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FROM THE BENCH

CONFRONTATION AND HEARSAY: NEW WINE IN AN OLD BOTTLE

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After jury selection and opening statements come the prosecution witnesses. The Sixth Amendment of the United States Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹ One would think that the Sixth Amendment or “Confrontation Clause” requires a prosecutor to put available and competent witnesses on the stand so the defendant can confront them face to face while the jury carefully looks on both accuser and accused. Until January 15, 1992, this was a correct statement of the law. After that date, it is no longer a correct statement of the federal law. What happened on January 15, 1992? *White v. Illinois*² was decided by the United States Supreme Court.

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1. U.S. CONST. amend. VI
2. 112 S. Ct. 736 (1992).

I. BACKGROUND

The Bill of Rights to the United States Constitution, including the Sixth Amendment, was ratified and became a part of the United States Constitution on December 15, 1791. From that date until 1965, there was comparatively little case law interpreting the Sixth Amendment. But all that changed in 1965 when the United States Supreme Court, in the case of *Pointer v. Texas*,³ extended the guarantees of the Sixth Amendment to the states by way of the Due Process Clause of the Fourteenth Amendment. From that time until *Mancusi v. Stubbs*,⁴ the United States Supreme Court handed down a total of eight Confrontation Clause cases in seven years. Those eight cases are difficult if not impossible to reconcile, and they were the subject of much adverse law review commentary.⁵ From that unsettled arena, the Court apparently decided to leave the matter alone until 1980 when it handed down the case of *Ohio v. Roberts*.⁶ While the case dealt with "prior testimony"⁷ as its factual background, the Court's opinion, written by Justice Blackmun, did not treat that as of significance. Two paragraphs from that opinion, particularly the second, had been taken by many to be the definitive definition and application of the Confrontation Clause to hearsay evidence as it might appear in any and all State and Federal criminal trials. The Court first summarized the justification for its rule:

The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the Constitutional protection." This reflects the truism that "hearsay rules and the Confrontation Clause" are generally designed to protect similar values" . . . and "stem from the same roots." It also

3. 380 U.S. 400 (1965) (holding that an accused's right to confront witnesses is a fundamental right protected by the fourteenth amendment).

4. 408 U.S. 204 (1972) (holding that statements made by a now unavailable witness during a prior trial are admissible if the witness was subject to adequate cross examination).

5. See, e.g., JoAnne A. Epps, *Passing the Confrontation Clause Stop Sign: Is All Hearsay Constitutionally Admissible?*, 77 Ky. L.J. 7 (1989); Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665 (1986); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988).

6. 448 U.S. 56 (1980).

7. *Id.* at 68.

responds to the need for certainty in the workaday world of conducting criminal trials.⁸

The Court concluded with a recapitulation of the rule:

In sum, when 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 without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.⁹

In retrospect, it is perhaps significant that even in *Roberts* Justice Blackmun said in footnote number seven that "[a] demonstration of unavailability, however, is not always required."¹⁰

Since the Supreme Court set forth a definitive two-prong constitutional test, (1) unavailability and (2) reliability, it would have been logical to conclude that *Roberts* was deliberately written to be the last word from the Supreme Court on the Confrontation Clause, especially in light of the Court having been somewhat beaten in its ventures into the Confrontation Clause melee. It was realistic to assume that the Supreme Court had decided to leave this field of battle with the last paragraph in *Roberts* being the ball, end-all law on the subject of Confrontation. However, the Supreme Court soon realized that *Roberts* was not the end of the Court's battle over Confrontation. The Supreme Court soon reentered the Confrontation Clause thicket.¹¹

8. *Id.* at 66 (citing *Mattox v. United States*, 156 U.S. 237, 244 (1895) and quoting *California v. Green*, 399 U.S. 149, 155 (1970) and *Dutton v. Evans*, 400 U.S. 74, 86 (1970)) (Court's footnote omitted).

9. *Id.* (Court's footnote omitted).

10. *Roberts*, 448 U.S. at 65 n.7 (citing *Dutton v. Evans*, 400 U.S. 74 (1970)).

11. See Nancy H. Bauhan, *White v. Illinois: The Confrontation Clause and the Supreme Court's Preference for Out-Of-Court Statements*, 46 VAND. L. REV. 235 (1993) (surveying the United States Supreme Court cases between the *Roberts* decision and the *White* decision); S. Douglas Borisky, *Reconciling the Conflict Between the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294 (1985) (discussing the confusion created by *Roberts* in the lower courts concerning the "firmly rooted hearsay exceptions" and their relationship to the reliability prong); Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement* 70 MINN. L. REV. 665 (1986) (discussing the confusion created by *Roberts* in the lower courts, about the unavailability prong and the court's qualification of that prong in a footnote to the *Roberts* opinion).

In *United States v. Inadi*,¹² the United States Supreme Court tackled co-conspirator hearsay statements and how they could be squared at trial with the language in *Roberts* that “the Confrontation Clause normally requires a showing that [the declarant] is unavailable.”¹³ The Court considered the reliability of such statements,¹⁴ the necessity for such statements,¹⁵ the lack of any real benefit to a defendant to have such previous co-conspirator on the witness stand,¹⁶ and the burden to the prosecution and the defense from having to find such person.¹⁷ Then the Court indicated that the Confrontation Clause did not mandate a showing of unavailability of such co-conspirator declarant before his co-conspirator statements might be received in evidence.¹⁸ Writing for the Court, Justice Powell stated that *Roberts* as well as the cases *Roberts* cited, were former testimony hearsay exception cases, which have always required a showing of “unavailability” as part of their foundation.¹⁹ Perhaps foreshadowing *White v. Illinois*, the Court in *Inadi* stated, “*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.”²⁰ *Inadi* resolved the first prong of *Roberts*, the unavailability prong, but it still left the adequate “indicia of reliability” prong. This matter was resolved the following year by the United States Supreme Court in the case of *Bourjaily v. United States*,²¹ where the Court held that “the co-conspirator exception to the hearsay rule is firmly rooted enough in our jurisprudence that, under the holding in *Roberts*, a Court need not independently inquire into the reliability of such statements.”²²

12. 475 U.S. 387 (1986).

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

14. *Inadi*, 475 U.S. at 395.

15. *Id.* at 395-96.

16. *Id.* at 396-98.

17. *Id.* at 399.

18. *Id.* at 399-400.

19. *Inadi*, 475 U.S. at 393-94 (citing *Barber v. Page*, 390 U.S. 719 (1968); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Ohio v. Roberts*, 448 U.S. 56 (1980)). See, e.g., N.C. GEN. STAT. § 8C-804(b)(1) (1992).

20. *Inadi*, 475 U.S. at 394 (italics added).

21. 483 U.S. 171 (1987).

22. *Id.* at 183. See generally Stanley A. Goldman, *Not So “Firmly Rooted:” Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1 (1987); Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521 (1992).

Many observers of the United States Supreme Court opinions were of the view that these two decisions in 1986 and 1987 dealt simply with the co-conspirator exception and did not themselves deal, or at least deal much, with other hearsay exceptions. As for other hearsay exceptions, many observers thought that they had to be answered by the two-prong principles of *Roberts*, cited yet again in *Idaho v. Wright*,²³ particularly as set forth in the "in sum" paragraph cited from *Roberts*.²⁴ Such thoughts were erased, in large measure, by *White*. Even a quick reading of the case makes apparent that the words of *Roberts*, are now "Gone With The Wind."

II. THE CASE

White is an unanimous opinion of the United States Supreme Court written by Chief Justice Rehnquist²⁵. There was a concurring opinion by Justice Thomas which was joined in by Justice Scalia, but that concurring opinion opted for an even more restrictive view of the Confrontation Clause than was adopted by the other seven judges²⁶. Therefore, it is clear to see that the entire Supreme Court today, including Justice Blackmun, the author of *Roberts*, now subscribes to what may fairly be called "new wine in an old bottle."

The actual facts of *White* do not differ much from the facts that are likely to be encountered in any child abuse, child molestation or child sexual assault case that a lawyer is likely to encounter in North Carolina or any other place in the United States. In *White*, a four-year-old child, while being babysat by a responsible person, screamed out in the night and as the babysitter came to the child's room, he saw the defendant leave the room.²⁷ The babysitter asked the child what had happened, and the child said that the defendant had "touched her in the wrong places" and then pointed to her vaginal area.²⁸ Some thirty minutes later the child's mother returned, finding her child scared and agitated.²⁹

23. 497 U.S. 805 (1990). See also Donald A. Dripps, *The Confrontation Clause and the Sexual Abuse of Children*, TRIAL, May 1991, at 11.

24. See *supra* note 9 and accompanying text ("in sum" paragraph from *Roberts*).

25. *White*, 112 S. Ct. at 739.

26. *Id.* at 744.

27. *Id.* at 739.

28. *Id.*

29. *Id.*

In response to the mother's questions, the child repeated what she had told the babysitter and added that the defendant had "put his mouth on her front part."³⁰ The police were then called and apparently arrived in about fifteen minutes.³¹ The police questioned the child, who repeated what she had told the babysitter and her mother and added that the defendant had "used his tongue in her private part."³² Some four hours after the babysitter had first heard the child scream, the child was taken to a hospital and examined by an emergency room nurse and then by a doctor.³³ The child told the nurse and the doctor essentially what she told the sitter and her mother and the police.³⁴ At trial, the child was present but did not testify, and the trial court made no finding that the child was unavailable.³⁵ The babysitter, the mother, and the police all testified as to the child's hearsay statements to them.³⁶ The admission of that hearsay was upheld by an Illinois appellate court under the spontaneous declarations [excited utterance] hearsay exception.³⁷ The hearsay statements of the child as made to the nurse and the doctor were upheld by the court under the hearsay exception for statements made to secure medical treatment or diagnosis.³⁸

III. THE COURT'S ANALYSIS

First, the Court had to address the language it had used in *Roberts*. The Court acknowledged that it had "used language that might suggest that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence."³⁹ It dealt with the unavailability prong of *Roberts* by simply saying that "such an expansive reading of the Clause [was] negated by [the Court's] subsequent decision in *Inadi*."⁴⁰ The

30. *Id.*

31. *Id.*

32. *White*, 112 S. Ct. at 739.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *White*, 112 S. Ct. at 740. See, e.g., N.C. GEN. STAT. § 8C-803(2) (1992) (North Carolina's excited utterance exception).

38. *White*, 112 S. Ct. at 740. See, e.g., N.C. GEN. STAT. § 8C-803(4) (1992) (North Carolina's statement for purposes of medical diagnosis exception).

39. *White*, 112 S. Ct. at 741.

40. *Id.* (citation omitted).

court further narrowed the case by stating that “Roberts stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry *only* when the challenged out-of-court statements were made in the course of a prior judicial proceeding.”⁴¹ Thus, the Court stated, and perhaps meant, that the unavailability of a hearsay declarant is only a Confrontation Clause requirement when you are talking about one single hearsay exception, namely that of former testimony, which is embodied in the Federal and North Carolina rules of evidence.⁴²

The Court also discussed the manner in which it had distinguished co-conspirators’ statements from former testimony in *Inadi* by stating “unlike former in-court testimony, co-conspirator statements ‘provide evidence of the conspiracy’s context that cannot be replicated, even if the declarant testifies to the same matters in court,’”⁴³ and went on to add that “these observations, although expressed in the context of evaluating co-conspirator statements, apply with full force to the case at hand.”⁴⁴ The opinion notes that:

The evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements’ reliability cannot be recaptured even by later in-court testimony. . . . [A] statement made in the course of procuring medical services, where declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.⁴⁵

The Court then goes on in *White* to state the following in one paragraph:

The preference for live testimony in the case of statements like those offered in *Roberts* is because of the importance of cross-examination:” the greatest legal engine ever invented is the discovery of truth” (citation omitted). Thus courts have adopted the general rule prohibiting the receipt of hearsay evidence. But *where proffered hearsay has sufficient guarantees of reliability to*

41. *Id.* (emphasis added).

42. FED. R. EVID. 804(b)(1); N.C. GEN. STAT. § 8C-804(b)(1) (1992).

43. *White*, 112 S. Ct. at 742 (citing *Inadi*).

44. *Id.* at 742.

45. *Id.* at 742-43.

*come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.*⁴⁶

This italicized quote amounts to the most important holding in this case. It takes one of the alternative bases of satisfying the second prong of the *Roberts* opinion and makes that prong, and it alone, the current basis of admissibility under the Confrontation Clause for many, perhaps most, hearsay statements.⁴⁷ The defendant argued that two other recent decisions of the United States Supreme Court entitled him to relief⁴⁸, namely, *Coy v. Iowa*⁴⁹ and *Maryland v. Craig*.⁵⁰ But the Court quickly dismissed this argument by stating that those cases “involved only the question of what *in-court* procedures are constitutionally required to guarantee a defendant’s confrontation right once a witness is testifying.”⁵¹ The Court determined this was a “quite separate [question] from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations,”⁵² and that “*Coy* and *Craig* did not speak to the latter question.”⁵³

IV. SIGNIFICANCE

In light of all the twists and turns that the Confrontation Clause decisions the United States Supreme Court have taken from 1965 through 1992, it would not be wise to attempt to give a definitive answer to what the federal Confrontation Clause means or requires. The cases leading to *White* have proven that no definitive answer can safely be found within that one main paragraph of *Roberts* written in 1980.⁵⁴ Assuming *White* to be the law for at least the moment, it appears that some things can be safely said to the trial judges and trial lawyers of North Carolina.

It seems clear enough that at trial, when the State offers hearsay, the Court should conduct a brief *voir dire* at which time the proffered hearsay is heard in full. At that time, the trial court

46. *Id.* at 743 (emphasis added).

47. See *infra* Appendix A (list of “firmly rooted” exceptions).

48. *White*, 112 S. Ct. at 743.

49. 487 U.S. 1012 (1988).

50. 497 U.S. 836 (1990).

51. *White*, 112 S. Ct. at 743-4.

52. *Id.* at 744.

53. *Id.*

54. See *supra* note 11 (collecting articles discussing the confusion caused by *Roberts*).

makes a one-step determination and ruling. If the trial judge finds that the proffered hearsay fits within a firmly rooted exception to the hearsay rule, then that is both the beginning and the end of the inquiry.⁵⁵ The evidence is admissible under both the exception to the hearsay rule that it fits and is also admissible under the Confrontation Clause. It makes no constitutional difference that the out-of-court declarant is sitting right next to the District Attorney at the trial itself. No showing of the hearsay declarant's unavailability is required. Thus, the two-prong requirements of *Roberts* have apparently become one requirement for a great deal of hearsay.⁵⁶

But what if the prosecution's proffered hearsay does not fit within a firmly rooted exception to the hearsay rule? Apparently a two-prong version of *Roberts* still exists: to wit, that the State would have to show (1) the unavailability of the hearsay declarant to be a witness at trial and (2) particularized guarantees of trustworthiness of the proffered hearsay.

White overrules several North Carolina cases, insofar as they were based on the Sixth Amendment of the U.S. Constitution. In *State v. Kerley*,⁵⁷ the North Carolina Court of Appeals, citing the Sixth Amendment, held that evidence which was otherwise admissible as an excited utterance under Rule 803(2) was constitutionally inadmissible because the State of North Carolina failed to produce the hearsay declarant or to show reasonable efforts to produce that declarant. *White* also overturns *State v. Fearing*,⁵⁸ which reversed a trial judge for accepting the stipulations of the State and defense that the minor child victim declarant was unavailable⁵⁹. Of interest, as though the North Carolina Supreme Court anticipated *White*, is the recent major decision of *State v. Stager*,⁶⁰ where the North Carolina Supreme Court said that "statements falling within an exception to the general prohibition against hearsay may be admitted into evidence without violating a defendant's right to confrontation, if the evidence is reliable."⁶¹

55. See N.C. GEN STAT. § 8C-104(a) (outlining the procedure for dealing with preliminary questions of admissibility).

56. See *White*, 112 S. Ct. at 743 (holding that hearsay falling within a firmly rooted exception is admissible without regard for the availability of the witness).

57. 87 N.C. App. 240, 360 S.E.2d 464 (1987).

58. 315 N.C. 167, 337 S.E.2d 551 (1985).

59. *Id.*

60. 329 N.C. 278, 406 S.E.2d 876 (1991).

61. 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991).

It appears that the one overriding question, which will arise in every instance in which the State seeks to have hearsay evidence admitted, is whether that hearsay evidence falls within a "firmly rooted" hearsay exception. What hearsay exceptions are firmly rooted? Is it determined by age alone? Number of jurisdictions now accepting? Or is it also a question of whether those factors that would indicate reliability at the time the statement was made would be difficult or impossible to recapture at the time of trial?⁶² Determining what a "firmly rooted" hearsay exception is will be the main battle in future trials. *Roberts* itself indicated that the business records and public records exceptions were firmly rooted.⁶³ *Bourjaily v. U. S.* establishes that the co-conspirator exception to the hearsay rule is firmly rooted.⁶⁴ *White* establishes that both the excited utterance exception⁶⁵ as well as the exception for statements made for the purpose of medical treatment and diagnosis⁶⁶ are firmly rooted.⁶⁷

In his definitive book on the law of evidence, *Modern State and Federal Evidence*,⁶⁸ Professor Michael H. Graham indicates in his section on hearsay and the Confrontation Clause that:

[s]tatements falling within *any* traditional common law hearsay exception are sufficiently reliable on their face to be admitted against the accused, and that the imposition of a requirement of unavailability by the Confrontation Clause is congruent with the requirement of unavailability as applied to the traditional common law hearsay exceptions: "If it's good enough for the Federal Rules of Evidence, its good enough for the Confrontation Clause."⁶⁹

The bottom line is that if Professor Graham's statement proves to be true, then the Confrontation Clause simply means that the current Federal Rules of Evidence have now been constitutionalized, as to the Sixth Amendment, when offered by the State in a criminal case. And you will note that there are some hearsay exceptions set forth in the Federal Rules of Evidence that

62. See generally Imwinkelried, *supra* note 22.

63. *Roberts*, 448 U.S. at 66 n.8.

64. *Bourjaily*, 483 U.S. at 183.

65. *White*, 112 S. Ct. at 743.

66. *Id.*

67. See *infra* Appendix A for a more detailed accounting of those hearsay exceptions considered "firmly rooted".

68. MICHAEL H. GRAHAM, *MODERN STATE AND FEDERAL EVIDENCE: A COMPREHENSIVE REFERENCE TEXT* (Patricia C. Bobb et al. eds., 1989).

69. *Id.* at 312-13.

were not carried forth by the North Carolina General Assembly into the North Carolina Code of Evidence.⁷⁰ This raises the interesting question as to whether some evidence that might be offered by the State in a state criminal trial would meet the Confrontation Clause requirements of the U.S. Constitution but somehow not be specifically mentioned by the North Carolina Evidence Code. Would they be admissible or not?

Yet, *White* clearly indicates that when a trial lawyer or trial judge in the State Courts of North Carolina looks at the North Carolina Evidence Code in light of the Sixth Amendment's Confrontation Clause, the following emerges: Any hearsay evidence that would be admissible under the exceptions set forth in Rule 801⁷¹ are probably automatically admissible under the Confrontation Clause; any evidence that would be received under the exception's set forth in Rule 803⁷² are probably automatically admissible except for 803(24)⁷³, under the Confrontation Clause. And any hearsay evidence which would be admitted under Rule 804⁷⁴ would have to meet both the requirements of unavailability *and* of particularized guarantees of trustworthiness.

V. IMPEACHMENT OF HEARSAY DECLARANT

It is highly probable that as a direct result of this most recent landmark decision of the United States Supreme Court there will be an increased use of hearsay in criminal trials offered by the prosecution against the criminal defendant. It is equally clear that the defense lawyer in a criminal case, in order to provide the defendant client effective assistance of counsel required by the constitution, must be prepared to deal with such hearsay.⁷⁵

In North Carolina, before the evidence code was adopted in 1984, the common law evidence rule of allowable impeachment cross-examination was wide open and brutally simple. Any witness, including the criminally accused, could be impeached by

70. See, e.g., FED. R. EVID. 803(22).

71. N.C. GEN. STAT. § 8C-801 (1992).

72. N.C. GEN. STAT. § 8C-803 (1992).

73. N.C. GEN. STAT. § 8C-803(24) (1992).

74. N.C. GEN. STAT. § 8C-804 (1992).

75. For an exposition on how to impeach the credibility of an out-of-court declarant, see Anthony M. Brannon, *Successful Shadowboxing: The Art of Impeaching Hearsay Declarants*, 13 CAMPBELL L. REV. 157 (1991). See also DAVID F. BINDER, HEARSAY HANDBOOK (Wendy Bliss & Frear Simons eds., 3rd ed. 1991).

being cross-examined with "disparaging questions concerning collateral matters relating to his criminal and degrading conduct."⁷⁶

Everyone thought that the new evidence code made a drastic change in the very old North Carolina trial practice of "make your client happy even if he has no case by beating up on the other side's witness" on their cross-examination. All the legal commentators⁷⁷ on the new code thought that the new Rules of Evidence prohibited this tactic, particularly new Rule 608(b)⁷⁸ and new Rule 404⁷⁹ when Rule 404 made character evidence inadmissible for proving conduct except for evidence of a witnesses' character under Rules 607, 608, and 609.⁸⁰ Rule 608 limits the use of specific instances of a witnesses' conduct to cross-examination "concerning his character for truthfulness or untruthfulness."⁸¹ For example, Laura Crumpler and Gordon Widenhouse in their article, *An Analysis of the New North Carolina Evidence Code: Opportunity for Reform*,⁸² said "Rule 608 will radically alter [our prior practice]. By limiting impeachment by . . . specific acts solely to that evidence that bears on the witness' truth and veracity, it will eliminate completely the use of evidence showing merely a witness' bad moral character."⁸³

Further proof of this seemingly drastic change in North Carolina impeachment law came quickly enough from the North Carolina Supreme Court in *State v. Morgan*.⁸⁴ There Justice Meyer said, "Rule 608(b) represents a drastic departure from the former traditional North Carolina practice which allowed a defendant to be cross-examined for impeachment purposes regarding *any* prior act of misconduct . . . so long as the [cross-examiner] had a good-faith basis for the questions."⁸⁵ The opinion then went on to add

76. *State v. Williams*, 279 N.C. 663, 185 S.E.2d 174 (1971). See also *State v. Jean*, 310 N.C. 157, 311 S.E.2d 266 (1984) for the high-water mark (or low ebb) of this wide-open rule.

77. See, e.g., Laura E. Crumpler & Gordon Widenhouse, *An Analysis of the New North Carolina Evidence Code: Opportunity for Reform*, 20 WAKE FOREST L. REV. 1 (1984). But see Gary R. Govert, *Stuck in a Sebonian Bog: State v. Jean and the Future of Character Impeachment in North Carolina*, 63 N.C. L. REV. 535 (1985).

78. FED. R. EVID. 608(b).

79. FED. R. EVID. 404.

80. FED. R. EVID. 404(a)(3).

81. FED. R. EVID. 608(b).

82. Crumpler & Widenhouse, *supra* note 77.

83. *Id.* at 47.

84. 315 N.C. 626, 340 S.E.2d 84 (1986).

85. *Id.* at 634, 340 S.E.2d at 89 (citations omitted).

that "Rule 608(b) addresses the admissibility of specific instances of conduct . . . only in the very narrow instance where . . . the purpose of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness."⁸⁶ The opinion further limited such evidence by stating that "[e]ven if the trial judge allows the inquiry on cross-examination [after evaluating its admissibility under the balancing test of Rule 403], *extrinsic evidence* of the conduct is not admissible."⁸⁷

Until 1992, Rule 608(b) was similarly construed by all North Carolina courts, trial and appellate, without exception. However, *State v. Williams*,⁸⁸ decided January 27, 1992, signaled a partial return of impeachment law and procedure to the pre-code rough and tumble days. The operative facts of the case, in chronological order were as follows. One Carroll, a "key state witness," regularly smoked marijuana and cocaine from 1987 through 1989 while in high school.⁸⁹ Carroll had attempted suicide twice in 1987, because of depression and had received psychiatric counselling in 1987 as a result of the suicide attempts.⁹⁰ In January 1989, a young lady was murdered, and Carroll was a suspect.⁹¹ Carroll was questioned by the police, gave conflicting accounts, and finally gave a statement indicating the defendant, Williams, as the killer.⁹²

At trial, Carroll's testimony was similar to his last statement given to the police, identifying the defendant, Williams, as the killer.⁹³ On cross-examination, the able trial judge allowed the defendant's attorney to elicit evidence that Carroll had several misdemeanor convictions⁹⁴ and that a condition of his suspended sentences from these convictions was that he seek help from the local county mental health clinic.⁹⁵ It was also established that his reputation for truthfulness was that "he lied quite a bit" and

86. *Id.*

87. *Id.*, 340 S.E.2d at 90 (emphasis added).

88. 330 N.C. 711, 412 S.E.2d 359 (1992).

89. *Id.* at 713, 412 S.E.2d at 361.

90. *Id.*

91. *Williams*, 330 N.C. at 713, 412 S.E.2d at 360.

92. *Id.*

93. *Id.*

94. *Id.* at 715, 412 S.E.2d at 362. See also FED. R. EVID. 609.

95. *Williams*, 330 N.C. at 715, 412 S.E.2d at 362.

“fantasized.”⁹⁶ Moreover, he had smoked marijuana cigarettes laced with cocaine once or twice a week on or about the date of the murder.⁹⁷ The trial judge forbade cross-examination of Carroll about his prior drug habit, attempted suicides, and psychiatric counselling.⁹⁸

The North Carolina Supreme Court reversed, agreeing with the trial judge that Rule 608(b), as construed in *State v. Morgan*, did forbid such cross-examination,⁹⁹ but holding that under Rule 611(b), such cross-examination was allowable.¹⁰⁰ The Court observed quite properly, that “[t]here is no rule of evidence which provides that testimony admissible for one purpose [Rule 611(b)] and inadmissible for another purpose [Rule 608(b)] is thereby rendered inadmissible; quite the contrary is the case.”¹⁰¹ The Court observed that Rule 611(b) allows a witness to be “cross-examined on any matter relevant to any issue in the case, *including credibility*.”¹⁰²

The *Williams* court went on to acknowledge that “the language of the rule alone does not clearly illuminate the issue here, the case law and treatises interpreting it establish that evidence of [a witness’] *drug use*, his *suicide attempts*, and his *psychiatric history* is proper and admissible for purposes of impeachment.”¹⁰³

The rationale for the Court’s new holding is clear and logical. As the court phrased it, “[w]hile specific instances of *drug use* or *mental instability* are not directly probative of truthfulness, they may bear upon credibility in other ways, such as to ‘cast doubt upon the *capacity* of a witness to *observe, recollect, and recount*.”¹⁰⁴ The North Carolina Supreme Court, citing Weinstein’s Evidence, said that while Rule 608 deals with “*moral*

96. *Id.* at 716-17, 412 S.E.2d at 363. See FED. R. EVID. 404(a)(3), 405(a), 803(21).

97. *Williams*, 330 N.C. at 715, 412 S.E.2d at 362.

98. *Id.* at 717 (citing Rule 608(b) and *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986)).

99. *Williams*, 330 N.C. at 719, 412 S.E.2d at 364.

100. *Id.*

101. *Id.* (quoting *U.S. v. Abel*, 469 U.S. 45, 56 (1984)).

102. FED. R. EVID. 611(b) (emphasis added).

103. *Williams*, 330 N.C. at 719, 412 S.E.2d at 364 (emphasis added). The Court did not cite to any post-code North Carolina cases.

104. *Id.* (quoting 3 DAVID W. LOUISELL AND CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 305, at 263 (1979))(emphasis added).

inducements” or the character trait for truth-telling, Rule 611(b) deals with the *mental capacity* for truth-telling.¹⁰⁵

VI. CONCLUSION

What is the possible impact of this new case on future trials in North Carolina? It can be considerable if the trial lawyer reads it and is alert to its possibilities in her cases, be they civil or criminal.

First, how can the lawyer find out about such information, usually considered both sensitive and private by most people? In civil cases, the lawyer can find it through discovery and the Federal Rules of Civil Procedure.¹⁰⁶ In criminal cases, the only possible discovery vehicle is a “Brady-Agurs” Motion.¹⁰⁷ For the enterprising lawyer there is an additional possible avenue. Check the courthouse records for the witness’ past criminal case files, if any. You may find, through careful examination, that your hostile witness was another lawyer’s criminal defendant client. After this prior defendant was sent to a state mental hospital for pre-trial examination, a most interesting psychiatric report was sent back to the courthouse. Assuming there are no applicable state statutory privacy privileges (and I’m certainly *not* assuming it),¹⁰⁸ the report could be a veritable gold mine of impeachment nuggets. Employ the “voice over” insistent tones of today’s thirty-second political attack ads, and you may be able, by *Williams* impeachment alchemy, to turn gold into pyrite.

A further piece of dynamite in *Williams* is the quote from Louisell & Mueller’s *Federal Evidence* that *Williams*’ impeachment material — mental health treatment, drug use, suicide attempts, civil commitments, alcohol problems is “properly the subject not only of cross-examination but of *extrinsic evidence*.”¹⁰⁹ This phrase means, at least, that you’re not “bound by the witness’ answer.” These subjects are not collateral. You may yourself introduce other evidence on these subjects to refute the witness’ denials, if any, and thereby doubly impeach the witness. This is a powerful sword for an able advocate!

105. *Id.* (citing 3 LOUISELL & MUELLER, *supra* note 104, at § 305)(emphasis added).

106. *See, e.g.*, FED. R. CIV. P. 26.

107. *See, e.g.*, State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

108. *See, e.g.*, N.C. GEN. STAT. § 15A-1002(d) (1992).

109. *Williams*, 330 N.C. at 719, 412 S.E.2d at 364 (quoting 3 LOUISELL & MUELLER, *supra* note 104, § 305, at 263)(emphasis added).

How far back in the witness' life closet can you reach for these *Williams* skeletons? Since Rule 611 says nothing about time frames, the United States Supreme Court had to look elsewhere for "authority" with which to enclose their new creation. It chose to cite an Eleventh Circuit case requiring a ten-year limitation.¹¹⁰ Not mentioned in the opinion, but obviously known to the justices, is the ten-year general limitation set forth in Rule 609(b)¹¹¹ for prior criminal convictions.

110. U.S. v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983).

111. FED. R. EVID. 609(b).

APPENDIX A

“Firmly Rooted” Hearsay Exceptions — Authorities

- RULE 801(d). Admissions by a Party-Opponent**
- 801(d)(B) “Adoptive Admission”
State v. Marshall, 335 N.W.2d 612 (Wis. 1983).
 - 801(d)(D) Agent Admission
U.S. v. Saks, 964 F.2d 1514 (5th Cir. 1992).
 - 801(d)(E) Co-conspirator Statement
Bourjaily v. U.S., 483 U.S. 171 (1987).
- RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial**
- 803(1) Present Sense Impression
Brown v. Tard, 552 F.Supp. 1341 (1982).
 - 803(2) Excited Utterance
White v. Illinois, 112 S. Ct. 736 (1992).
State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1981).
Washington v. Palomo, 783 P.2d 575 (Wash. 1989).
 - 803(3) Then Existing Mental, Emotional, or Physical Condition (state of mind)
State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).
Lenza v. Wyrick, 665 F.2d 804 (8th Cir. 1982).
 - 803(4) Statements for Purpose of Medical Diagnosis or Treatment
White v. Illinois, 112 S. Ct. 736 (1992).
 - 803(5) Recorded Past Recollection
U.S. v. Kelly, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).
 - 803(6) Business Records
Ohio v. Roberts, 448 U.S. 56, 66 n.6 (1980) (“Properly administered, the business and public records exceptions would seem to be among the safest of the hearsay exceptions.”); J. Brooks Greer, III, Comment, *Hearsay, The Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651, 668 (1970). *But see* Johnson v. Lutz, 170 N.E. 517 (N.Y. 1930). The business record exception, not recognized at common law, is a creature of statute. *See also* U.S. v. Ray, 920 F.2d 562 (9th Cir. 1990); U.S. v. Norton, 867 F.2d 1354 (11th Cir. 1989).
 - 803(8) Public Records
Ohio v. Roberts, 448 U.S. 56 (1980). *See supra*, exception found in Rule 803(6) above.
U.S. v. DeWater, 846 F.2d 528 (9th Cir. 1988).

- 803(9) **Vital Statistics**
Segrest v. Gillette, 331 N.C. 97, 414 S.E.2d 334 (1992) (death certificates).
- 803(17) **Trade Reports**
In Dutton v. Evans, 400 U.S. 74, 96 (1970) (Harlan, J., concurring) (to require the declarant's production, as to learned treatises and trade reports, would be "unduly inconvenient and of small utility").
- 803(18) **Learned Treatises**
See supra, exception found in Rule 803(17).
- RULE 804. Hearsay Exceptions; Declarant Unavailable.**
- 804(b)(1) **Former Testimony**
Ohio v. Roberts 448 U.S. 56 (1980).
U.S. v. Kelly, 892 F.2d 255 (3rd Cir. 1989).
U.S. v. Salim, 855 F.2d 944 (2d Cir. 1988).
Mancusi v. Stubbs, 408 U.S. 204 (1972) (where opportunity for cross-examination was available and availed of).
- 804(b)(2) **Statement Under Belief of Impending Death**
Pointer v. Texas, 380 U.S. 400 (1965).
Ohio v. Roberts, 448 U.S. 56 (1980).
Mattox v. U.S., 156 U.S. 237 (1895).
- 804(b)(3) **Statement Against Interest**
Berrisford v. Wood, 826 F.2d 747 (8th Cir. 1987) (penal interest); *contra* Olson v. Green, 668 F.2d 421 (8th Cir. 1982).
U.S. v. Seeley, 892 F.2d 1 (1st Cir. 1989); Lee v. Illinois, 476 U.S. 530 (1986) (holding that a confession of one defendant may be inadmissible against other co-defendants because such statements against penal interest are presumptively unreliable hearsay as to things said against the declarant's co-defendants, but this presumption is rebuttable). *See* U.S. v. York, 933 F.2d 1343 (7th Cir. 1991); Jennings v. Maynard, 946 F.2d 502 (10th Cir. 1991); New Mexico v. Earnest, 477 U.S. 648 (1986).
- 804(b)(5) **Other**
Idaho v. Wright, 497 U.S. 805 (1980) (holding that the residual exceptions are not "firmly rooted").