, 44 Okla. Crim. 116, 279 P. 925 (1929); McCurdy v. State, 39 Okla Crim. 310, 264 P. 925 (1928); *Ex parte* Beville, 6 Okla. Crim. 145, 117 P. 725 (1911).

49. A preliminary hearing is not a trial since it does not result in a final disposition of guilt or innocence; it merely determines whether a trial is necessary.

50. McAllister v. State, 97 Okla. Crim. 167, 260 P.2d 454 (1953); Lyon v. State, 55 Okla. Crim. 286, 28 P.2d 598 (1934); Neff v. State, 39 Okla. Crim. 133, 264 P. 649 (1928).

51. Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164 (1965).

52. *Id.* at 164.

53. *Id.* at 177; *Ex parte* Miller, 82 Okla. Crim. 315, 169 P.2d 574 (1946) (dictum).

54. 255 Cal. App. 2d 739, 63 Cal. Rptr. 471, 475 (1967).

witness when testifying.[55] A former trial generally provides the "full judicial protection" guaranteed the defendant by the sixth amendment, with the possible exception of the ability of the trier of fact to judge the demeanor of the witness.[56] There are inherent differences between a full-fledged trial and a preliminary hearing which should be considered before courts equate the two in allowing reported testimony from such prior proceeding into evidence.[57] It would be the rare case where confrontation at a preliminary hearing could compensate for the absence of confrontation at trial.[58] In *Barber* the Court recognized the differences between the nature of the two proceedings stating that a preliminary hearing was a much less searching exploration of a case due to its limited function of determining probable cause.[59] The court in *Gibbs*[60] aptly described a preliminary hearing and its limitations:

> In most California criminal prosecutions the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouement—an order holding the defendant for trial. Only television lawyers customarily demolish the prosecution in the magistsrates court.[61]

The primary confrontation right of an accused is the right to cross-examine the witnesses against him. In *Mattox* and cases following it the courts have assumed that the confrontation requirement is satisfied even though there was no cross-examination during the trial as long as the critical right to cross-examination has been exercised at some other stage of the criminal process. Various tests have been stated by the Court which must be met before the prior testimony may be admitted at trial; prior testimony has been held to be allowable as long as the defendant had "a complete and adequate opportunity"[62] to cross-examine or as long as the defendant's right to cross-examination was not "significantly limited"[63] at the prior proceeding. Given the nature and purpose of a preliminary hearing, as opposed to a trial, is the cross-examination at that stage of the judicial process constitutionally adequate?

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55. *Supra* note 20.
56. *Supra* notes 21, 22.
57. In California v. Green, 399 U.S. 149 (1970), the court found there was no significant difference in a trial and a preliminary hearing for purposes of confrontation as long as a defendant's right of cross-examination was not significantly limited and that the right of cross-examination then afforded provides substantial compliance as long as the declarant's inability to give live testimony is in no way the fault of the state.
58. *Id.* at 190 (dissenting opinion).
59. 390 U.S. at 725.
60. 255 Cal. App. 2d at —, 63 Cal. Rptr. at 474.
61. *Id.* at 475 n.2.
62. Pointer v. Texas, 380 U.S. 400, 407 (1968).
63. California v. Green, 399 U.S. 149 (1970).

Justice Brennan, dissenting in *California v. Green*,[64] stated: "Cross-examination at the [preliminary] hearing pales beside that which takes place at trial." The rationale behind his statement is that (1) as noted *supra*, the objective of a preliminary hearing is merely to establish probable cause, not guilt or innocence beyond a reasonable doubt, and therefore the defense has little reason to show that the evidence offered does not conclusively establish guilt; (2) neither the defense nor the prosecution is eager before trial to disclose its case by extensive examination at this stage; (3) lengthy preliminary hearings cannot easily be accommodated either by the court or counsel and such would be required if extensive cross-examination were to be had; and (4) both the defense and prosecution have generally had inadequate time before hearing to prepare for extensive examination.

In *Government of Virgin Islands v. Aquino* the distinction between cross-examination at preliminary hearing and at trial was explored by the court; it stated:

> Were the question one of first impression it would seem that a clear distinction should be recognized between testimony given at a prior trial and testimony given at a preliminary hearing. In the case of a prior trial the goal of the cross-examiner is precisely the same as that which he would have followed at the second trial—acquittal of the defendant. At the preliminary hearing, however, the cross-examiner is much more narrowly confined by the nature of the proceeding. The government's aim is merely to show a prima facie case and its tactic is to withhold as much of its evidence as it can once it has crossed that line. The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case remains still in doubt. The cross-examiner therefore is in a far different position than he would be at trial, where the government must go beyond its prima facie case to convince the jury of the defendant's guilt beyond a reasonable doubt. Everyday experience confirms the difference, for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at trial. Credibility is not the issue at the preliminary hearing as it is in a trial. All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing.[65]

64. *Id.* at 197 (dissenting opinion).
65. 378 F.2d 540, 549 (3d Cir. 1967).

While recognizing these inherent differences and the limitations of preliminary hearing cross-examination, the court allowed the transcript of a witness' preliminary hearing testimony upon the following reasoning: "Nevertheless, we must accept for present purposes the rule which makes no distinction between testimony given at a prior trial and the testimony given at a preliminary hearing."[66] Other courts have recognized the deficiencies of preliminary hearing cross-examination and held that such was lacking in constitutional validity.[67] Even where the defendant has been afforded the right to cross-examination, the "greatest legal engine ever invented for discovery of the truth,"[68] the inability of the defendant to cross-examine at trial because of the witness' unavailability may have a significant effect on the "integrity of the fact finding process."[69]

In addition to the primary right to confrontation, *i.e.* cross-examination, authorities usually agree that confrontation includes the secondary right of demeanor evidence; but most have been hesitant to hold it a constitutionally mandatory right.[70] Demeanor is of the utmost importance in the determination of the credibility of the witness.

> The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words.[71]

If the court allows into evidence reported testimony from a preliminary hearing, the defendant can in no way "test the recollection and sift the conscience" of a witness regarding the facts of an alleged offense if that witness is unavailable. The defense cannot probe the story of an unavailable witness and attempt to expose facts and discredit his testimony.

As noted above, much of the confusion in courts' discussion of the right to confrontation is caused by the similarities between the confron-

66. *Id.* at 549.

67. 255 Cal. App. 2d 739, 63 Cal. Rptr. 471 (Cir. Ct. App. 1967). "That the speaker of the words therein recorded had been cross-examined on another day, before another trier of fact, and for another purpose—i.e., to establish probability, not guilt—was without practical significance to the ultimate trier of fact and we find the process lacking in constitutional validity." People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 427, 75 Cal. Rptr. 782, 786 (1969).

68. 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

69. Berger v. California, 393 U.S. 314, 315 (1969).

70. Professor Wigmore believed that the demeanor requirement should be met whenever possible, but found that, unlike the requirement of cross-examination it is merely desirable but not necessary. 5 J. WIGMORE, EVIDENCE § 1395 (3d ed. 1940).

71. Gov't of Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967).

tation clause and the hearsay rule and the unavailability exceptions under each.[72] Some authorities have concluded that any valid exception to the hearsay rule is also a valid exception to the confrontation clause.[73] Such is clearly erroneous, for the purposes behind the two rules are far from identical. While both are intended to exclude evidence that has not been tested by cross-examination, the confrontation clause has additional purposes including that of giving the accused the opportunity to have the witness face the trier of fact when giving his testimony and when it is being tested by cross-examination.

The courts' decisions as to the admissibility of testimony taken at a preliminary hearing ultimately depend on whether the interest of the prosecution in presenting relevant evidence, and therefore upholding the public interest, outweighs the defendant's constitutional right to confrontation.

> The State, obviously, does need to introduce relevant evidence. But the "necessity" that justifies the admission of pretrial statements is not the prosecution's need to convict, but the factfinder's need to be presented with reliable evidence to aid its determination of guilt or innocence. Whether a witness' assertions are reliable ordinarily has little or no bearing on their admissibility for they are subject to the corrective influences of his demeanor and cross-examination. If, however, there is no possibility that his assertions can be so tested at trial then their reliability becomes an important factor in deciding whether to permit their presentation to the factfinder. When a probability exists that incriminating pretrial testimony is unreliable, its admission, absent confrontation, will prejudicially distort the factfinding process.[74]

Courts should not be too quick to accept testimony from a preliminary hearing. For, although the right to confrontation is not absolute, the sixth amendment does at least require the courts to inquire into and make a critical examination of the facts and circumstances of each case.

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72. As a result of these similarities it has frequently been held that the right of confrontation may not be invoked to exclude evidence otherwise acceptable under the legitimate exceptions to the hearsay rule. *See, e.g.*, Mattox v. United States, 156 U.S. 237 (1895); Kay v. United States, 255 F.2d 476 (4th Cir. 1958); Matthews v. United States, 217 F.2d 409 (5th Cir. 1954); United States v. Leathers, 135 F.2d 507 (2d Cir. 1943).

73. Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 747 (1965).

74. California v. Green, 399 U.S. 149, 201 (1970) (dissenting opinion).