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Evidence

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EVIDENCE

I. CHARACTER EVIDENCE

In *Johns v. United States*,[1] the District of Columbia Court of Appeals addressed whether a defendant places his character at issue when he claims self-defense in a homicide case and introduces evidence of the victim's violent character. In a case of first impression, the court held that, unless a defendant expressly puts his own character at issue, he is free to introduce evidence of the victim's violent character to support a claim of self-defense without putting his own character at issue.

In its decision, the court provided a lucid analysis of the evidentiary problems that arise in such a situation. First, the court noted the fundamental rule of character evidence: "The prosecution may not present evidence of the defendant's [bad] character, in order to show likelihood of committing a crime, unless the defendant first places her own [good] character in issue."[2] This rule is based upon fundamental fairness; to allow the prosecution to introduce evidence of a defendant's bad character merely because he testifies on his own behalf would "prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[3]

Second, the court recognized the relevance of the victim's violent character to the defendant's claim of self-defense.[4] Evidence of a victim's violent character "may be relevant to the two basic self-defense issues: (1) the objective question [of] who was the aggressor, and (2) the subjective evaluation of the defendant's state of mind: whether she was in reasonable fear of imminent great bodily injury."[5] Finally, the court considered the rule of evidential parity; if the defendant introduces evidence of the defendant's

1. 434 A.2d 463 (D.C. 1981).

2. *Id.* at 468 (citing Michelson v. United States, 335 U.S. 469, 475-79 (1948)); E. CLEARY, MCCORMICK ON EVIDENCE § 191, at 454 (2d ed. 1972 & Supp. 1978); 1 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 229, at 489 (13th ed. 1972 & Supp. 1981).

3. *Johns*, 434 A.2d at 468 (quoting *Michelson*, 335 U.S. at 476); *see* E. CLEARY, *supra* note 2, at 454; 1 J. WIGMORE, EVIDENCE § 57, at 456 (3d ed. 1940 & Supp. 1980).

4. *Johns*, 434 A.2d at 468 (citing United States v. Burks, 470 F.2d 432, 434 (D.C. Cir. 1972); Evans v. United States, 277 F.2d 354, 355 (D.C. Cir. 1960); United States v. Akers, 374 A.2d 874, 877 (D.C. 1977); Hurt v. United States, 337 A.2d 215, 217 (D.C. 1975) (per curiam); King v. United States, 177 A.2d 912, 913 (D.C. 1962); C. TORCIA, *supra* note 2, § 236)).

5. *Johns*, 434 A.2d at 469.

good character, the prosecution is entitled to rebut this evidence with evidence of the defendant's bad character.

Noting that the issue was one of first impression, the court examined approaches used by other jurisdictions. A few states follow the minority "Missouri" rule, which states that when the defendant puts the victim's character at issue to substantiate a self-defense claim, he opens inquiry into his own character to the extent relevant to the issue of self-defense.[6] However, the prevailing view holds that evidence of a defendant's character can never be introduced unless the defendant expressly places his own character at issue.[7] The court of appeals agreed with the latter view, concluding that it prevented the jury from improperly using evidence of the defendant's violent character to offset his self-defense claim. Thus, it ruled that evidence of the defendant's own bad character was inadmissible unless the defendant first placed his character at issue.[8]

The *Johns* rule follows the approach taken by the Federal Rules of Evidence. Under Rule 404,[9] evidence of a person's character is not admissible for the purpose of proving that he acted similarly in a particular situation. However, the rule permits a defendant in a criminal case to introduce evidence of a pertinent character trait of his own character,[10] or that of his victim.[11] Once the defendant offers evidence relating to the violent character of the victim, the door to character evidence relating to the victim is opened. The prosecution is then entitled to offer evidence of the victim's peaceful character.[12]

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6. *Id.* at 469.

7. Roberson v. State, 91 Okla. Crim. 217, 218 P.2d 414 (Okla. Crim. App. 1950) (allowing proof of accused's bad character in such cases unfairly prejudicial); Keith v. State, 612 P.2d 977 (Alaska 1980) (following FED. R. EVID. 404(a), proof of victim's and accused's character are not interrelated); 22 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5237 (2d ed. 1981) (common law rule contrary to the Missouri rule).

8. *Johns*, 434 A.2d at 471.

9. FED. R. EVID. 404 provides in pertinent part:

> (a) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
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> (1) CHARACTER OF ACCUSED. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
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> (2) CHARACTER OF VICTIM. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor
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> . . . .

10. FED. R. EVID. 404(a)(1).

11. FED. R. EVID. 404(a)(2).

12. *See, e.g.*, United States v. Dennis, 625 F.2d 782 (8th Cir. 1980). In this extortion case, the government was permitted to introduce evidence of defendant's prior acts to show

The analytical symmetry of the *Johns* rule offers criminal defendants the greatest protection possible by allowing them to present evidence of the victim's character for self-defense purposes, without fear of being prejudiced by having their own prior bad acts recited before the jury. If the issue is whether the defendant had "reasonable fear" of the victim or whether the victim was the aggressor in the incident, a defendant should not be restrained from introducing relevant evidence for fear that he may be opening the door to such evidence against himself.

II. Witness Unavailability

Under the sixth amendment to the United States Constitution, a defendant has the right to "be confronted with the witnesses against him." In protection of this right, hearsay statements are usually inadmissible as they deny the defendant an opportunity to confront and cross-examine the declarant. In *Ohio v. Roberts*,[13] however, the Supreme Court recently declared that where the declarant is "unavailable," and where his statement bears "adequate indicia of reliability," it may be admitted into evidence without violating the sixth amendment. In 1981, the District of Columbia Court of Appeals decided three opinions that addressed the admissiblity of hearsay statements in situations where the declarant was allegedly unavailable.

In *Harrison v. United States*,[14] the District of Columbia Court of Appeals, sitting en banc, interpreted *Roberts* to allow the admission of certain hearsay statements even where used to prove an essential element of the government's case in chief. The court upheld defendant's robbery conviction although the conviction was based on statements of the victim who was not present at trial. Defendant was found guilty of robbing an eighty-three year old man at a bus station as he disembarked from a bus.[15] A bus company employee testified that he had observed the defendant's accomplice distract the victim while the defendant removed an envelope from the victim's overcoat.[16] Although security guards were summoned, defendant quickly left the area.[17] Approximately fifteen minutes later, the victim reported to a police officer that he had "lost" an envelope containing $6,000;

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the reasonableness of the victim's fears. The court held that prior acts may be relevant even when they are not identical to those the victim fears, although similarity is an important consideration in determining whether the evidence's probative value outweighs its prejudicial effect.

13. 448 U.S. 56 (1980).
14. 435 A.2d 734 (D.C. 1981) (en banc).
15. *Harrison*, 435 A.2d at 735.
16. *Id.*
17. *Id.*

he was at that time confused and disoriented and unaware that he had been robbed.[18] Although defendant was subsequently arrested, the envelope was never recovered.

At defendant's trial, the government had to prove that the defendant had taken something "of value" as an essential element of the crime.[19] The only evidence to establish that the envelope had contained $6,000 was the statement made by the victim to the police officer at the bus station. A detective testified that he had spoken with the victim's daughter, who lived with her father in Louisiana and was advised that the victim was undergoing treatment for a nervous condition and could not attend the trial.[20] The trial court ruled the victim unavailable and, in lieu of his testimony, admitted the police officer's report about the victim's statements at the bus terminal.[21] The court of appeals reversed, concluding that admission of the officer's testimony deprived defendant of his right to confrontation because the statement was used to prove an essential element of the government's case.[22] When *Ohio v. Roberts* was thereafter decided, however, the court of appeals vacated its decision and agreed to reconsider the case. When it reached the same result, it agreed to reconsider the case again en banc.[23]

On rehearing en banc, the court[24] affirmed defendant's conviction. Judge Kern, writing for the plurality, set out the test enunciated by the Supreme Court in *Roberts* for determining whether hearsay statements are admissible:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred in a case where the evidence falls within a firmly rooted hearsay exception.[25]

The Supreme Court, therefore, established a two-part test. Before hearsay statements may be admitted in evidence and not run afoul of the sixth

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18. *Id.*

19. *See* D.C. CODE ANN. § 22-2901 (1981).

20. 435 A.2d at 735. Both the police officer and the prosecutor spoke with the victim's daughter; neither spoke with anyone else.

21. *Id.*

22. Harrison v. United States, 407 A.2d 683 (D.C. 1979) (vacated Jan. 21, 1981). "We have grave difficulty, at least where the declarant is living, in permitting a hearsay statement to be used to supply an essential element of the government's case." *Id.* at 687.

23. *Harrison*, 435 A.2d at 734.

24. Four judges joined in a plurality opinion, two judges concurred only in the result, and two judges dissented. Judge Gallagher did not take part in the proceedings.

25. *Harrison*, 435 A.2d at 736 (citing *Roberts*, 448 U.S. at 66).

amendment the declarant must be unavailable to testify and his statement must be reliable.

The plurality first examined the reliability of the victim's statements. It found that his statement was a "spontaneous utterance" and thus admissible as an exception to the hearsay rule. Drawing on the Supreme Court's teaching that reliability can be inferred where the evidence falls within a firmly rooted hearsay exception, the court deemed the "spontaneous utterance" exception to be firmly rooted and resting on such a solid foundation as to permit an inference of reliability for confrontation purposes.[26] It was only at this point that the court questioned whether the government had carried its burden of showing that the witness was unavailable. It noted the sparseness of the government's evidence showing that it had tried to locate and produce the witness. In light of the victim's advanced age, his uncertain medical condition, and alleged inability to travel the great distance to court, the court was finally persuaded, however, that the victim had been properly ruled unavailable to testify.[27]

The plurality finally commented on the statement in *Roberts* that, under some circumstances, "the utility of the trial confrontation [is] so remote that it [does] not require the prosecution to produce a seemingly available witness."[28] Although carefully pointing out that it was not fashioning a rule that would relieve the government of showing witness unavailability where the utility of trial confrontation was remote, the plurality did posit that cross-examination in this case would have been of minimal value; the defendant probably would not have refuted the victim's assertion that the envelope had contained money.[29]

Concurring in the judgment only, Judge Ferren sharply criticized the plurality's finding of unavailability.[30] In his view, it was improper to rely on the daughter's statement as to her father's inability to travel. The government should have interviewed the victim or his physician, rather than rely on the opinion of a protective daughter whose desire to save her father from stress might distort her judgment as to his actual ability to testify.[31] Moreover, Judge Ferren took issue with the plurality's comment that cross-examination would have been of little use. The court was in no position to make such a speculative judgment.[32] Nonetheless, because the de-

26. *Id.* at 736.
27. *Id.*
28. *Id.* at 736-37.
29. *Id.* at 737.
30. *Id.* at 737-38 (Ferren, J. concurring).
31. *Id.* at 738.
32. *Id.*

fendant had not challenged the alleged unavailability of the victim, and because Judge Ferren agreed that the statements fell within the spontaneous utterance exception to the hearsay rule, he concurred in the result.[33]

In a vigorous dissent, Judge Mack, joined by Judge Kelly, argued that although the confrontation clause and rules governing hearsay statements were built on the same premises, the two had never been equated.[34] Thus, a statement admissible as a hearsay exception might nevertheless violate the sixth amendment confrontation clause. The preference for face-to-face confrontation implicit in the sixth amendment restricts the range of admissible hearsay statements by requiring the prosecutor to produce the witness or show him to be unavailable.[35] And, once the witness is unavailable, his statements will only be admitted if shown to be reliable. That the statements qualify under an exception to the hearsay rule is not, in Judge Mack's opinion, necessarily indicative of reliability. Since the Supreme Court has not determined that the spontaneous utterance exception is "firmly rooted," the reliability of such statements should be tested under the four-part analysis set forth by the Supreme Court in *Dalton v. Evans*. Courts should determine whether:

> (1) the statement contained no express assertion about past fact and so carried on its face a warning to the jury against giving it undue weight; (2) declarant's knowledge for making the out-of-court statement [was] well established; (3) declarant's recollection of the crime [was] good; and (4) declarant [had] any motive to misrepresent himself.[36]

Measured against these factors, Judge Mack would have ruled the victim's on-the-scene statements unreliable.[37] The declarant was in a position to know the contents of the envelope, he had no motive to lie, and his statement arguably contained no express assertion of past fact. However, the victim's memory could have been faulty. In view of his advanced age and disoriented, nervous condition, sufficient doubt was cast on the accuracy of his statements to require the opportunity to confront and cross-examine at trial.[38]

The *Harrison* decision is troublesome because it allows a prosecutor to

33. *Id.* at 738-39.
34. *Id.* at 739 (Mack, J. dissenting).
35. *Id.* at 740.
36. 400 U.S. 74, 88-89 (1970).
37. *Harrison*, 435 A.2d at 740.
38. *Id.* Historically, exceptions to the confrontation guarantee emerged only where the declarant had died. Thus, the dissenting judges in *Harrison* found insufficient trustworthiness and accuracy in the victim's statements to justify a departure from the strict unavailability requirement.

make only a minimal showing of unavailability where the declarant's statements meet evidentiary standards of reliability. Under the court's analysis, sixth amendment protections will be satisfied whenever the prosecutor determines that the declarant is unavailable and the out-of-court statement may be classified as an exception to the hearsay rule. This analysis, however, ignores the Supreme Court's emphasis in *Roberts*, that reliability may be inferred only where the hearsay exception is "firmly rooted"; in all other circumstances, additional indications of reliability must be shown. The *Harrison* court failed to develop criteria for determining whether a hearsay exception is "firmly rooted." As a result, it applied the same standard of reliability to satisfy both evidentiary and confrontation requirements. Consequently, the court of appeals altered the traditional focus in confrontation cases from whether the statement is sufficiently reliable to justify depriving defendant of his ability to confront and cross-examine to the more simple question of whether the statement is reliable enough to meet evidentiary standards. At the very least, this evidentiary approach to confrontation problems signals a potential retreat from the close case-by-case scrutiny given to cases in which the defendant's right to confront is threatened.

In *United States v. Hsu*,[39] however, the District of Columbia Court of Appeals seemed to impose a more rigorous duty on the trial judge. In his first trial, defendant Hsu had acted as his own counsel and had cross-examined a government witness, Johnson. When Hsu was subsequently convicted of perjury,[40] he appealed. His conviction was reversed on the ground that the record below failed to show a voluntary and intelligent waiver of counsel.[41] During Hsu's second trial, Johnson claimed to have no memory of the events to which he had formerly testified. The government, therefore, attempted to introduce transcripts of his former testimony under either of two hearsay exceptions—"past recollection recorded," or "prior cross-examined testimony."[42] The trial judge refused to allow the transcripts to be introduced, ruling that Johnson was not "unavailable,"

39. United States v. Hsu, 439 A.2d 469 (D.C. 1981).

40. Hsu was convicted under D.C. CODE ANN. § 22-2501 (1981).

41. Hsu v. United States, 392 A.2d 972, 981-87 (D.C. 1978). In a long line of Supreme Court and federal circuit court cases, defendant's representation pro se at trial must be accompanied by either a recorded "knowing and intelligent waiver of counsel, or by a record showing defendant was offered counsel but intelligently and understandingly rejected the offer." Carnley v. Coshian, 369 U.S. 506, 516 (1962). *See also* Faretta v. California, 422 U.S. 806, 835 (1975); Von Moltka v. Gillies, 332 U.S. 708, 727 (1948); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942); Johnson v. Dabst, 304 U.S. 450, 464 (1930). The burden of proving waiver is on the government. In Hsu v. United States, 392 A.2d 972 (D.C. 1978), the government failed to prove that Hsu's waiver had been knowing and intelligent. *Id.* at 984-85.

42. The District of Columbia has not adopted the Federal Rules of Evidence, relying

and that admission of transcripts in lieu of an available witness violated defendant's right of confrontation. The government appealed.

The court of appeals, relying on *Ohio v. Roberts*,[43] reversed. The court began its analysis by referring to the two-prong analysis set out in *Roberts*. First, before hearsay evidence can be admitted, the need for the evidence must be established—the witness must be found "unavailable" to testify at the present trial.[44] Once the unavailability threshold is crossed, the second prong of the analysis addresses the trustworthiness of the former testimony. This prong is critical since it satisfies the requirements of the sixth amendment confrontation clause.[45] In *Roberts*, the Supreme Court had indicated that statements that may be characterized within a firmly rooted exception to the hearsay rule are usually sufficiently trustworthy to be admissible.[46] The Court had recognized, however, that under special circumstances, even a firmly rooted exception would not in itself verify trustworthiness and further scrutiny would be required to establish added indicia of reliability.[47]

Applying *Roberts*, the *Hsu* court first addressed the "unavailability" requirement. It relied on cases from other federal circuits,[48] rule 804(a) of the Federal Rules of Evidence,[49] and commentators[50] to find that the wit-

instead on common law development of the law of evidence. *See* Jackson v. United States, 424 A.2d 40, 42 (D.C. 1980).

43. 448 U.S. 56 (1980).

44. *Hsu*, 439 A.2d at 471-72.

45. *Id.*

46. *Roberts*, 448 U.S. at 66.

47. *Id.* at 73 & n.12 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972)). In *Mancusi*, the defendant was initially represented by counsel that had been appointed only four days prior to trial. Upon appeal, counsel was ruled to have been ineffective and the defendant was granted a new trial. When a witness who had testified at the first trial was ruled unavailable at the second, the prosecution sought to introduce cross-examination from the first trial. The Supreme Court was asked to decide whether there were sufficient indicia of reliability associated with the cross-examination by the ineffective counsel to allow admission at the second trial. Exploring the "character of the actual cross-examination to ensure that an adequate opportunity for full cross-examination had been afforded the defendant," the Court found the earlier cross-examination satisfactory, and the transcript therefore admissible.

48. United States v. Collins, 478 F.2d 837, 839 (5th Cir. 1973); United States v. Insana, 423 F.2d 1165, 1170 (2d Cir. 1970).

49. FED. R. EVID. 804(a), provides in pertinent part:

'Unavailability as a witness' includes situations in which the declarant—

. . . .

(3) testifies to a lack of memory of the subject matter of his statement;

. . . .

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.

50. J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 801(d)(1)(A), at 801-99

ness was properly "unavailable" for testimony at the second trial when he simply claimed loss of memory. It was immaterial for purposes of unavailability whether his loss of memory was genuine or feigned.[51]

Addressing the second prong of the *Roberts* test, the *Hsu* court found that the former sworn testimony exception to the hearsay rule was a firmly rooted one and, therefore, Johnson's former testimony would normally be readily admissible. However, because of the special circumstances of the defendant's pro se representation, the court determined a need for additional indications of reliability.[52]

Examining the record of the original trial, the *Hsu* court was impressed by the defendant's cross-examination of Johnson. Hsu had highlighted incongruities, pointed out inaccuracies, used leading questions, and, in general, "exhibited considerable skill in his . . . cross-examination of witnesses."[53] The court concluded that the cross-examination was "effective enough to assure that full opportunity for cross-examination was afforded appellee, as required by *Ohio v. Roberts*, and thus the trustworthiness of the prior cross-examined testimony is also assured."[54]

The *Hsu* decision, in refusing to declare a hearsay statement reliable whenever it fits into an exception to the hearsay rule, is more in harmony with *Roberts*. In requiring particularized indicia of reliability, the court requires close scrutiny of the statement beyond its technical classification. And, in so examining the statement in the context of defendant's needs, rather than, as in *Harrison*, in a vacuum, the court's analysis seems to address more clearly the sixth amendment concerns.

In *Warren v. United States*,[55] the United States Court of Appeals for the District of Columbia Circuit addressed several evidentiary issues, again, chief among them, the issue of witness unavailability.[56] Here, defendant

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n.13 (1980); S. SALTSBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 600, 613 (2d ed. 1977).

51. *Hsu*, 439 A.2d at 471.

52. *Id.* at 472.

53. *Id.* at 473, quoting from Hsu v. United States, 392 A.2d at 989.

54. *Hsu*, 439 A.2d at 473.

55. 436 A.2d 821 (D.C. 1981).

56. Under District of Columbia common law, prior recorded testimony is admitted into evidence as an exception to the hearsay rule when:

> (1) the direct testimony of the declarant is unavailable, (2) the former testimony was given under oath or affirmation in a legal proceeding, (3) the issues in the two proceedings were substantially the same, and (4) the party against whom the testimony now is offered had the opportunity to cross-examine the declarant at the former proceedings.

was retried after his previous conviction had been reversed and was reconvicted of kidnapping, armed robbery, and rape. He appealed, alleging that several errors had been committed at his second trial.

Defendant first alleged that the testimony of two complainants given at his first trial should not have been introduced into evidence at his second trial because the complainants were available to testify personally.[57] The trial court had found the two complainants unavailable (and consequently allowed the introduction of transcripts in lieu of their testimony) because one could not be found and one was "psychologically unavailable."[58] Although the court of appeals reversed on other grounds, it sustained both of these trial rulings.[59]

Turning to the psychological unavailability of one of the complainants, the court noted that "unavailability" for psychological reasons had been expressly sanctioned in only two cases, one in California and one in New York.[60] In reaching their decisions, moreover, both courts had been interpreting state codes that included psychological factors as grounds for unavailability.[61] The District of Columbia has no such statute.[62] Nevertheless, the court of appeals determined that psychological infirmity was a reasonable construction of the witness unavailability rule. Where experts had opined that submitting the complainant to the ordeal of testi-

436 A.2d at 825 (footnotes omitted). Defendant challenged only the trial court's ruling with regard to the unavailability of the complainants; he agreed that the testimony was itself reliable.

57. The trial court had actually approved the introduction into evidence of transcripts from three complainants. However, because the third complainant had died since the first trial, defendant conceded her unavailability and took issue only with the unavailability of the other two.

58. *Warren*, 436 A.2d at 824.

59. *Id.* at 836-43. The court of appeals reversed the lower court because it had improperly allowed (1) the introduction of the complainants' pretrial suppression hearing testimony along with statements made by police officers regarding the complainants' reports as a "prior consistent statement" exception to the hearsay rule; and (2) the reading of defendant's presentence report by the probation officer before his conviction at the second trial.

60. *Id.* at 827. The court cited People v. Gomez, 26 Cal. App. 3d 225, 230, 103 Cal. Rptr. 80, 83-84 (1972); People v. Lombardi, 3 App. Div. 2d 700, 701, 332 N.Y.S.2d 749, 750-51 (1972), *aff'd*, 33 N.Y.2d 658, 303 N.E.2d 705, 348 N.Y.S.2d 980 (1973), *cert. denied*, 416 U.S. 906 (1974). The court later pointed out that FED. R. EVID. 804(a)(4) and the corresponding Uniform Rule of Evidence, also sanctioned unavailability if the declarant "is unable to be present or to testify at the hearing because of death, or *then existing* physical or *mental* illness or *infirmity*." (emphasis added by court). *Id.* at 828.

61. *Id.* at 827. Although defendant argued that D.C. CODE ANN. § 14-303 (1981) applied and specifically prohibited a finding of unavailability on psychological grounds, the court of appeals found this code section applicable only to former testimony of *parties* and not to the *non-party* witness testimony involved here.

62. *See supra*, note 61.

fying might lead to permanent psychological injury or suicide, it was reasonable for the court to declare her unavailable. The court, however, was careful to limit its decision:

> We do not intend to sanction a new category of medical unavailability in all cases where witnesses are likely to suffer adverse emotional or psychological effects as a result of testifying against their assailants. But in the extreme circumstances here, we agree that the grave risks to the witness' psychological health justify excusing her live in-court testimony.[63]

The court was similarly unpersuaded that the trial court had abused its discretion in declaring the other witness unavailable because she could not be found. As the government was under a continuing good faith duty to look for the witness and report any change to the court, it was reasonable for the trial court to rely on the year old testimony absent any contrary notification from the government.[64] The trial court had no duty to request a fresh recitation of the government's search efforts immediately before the second trial.[65]

Although the court's ruling with regard to the unlocated witness appears sound, its approval of "unavailability" for psychological reasons is more troublesome. Specifically, the court failed to set forth a test by which the amount of evidence needed to support such a claim, or the manner of obtaining such evidence, is to be determined. Later cases will undoubtedly have to address these issues. The court's ruling leaves the government free to claim psychological unavailability in a wide range of circumstances, for trial judges to rule on the claim with little guidance from the court of appeals, and for criminal defendants to bring each case to the higher court for a more definitive, structured ruling.

III. Missing Witness Instruction

A "missing witness" instruction may be issued to the jury when a party, who has it peculiarly in his power to produce a witness whose testimony would elucidate the alleged misconduct, fails to do so.[66] The fact that he

63. *Warren*, 436 A.2d at 829.

64. *Id.* at 830.

65. *Id.* at 831.

66. *See, e.g.*, E. Devitt & C. Blackmar, Federal Jury Practice and Instructions—Civil and Criminal § 11.33, at 250 (1970). The model instruction suggested by Devitt and Blackmar is almost identical to the one used by the trial court in Harris v. United States, 430 A.2d 536 (D.C. 1981). Here, the court issued the following instruction to the jury:

> If you find that a witness who could have given material testimony on an issue in this case was peculiarly within the power of one party to produce [but] was not produced by that party and his absence has not been sufficiently accounted for or

does not call the witness is allowed, through the "missing witness" instruction, to create an inference in the jury's mind that the testimony, if produced, would have been unfavorable.

Because the instruction allows a damaging presumption to be created, courts carefully restrict the instruction to situations where (1) it is "peculiarly within the party's power to produce the witness," and (2) the witness's testimony would "elucidate the transaction."[67] In assessing whether a witness is "peculiarly available" to the defendant, District of Columbia courts have traditionally found it significant that a close relationship exists between the two.[68] Thus, when a witness who has some close bond with the defendant fails to give what could be valuable, mitigating testimony, there is a strong implication that his testimony would, in fact, be damaging.[69]

In *Harris v. United States*,[70] the District of Columbia Court of Appeals expanded the meaning of "peculiarly available" to include a witness with whom the defendant had no significant relationship. Defendants Cosby and Harris were convicted of possession of narcotics in violation of D.C. Code section 33-402. Detective Thomas, a plainclothes officer, was driving in the District when he was approached by defendant Cosby. They negotiated the sale of a single Dilaudid pill for $32. According to Officer Thomas, Cosby then walked up to defendant Harris, entered a garage with him and reemerged with the pill a few minutes later. Officer Thomas paid Cosby for the drug with marked bills. As he drove away, he saw Cosby give the money to Harris.[71] After Officer Thomas relayed a description of

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explained, then you may, if you deem it appropriate, infer that the testimony of the witness would have been unfavorable to the party which failed to produce him.

However, no such inference should be drawn by you with regard to a witness who was equally within the power of either party to produce or whose testimony would have been merely cumulative or immaterial.

430 A.2d at 540 n.5.

67. *Id.* at 542. The court cited Dent v. United States, 404 A.2d 165, 169-70 (D.C. 1979); Conyers v. United States, 309 A.2d 309, 312-13 (D.C. 1973); Wynn v. United States, 397 F.2d 621, 625 (D.C. Cir. 1967).

68. United States v. Young, 463 F.2d 934, 942 (D.C. Cir. 1972); Hale v. United States, 361 A.2d 212, 216 (D.C. 1976).

69. In Hale v. United States, 361 A.2d 216 (D.C. 1976), the defendant was convicted of assault with a dangerous weapon and carrying a pistol without a license. The court had issued a "missing witness" instruction after Hale's girlfriend refused to testify on his behalf. Significantly, his girlfriend had previously testified before a grand jury that Hale had shot the complainant in self defense. In view of the witness's former testimony and of her relationship with the defendant, the court affirmed the "missing witness" instruction as appropriate.

70. 430 A.2d 536 (D.C. 1981).

71. Expert testimony was presented at trial that identified the defendants' conduct as "juggling." This method of conducting drug transactions is used to separate possession of

the two to other officers, both defendants were quickly arrested.

At their trial, both defendants presented alibis. Defendant Cosby claimed that he was in the vicinity to see a "reverend" about painting a church, and that the clergyman had been standing with him when he was arrested.[72] Defendant Harris testified that he was in the area waiting for his brother, "Cornbread" Harris and, a few minutes before his arrest, had been given $50 by an unknown man and instructed to deliver the money to "Cornbread."[73] This, Harris explained, was why he had the marked bills in his possession when he was arrested.[74] Neither Cosby nor Harris produced their alibi witnesses to corroborate their explanations. Over their objection, the trial judge issued a "missing witness" instruction to the jury with regard to both witnesses. When the jury returned guilty verdicts, the defendants appealed alleging, inter alia,[75] that the "missing witness" instruction had been improper.

In a split decision, the court of appeals affirmed. Judge Harris, writing for the majority, was persuaded that the instruction was proper because the "inference of unfavorable testimony from [the] absent witness[es] was a natural and reasonable one."[76] Cosby argued that the instruction should not have been given because the clergyman was not "peculiarly available" to him. He described his various attempts to locate the clergyman and his ultimate inability to produce him for the trial.[77] Although noting that the "missing witness" instruction should not be given where the defendant has made a bona fide effort to find the witness,[78] the court refused to overrule the lower court's finding that the defendant's attempts had not met that standard.[79] Thus, it concluded that defendant Cosby failed to show that

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the drug from intent to sell it, as well as reduce the possibility of the solicitor being robbed when he approaches a potential buyer. 430 A.2d at 539 and n.3.

72. *Id.* at 539.

73. *Id.*

74. *Id.*

75. The defendants also challenged their convictions on the basis of prosecutorial misconduct. Although agreeing that the prosecutor had engaged in misconduct, the court was unpersuaded that his conduct amounted to prejudicial error. 430 A.2d at 540-41.

76. The court was quoting from Burgess v. United States, 440 F.2d 226, 234 (D.C. Cir. 1970). It also cited 2 J. WIGMORE, EVIDENCE § 286 (Chadbourn rev. 1979) in support of this standard.

77. *Harris*, 430 A.2d at 542.

78. *See* United States v. Dixon, 469 F.2d 940, 942 n.4 (D.C. Cir. 1972); Shelton v. United States, 388 A.2d 859, 865 (D.C. 1978); Nowlin v. United States, 382 A.2d 9, 13 (D.C. 1978).

79. The court emphasized that the two-prong "missing witness" test of "peculiar availability" and "elucidating" testimony is a factual determination to be made by the trial judge. *Harris*, 430 A.2d at 542 (citing authority). It was therefore reluctant to question the lower court's factual determination about the witness' availability. *Id.* at 543.

the clergyman was not "peculiarly available" to him.

Defendant Harris challenged the instruction on the ground that "Cornbread's" testimony could not have "elucidated the transaction." Again, the court disagreed. Although "Cornbread" could not shed light on Harris' alleged drug possession,[80] he could corroborate the defendant's allegedly innocent presence in the area. And, as no other witness testified as to this alibi defense, "Cornbread's" testimony was important and non-cumulative.[81]

Chief Judge Newman concurred and dissented in part. He strongly disagreed that the "missing witness" instruction was proper. In his view, the clergyman was not "peculiarly available" to Cosby. As Cosby hardly knew the clergyman, there was no close relationship that would make him more "peculiarly available" to the defendant than to the state.[82] And, by focusing solely on the clergyman's physical proximity in the forum, the court undermined the meaning of the term "peculiarly available." There could be no "natural and reasonable" inference of unfavorable testimony where the defendant was simply unable to procure a disinterested witness who was almost a stranger to him.[83] One of the underlying premises of the instruction was that the witness's relationship with the defendant was such that he or she would give mitigating testimony on behalf of the defendant if at all possible. In view of that relationship, it was particularly damaging when the witness failed to come forward. Therefore, in Judge Newman's view, that a particular witness was physically nearby did not satisfy the "peculiarly available" prong of the "missing witness" test.[84] Noting also that the record evidenced a bona fide attempt to procure the clergyman,[85]

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80. Judge Newman, in his partial dissent, called for a more narrow reading of the "elucidating" testimony requirement. In his view, the testimony should only be considered elucidating if it sheds light on the misconduct with which the defendant is charged. Thus, it should not be admitted only where it is of help with regard to the "transaction," or offense, at issue. 430 A.2d at 546.

81. *Id.* at 543.

82. *Id.* at 545.

83. *Id.*

84. Judge Newman felt also that the clergyman's testimony could not have "elucidated the transaction" at issue. The clergyman's testimony could shed no light on whether defendant Cosby had drugs in his possession; at best, it would have offered some explanation as to why Cosby was in the neighborhood. Such testimony, if not entirely irrelevant, was insufficient to satisfy the second prong of the "missing witness" test. *Accord* Dyson v. United States, 418 A.2d 127 (D.C. 1980)(prosecutor's comments about missing witness improper where witnesses could only corroborate defendant's alibi that he had been with them and could shed no light on whether defendant had actually committed breaking and entering with which he was charged).

85. *Harris*, 430 A.2d at 545-46.

Judge Newman concluded that Cosby's conviction should be reversed and the defendant be given a new trial.

As to defendant Harris, Judge Newman disagreed that "Cornbread" could have "elucidated the transaction."[86] Because Harris was convicted of drug possession based on his possession of the marked bills, "Cornbread's" testimony would only be elucidating if it shed light on the drug transaction.[87] That "Cornbread" could corroborate Harris' explanation of his presence in the neighborhood was irrelevant to the central issue in the trial. Moreover, the relevant standard for judging the propriety of issuing a "missing witness" instruction in the absence of testimony was, in Judge Newman's view, whether "Cornbread's" testimony would have been *likely* to elucidate the transaction.[88] He felt it to be highly, and impermissibly, speculative to deduce that "Cornbread" would have had some knowledge of the drug transaction through his alleged connection with the bills.[89] In view of all the evidence against Harris, however, Judge Newman was finally satisfied that the "missing witness" instruction was harmless error, and approved the majority's affirmation of Harris' conviction.[90]

The court's opinion in *Harris* seems to expand the possible situations in which a "missing witness" instruction may be given by redefining the term "peculiarly available." The inherent danger in the instruction, as the dissent points out, is that it creates evidence from non-evidence by allowing a damaging inference to be drawn from silence.[91] This danger may be somewhat curtailed by ensuring that the witness has some relationship with the defendant. Focusing only on whether the witness is physically available, however, threatens seriously to erode the protections that have been built into the doctrine. Moreover, there is significant authority that the instruction should not be given where the witness is equally available to both parties to the action. It is disallowed because the failure to produce a witness should remain open to an inference against *both* parties.[92] However, if District of Columbia courts are instructed only to examine the physical

86. *Id.* at 547.

87. *Id. See supra* note 80.

88. *Id.*

89. Even if "Cornbread's" testimony could have explained the passage of the marked bills, he would only have illuminated an issue that was "collateral" to the central "transaction" (possession of drugs). As Judge Newman pointed out, the court of appeals had previously indicated in Coombs v. United States, 399 A.2d 1313 (D.C. 1979), that such testimony was insufficient to allow a missing witness instruction: "We have extreme difficulty in concluding that the missing witness doctrine could be invoked under circumstances where the transaction to be elucidated is a totally collateral one . . . ." *Id.* at 1317.

90. *Harris*, 430 A.2d at 548.

91. *Id.* at 544-45.

92. *See* United States v. Evanchik, 413 F.2d 950, 954 (2d Cir. 1969); Beale v. United

availability of a witness, they may begin using the instruction where the witness is equally available to both the state and the accused rather than "peculiarly available" to the defendant. Indeed, by disregarding any examination of the relationship, the court's holding in *Harris* raises an increased possibility of future abuse by leaving the term "peculiarly available" open to any interpretation that an advocate is able to press on the trial judge.

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States, 263 F.2d 859 (2d. Cir. 1959); Johnson v. United States, 291 F.2d 150, 155 (8th Cir.), *cert. denied*, 368 U.S. 880 (1961).