Confrontation: A Trial Right? — *United States v. Singleton*

Federal agents arrested Singleton for selling narcotics to an undercover agent, but released him the same day on his offer to cooperate with the Government in narcotics investigations.[1] One year and two months later, after ceasing to cooperate, Singleton was indicted on the earlier narcotics charge.[2] Upon a showing that the prosecution's key witness [3] was too ill to leave his home in Mobile, Alabama, to testify at the trial in New York City, the trial court granted the Government's motion to take the witness's deposition in Mobile pursuant to section 3503 of the 1970 Organized Crime Control Act.[4] That provision permits the prosecution to take and

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[1] Singleton was arrested on January 22, 1970, five months after the alleged crime. At the time of his arrest, Singleton, an indigent Black, was interrogated, held incommunicado, and without counsel was coerced to agree to cooperate with federal agents or face the alternative of being sent "away forever." Brief for Appellant at 3, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), *citing* Record at 54–55.

[2] The indictment contained one count that charged Singleton with unlawfully selling or giving away cocaine hydrochloride. The Government did not indict Singleton until fourteen months after his arrest and eleven months after he had ceased cooperation with the Government, claiming that he was in fear of his life. Brief for Appellant at 1, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972).

[3] Counsel for Singleton was appointed for the first time on March 27, 1971. Trial was initially set for April 22, 1971, but at defendant's request it was changed to May 18, 1971, to enable the defense to prepare extensive pretrial motions. Brief for Appellant at 4, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), *citing* Record at 53. On the afternoon of May 17, 1971, one day before the trial date, Government counsel, on fifteen minutes notice, moved to depose an informer, one Morris, and to delay the trial of defendant until the deposition could be completed. Brief for Appellant at 5, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972).

Morris was a particularly suspect witness; he was a known drug "pusher" who had twice been convicted and sentenced on narcotics charges, the first time while a member of the New York Police Department. Morris admitted during cross-examination at the deposition that he was presently living in a seven-room house owned by a federal agent and was not paying rent, but denied being on the Government's payroll at the time of the alleged crime. The Government stipulated at trial, however, that Morris had received $200 or more on two separate occasions between the time of the alleged crime and Singleton's arrest, but that the "pay-offs" were not connected with Singleton's case.

Morris's testimony was the only evidence establishing Singleton's possession of narcotics and the only testimony implicating him in its delivery. Contradicting Morris's testimony, Singleton testified that Morris had devised a plan whereby they would obtain advance payment for the cocaine, fail to deliver, and split the proceeds. Singleton further testified that he received $1,800 from one Ford, gave it all to Morris, and then refused to further participate in the swindle because he felt he had been "set-up." Brief for Appellant at 10 n.3, 11–12, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), *citing* Record at 179, 198–99, 248, 263.

[4] 18 U.S.C. § 3503(a) (1970) provides:

> Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness. A motion by the Government to obtain an order under this section shall contain certification by the Attorney General or his designee that the legal proceeding is

use depositions as testimonial evidence upon certification by the Attorney General that the defendant is believed to have participated in organized crime. At trial, the prosecutor read the witness's deposition into evidence over the defense's objection, and the defendant was convicted and sentenced.[5]

On appeal, the defense argued, *inter alia*,[6] that the Government's use of a deposition as testimonial evidence had violated Singleton's sixth amendment right to confrontation. In a two-to-one decision, the Second Circuit Court of Appeals rejected the defendant's argument and held that where a deposition of a witness is taken under oath, in the presence of both defendant and his attorney, and is subject to full cross-examination, the use of such deposition at trial does not violate the defendant's right to confrontation, so long as the deponent is unavailable for trial for reasons not attributable to willful or negligent conduct of the Government.[7]

I

A. Historical Development of the Right to Confrontation

An undisputed requirement of the adversary system of criminal justice, the right to confrontation existed in England even before trial by jury and has been preserved in the United States by the sixth amendment.[8] The Anglo-Saxon trials by ordeal[9] or compurgation[10] were essentially adversary proceedings under public supervision in which the opponents appealed to deity for a decision.[11] The Anglo-Norman trial by combat,[12]

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against a person who is believed to have participated in an organized criminal activity.

Singleton provides the first judicial construction of the deposition provision.

[5] Defendant's motion to exclude the deposition as violative of his sixth amendment right to confrontation was argued and decided on July 20, 1971. Trial commenced on July 22, 1971, a full twenty-three months after the alleged commission of the crime, and concluded on July 27, 1971. Brief for Appellant at 5, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972).

Singleton was sentenced to a mandatory minimum sentence of imprisonment for five years pursuant to title 26, United States Code, sections 7237(b) and (d). Brief for appellee at 13, United States v. Singlton, 460 F.2d 1148 (2d Cir. 1972).

[6] Defendant sought reversal on four other grounds. *See* discussion in note 43 *infra*.

[7] United States v. Singleton, 460 F.2d 1148, 1152 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973).

[8] "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witness against him . . . ." U.S. CONST. amend. VI.

[9] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 70 (1883).

[10] T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 115–16 (5th ed. 1956).

[11] The court's function was to determine whether the accused was to be tried by compurgation or by ordeal; in this the courts recognized the right to confrontation. If the accused or his helpers had a good reputation, or the accusers had told an unconvincing story, the trial was by oath or compurgation; otherwise, it was by ordeal. As early as Cnut's time (circa 1000) there are indications that the accuser's testimony was subject to challenge by the prisoner; by the early 1200's the accuser had to present at least two "complaint witnesses," and the accused was permitted the right to cross-examine them. If the accuser's witnesses disagreed among themselves, the accused prevailed. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 385–86 (1959).

and later trial by inquest or recognition from which trial by jury evolved, retained the right to confrontation in a modified form.[13] Although the early jurors did not determine disputed questions of fact by hearing evidence, the requirement that the witness be credible was of such critical importance that it was included in the *Magna Carta* in 1215.[14] By the sixteenth century, jury members had ceased to be witnesses and had become judges of evidence that was publicly presented by the adversaries. The common law right to cross-examine witnesses at trial and to have demeanor evidence weighed by the trier of fact arose as a consequence of this change of jury roles.[15] Although some writers have traced the historical origin of the right to confrontation to the common law reaction against the abuses of political trials[16] and others to the development of hearsay rules of evidence,[17] confrontation was recognized in the ordinary trials in the assizes well before its recognition in political trials and well before the advent of the hearsay rule.[18] In any event, the common law right to confrontation has been recognized in all criminal trials in England since the mid-seventeenth century.

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[12] In trial by combat, the accused was permitted to challenge the accuser and the complaining witnesses on the field of battle to prove the substantiality of the charge. T. PLUCKNETT, *supra* note 10, at 116–18.

[13] Although the early jurors did not determine disputed questions of fact by hearing evidence, the accused was permitted to challenge a juror on the grounds of bad reputation or bias. The accused could attack an adverse judgment through a writ of attaint whereby a second jury was summoned to challenge the honesty of the previous jury. If the decision was favorable to the accused, the earlier verdict was set aside and the jury that rendered it punished. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 334–39 (7th ed. 1956).

[14] "[N]o bailiff for the future shall, upon unsupported complaint, put anyone to his 'law' without credible witnesses brought for this purpose." A. HOWARD, MAGNA CARTA — TEXT AND COMMENTARY 43 (1963).

[15] After England left the Church and rejected the canonical rule that at least two witnesses were needed for proof, courts put more stress upon the character of the evidence offered and the character of the witnesses offering it. A consequence was the right to confront and cross-examine witnesses to test credibility. Pollitt, *supra* note 11, at 387.

[16] At least one author traces the confrontation clause in its present form to the common law reaction against the abuses of the political trials and, more particularly, to the trial of Sir Walter Raleigh for treason in 1603. A critical element in Raleigh's conviction consisted of statements by a witness implicating Raleigh in a plot to seize the throne, although Raleigh had since received a written retraction from the witness. In the trial, Raleigh was refused the right of confrontation. F. HELLER, THE SIXTH AMENDMENT 104 (1951); J. STEPHEN, *supra* note 9, at 333–36.

[17] In discussing the history of the hearsay rule as indistinguishable from the history of the right to confrontation, Dean Wigmore points out that, while no precise date or ruling stands out as decisive, the impropriety of using hearsay statements by persons not called had received fairly constant enforcement from the second decade after the Restoration; between 1675 and 1690 the doctrine had become fixed. 5 J. WIGMORE, EVIDENCE § 1364 (3d. ed. 1940).

[18] By the early sixteenth century, witnesses in ordinary trials at the assizes were required to testify before adverse parties. W. HOLDSWORTH, *supra* note 13, at 335 n.2. As early as the mid-sixteenth century, Parliament attempted to extend this common law right to trials for treason, but its efforts were generally ineffective. 5 Edw. 6, c. 11 (1551), required at least two witnesses to appear against the accused in court. In 1554, Parliament required that in all trials for treason "[a]ll adverse witnesses . . . shall, if living, and within the realm, be brought forth in person before the party arraigned if he require the same, and object and say openly in his hearing, what they or any of them can against him . . . ." 1 & 2 Phil. & M., c. 10 (1554), *cited in* Pollitt, *supra* note 11, at 388 n.26.

The American colonists accepted the right to confrontation as part of their common law heritage.[19] Virginia was the first to include the right in its constitution,[20] and other colonies followed.[21] At present, nearly every state constitution contains a confrontation provision.[22] The sixth amendment of the United States Constitution similarly includes it as a fundamental right.[23]

B. Elements of Confrontation

With limited exceptions, the right to confrontation requires that testimony be given (1) under oath,[24] (2) in the personal presence of the trier of fact,[25] and (3) subject to cross-examination.[26] Much of the debate concerning the adequacy of confrontation involves the question whether it is proper to deny the jury an opportunity to view the witness.[27] Some writers argue that confrontation is synonymous with cross-examination

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[19] Pollitt, *supra* note 11, at 397.

[20] "In all capital or criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses . . . ." VA. CONST. § 8 (1776), *cited in* Pollitt, *supra* note 11, at 397.

[21] Pollitt, *supra* note 11, at 397, *citing* DEL. CONST. § 14 (1776); MD. CONST. § 19 (1776); MASS. CONST. § 12 (1780); N.C. CONST. § 7 (1776); N.H. CONST. § 15 (1784); PA. CONST. § 9 (1776); VT. CONST. § 10 (1776).

[22] *See* J. WIGMORE, *supra* note 17, § 1397 n.1.

[23] At the time of state ratification of the Constitution, members of various state conventions objected to the Constitution's lack of procedural safeguards. Mr. Holmes in the Massachusetts Convention objected:

> The mode of trial is altogether indetermined . . . whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantages of cross-examination, we are not yet told.
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> [W]e shall find congress possessed of powers enabling them to institute judicatories little less inauspicious than the Spanish Inquisition.

2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110–11 (3d ed. 1937).

[24] Standard procedure requires the swearing of witnesses. While the practice is clearly less effective than in earlier times when it was the basis of the trial by compurgation, no disposition to relax the requirement is apparent, other than to allow affirmation by persons with scruples against taking oaths. Rule 603 of the *Proposed Rules of Evidence* is designed to afford affirmation as an alternative for atheists, conscientious objectors, mental defectives, and children:

> Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Although the Supreme Court intended that the proposed rules become effective on July 1, 1973, House bill 5463, 93d Cong., 1st Sess. (1973), suspended their enactment, and the rules are presently being modified by the House Judiciary Committee.

[25] The demeanor of the witness traditionally has been critical to furnishing the trier of fact with nonverbal evidence. *See* Note, *Demeanor Evidence: Elusive and Intangible Imponderables,* 47 A.B.A.J. 58 (1961). FED. R. CRIM. P. 26 includes the general requirement that testimony be taken orally in open court.

[26] J. WIGMORE, *supra* note 17, § 1367.

[27] *Compare* United States v. Allen, 409 F.2d 611 (10th Cir. 1969), *with* United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972). *Compare* C. MCCORMICK, EVIDENCE § 234 (1954), *and* J. WIGMORE, *supra* note 17, § 1396 *with* Note, *Witnesses — The Confrontation Clause of the Sixth Amendment Requires State Authorities to Make a Good-Faith Effort to Produce an Out-of-State Witness at Trial,* 47 TEXAS L. REV. 331 (1969), *and* Note, *Confrontation, Cross-Examination and the Right to Prepare a Defense,* 56 GEO. L.J. 939 (1968).

and that demeanor evidence is an incidental, and therefore dispensable, benefit of the right to confrontation.[28] The Supreme Court, however, has consistently treated cross-examination and confrontation separately,[29] thereby suggesting that the right to confrontation is broader than mere cross-examination and that it includes demeanor evidence. Prior to *Singleton,* no federal court had squarely faced the issue whether cross-examination during the taking of a deposition may satisfy the right to confrontation.[30]

Traditionally, courts have made exception to the rule requiring actual confrontation before the trier of fact only where the witness was unavailable and where there was adequate previous confrontation. The courts have generally held that unavailability is sufficiently shown where the declarant is proved deceased,[31] insane,[32] absent due to the connivance of the accused,[33] or otherwise permanently unavailable despite good faith efforts by the prosecution to secure his presence at trial.[34] Where the Government has made no attempt to obtain the presence of the declarant,[35] has not adequately shown that the witness could not be produced,[36] or the declarant's unavailability is due to the Government's negligence,[37] out-of-court testimony is generally refused.[38]

Factors to be considered in testing the adequacy of a previous confrontation include the nature of the proceeding, the character and use

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[28] J. WIGMORE, *supra* note 17, § 1365; C. MCCORMICK, *supra* note 27, § 231.

[29] In *California v. Green,* the Court stated:

> Wigmore's more ambulatory view — that the Confrontation Clause was intended to constitutionalize the hearsay rule and all its exceptions as evolved by the courts — rests . . . on assertion without citation . . . . Wigmore's reading would have the practical consequence of rendering meaningless what was assuredly . . . meant to be an enduring guarantee.

399 U.S. 149, 178–79 (1970). In Turner v. Louisiana, 379 U.S. 466, 472–73 (1965), the Court held that the evidence developed against a defendant must come from the witness stand and be subject to both confrontation and cross-examination. *See* Barber v. Page, 390 U.S. 719, 722 (1968); Parker v. Gladden, 385 U.S. 363, 364 (1966); Note, *Confrontation, Cross-examination, and the Right to Prepare a Defense,* 56 GEO. L.J. 939 (1968). *See also* notes 62–63 *infra* and accompanying text.

[30] Comment, *Fifth Amendment Due Process Clause and Sixth Amendment Confrontation Clause — Deposition Provision in Organized Crime Control Act of 1970 Upheld in First Test — United States v. Singleton,* 4 RUTGERS CAMDEN L.J. 148 (1972).

[31] "The right of cross-examination having once been exercised, it was no hardship for the defendant to allow the testimony of the deceased to be read." Mattox v. United States, 156 U.S. 237, 242 (1895).

[32] *See* United States v. Hughes, 411 F.2d 461 (2d Cir.), *cert. denied,* 396 U.S. 867 (1969).

[33] *See* Reynolds v. United States, 98 U.S. 145, 158 (1878).

[34] *See* United States v. Bentvena, 319 F.2d 916 (2d Cir.), *cert. denied,* 375 U.S. 940 (1963). *See also* Barber v. Page, 390 U.S. 719 (1968).

[35] *See, e.g.,* Barber v. Page, 390 U.S. 719, 723 (1968) (witness not unavailable when the prosecution makes no attempt to bring the witness from prison in another state to the trial).

[36] *See, e.g.,* Government of Virgin Islands v. Aquino, 378 F.2d 540, 551 (3d Cir. 1967) (fact that witness was outside the court's jurisdiction was not adequately shown).

[37] *See, e.g.,* Motes v. United States, 178 U.S. 458, 468 (1900) (witness's prior testimony held inadmissible when his unavailability was due to the Government's negligence in keeping him in custody).

[38] *See* California v. Green, 399 U.S. 149, 165–66 (1970).

of the witness's testimony, and whether the testimony was given under oath, subject to cross-examination, before the trier of fact or at a previous trial from which a transcript is available to the court.[39] Exceptions are generally recognized for testimony given at a prior trial,[40] out-of-court testimony where the declarant is available at trial and subject to cross-examination,[41] and either out-of-court or previous trial testimony where sufficient indicia of reliability have been made available to the trier of fact to afford a satisfactory basis for evaluating the credibility of the prior statement.[42]

II

In *Singleton,* the court rejected the defendant's argument that the Government's use of the deposition at trial, even though it was taken and used in accordance with section 3503 of the Organized Crime Control Act, violated his sixth amendment right to confrontation by depriving the jury of the opportunity to judge the witness's demeanor.[43] Acknowledg-

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[39] People v. Gibbs, 255 Cal. App. 2d 739, 63 Cal Rptr. 471, 474 (1967).

[40] *See* notes 31–32 *supra* and accompanying text.

[41] *See, e.g.,* United States v. Green, 399 U.S. 149 (1970).

[42] *See, e.g.,* Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1968).

[43] Brief for Appellant at 28, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972). Defendant sought reversal on four other grounds. First, the length of time which elapsed between his criminal acts and the trial violated his sixth amendment right to a speedy trial, his fifth amendment right of due process, rule 48(b) of the Federal Rules of Criminal Procedure and Second Circuit rules regarding prompt disposition of criminal cases. 460 F.2d at 1150. The court, however, found that the delay was largely attributable to defendant's lack of preparation for trial, that there was no evidence of actual prejudice, that Singleton had waived his rights by failing seasonably to demand them, and that the Government's motion for a continuance to take Morris's deposition did not constitute a delay in violation of federal or circuit rules. 460 F.2d at 1150–52.

Second, defendant challenged the mandatory five-year sentence for violations relating to narcotics and marijuana imposed by sections 7237(b) and (d) of title 26, which was repealed in 1970 and replaced by the more liberal provisions of the Drug Abuse and Control Act of 1970. 21 U.S.C. § 841(b)(1)(A) (1970). The court held that defendant was properly sentenced since the 1970 law did not become operative until May 1, 1971, whereas the illegal acts had taken place on August 20, 1969, and Singleton had been indicted on March 10, 1971. 460 F.2d at 1153.

Third, defendant contended that the "exceptional circumstances" required by section 3503 (a) for the taking of depositions were wholly lacking in his case. The court, however, relied on the statute's legislative history and held that depositions under section 3503(a) are to be granted for the same reasons as those prescribed by rule 15(a) for the taking of defense depositions. In addition section 3503(b) specifies the illness of a witness as a circumstance under which a deposition obtained under section 3503(a) may be used in court. 460 F.2d at 1153.

Fourth, the defendant argued that certification by the Deputy Attorney General that the proceeding was against a person suspected of participating in organized criminal activity, without any requirement that the court examine the certification to find probable cause, violated the fourth amendment. Brief for Appellant at 37, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972). The court decided that it was only necessary to ascertain whether there had been a proper certification as required by statute and that Congress did not intend the organized crime certification to be subjected to judicial determination. The court stated that the certification procedures ensure political accountability, centralize the decisionmaking, and allow the party in the best position to know — the Attorney General — to make the decision. 460 F.2d at 1155.

ing confrontation to be essential to the adversary proceeding, the court held the confrontation in the deposition procedure adequate since it included transcribed cross-examination of the witness under oath. The witness's illness was a sufficient showing of unavailability for the court to conclude that there had been no violation of Singleton's sixth amendment rights.[44]

In so holding, the court relied on two tests established in *California v. Green*[45] for determining the admissibility of out-of-court testimony. First, the witness must actually be unavailable despite good faith efforts by the prosecution to produce him. Second, the declarant's inability to testify must in no way be the fault of the Government.[46] The court rejected Singleton's assertion under the latter test that the witness's inability to appear was the result of the Government's delay of the trial,[47] reasoning that the absence of almost any government witness may be traced in some part to governmental action or inaction. The Government's failure to have an instantaneous trial was not sufficient, the court held, to invalidate the use of the deposition.[48]

III

The court's decision in *Singleton* suffers from two general defects. First, the cases cited by the court in support of its position are distinguishable from *Singleton* in that none of them considered whether, or assumed that, demeanor evidence is a dispensable element of the right to confrontation. Second, the court seemingly ignored traditional limitations upon exceptions to the rule requiring in-court confrontation of witnesses in criminal prosecutions. Incidentally, the court erred in failing to consider the constitutionality of the federal statute that permitted the admission of the deposition against Singleton.

A. Distinguishable Judicial Authority

Contrary to the majority opinion's suggestion, none of the cases cited by the majority involved testimony that was not at some time subject to what the dissent described as "the crucible of in-court scrutiny by judge and jury."[49] In *United States v. Mattox*,[50] the Supreme Court permitted the use of testimony of two witnesses who had died after a prior trial. In doing so, however, the Court emphasized that the demeanor evidence presented at the earlier trial was critical to the constitutional adequacy of

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[44] 460 F.2d at 1154.

[45] 399 U.S. 149 (1970).

[46] *Id.* at 165.

[47] Brief for Appellant at 35, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972).

[48] 460 F.2d at 1152.

[49] *Id.* at 1155 (Oakes, J., dissenting).

[50] 156 U.S. 242 (1895).

confrontation.[51] In *United States v. Hughes*,[52] the Second Circuit, citing *Mattox*, allowed the use of previous trial testimony at a second trial, after the witness had become insane.[53] In *California v. Green*,[54] the witness was present in court; the issue, therefore, was not whether a deposition could be read in lieu of the witness's in-court testimony, but whether inconsistent pretrial testimony was admissible, contrary to the hearsay rules of evidence,[55] where the witness was present to testify and was subject to confrontation. Thus, *Green* goes no further than to say that "[t]he Confrontation Clause is not violated by admitting a declarant's out-of-court statements as long as the declarant is testifying as a witness and subject to full and effective cross-examination at trial." [56] Although the Supreme Court has on two occasions approved the use of depositions in state criminal trials, both cases were decided before the confrontation clause was held to apply to the states through the due process clause of the fourteenth amendment.[57] Briefly stated, there is no judicial precedent for the court's holding; *Singleton* allows the use of depositions by the Government in criminal trials in federal courts for the first time.

B. Departure from the Requirement of the Right to Confrontation

Traditional sixth amendment analysis requires that present, in-court confrontation of the witness be dispensed with only upon a showing of the witness's unavailability. The Government in *Singleton* did not meet this threshold burden; indeed, the Government never presented evidence of the witness's permanent unavailability. The fact that the absent witness

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[51] The primary objective [of the confrontation clause of the sixth amendment] was to prevent deposition of *ex parte* affidavits . . . 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.

Id. at 242–43.

[52] 389 F.2d 535 (2d Cir. 1968), *cert. denied*, 396 U.S. 867 (1969).

[53] *Id.* at 537.

[54] 399 U.S. 149 (1970).

[55] While it may readily be conceded that hearsay rules and the confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the confrontation clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

Id. at 155.

[56] *Id.* at 166.

[57] In *West v. Louisiana*, the Court allowed testimony given at a preliminary hearing on the theory that the sixth amendment "does not apply to proceedings in state courts." 194 U.S. 258, 262 (1904). In *Harrison v. Ohio*, the Court merely cited *West* in affirming a state decision to the same effect. 270 U.S. 632 (1925). In later holding that the confrontation clause applies to the states through the fourteenth amendment's due process clause, however, the Court explicitly overruled *West*. Pointer v. Texas, 380 U.S. 400, 406 (1965).

was a paid informer should have increased the Government's burden in proving permanent unavailability.[58]

Had the Government met the threshold burden of showing the witness's unavailability,[59] the court should then have required it to establish the adequacy of the previous confrontation to ensure its reliability. Cross-examination during a pretrial deposition may leave the defendant at a serious disadvantage; the defense may not be fully prepared to cross-examine witnesses prior to trial.[60] Even if prepared, the defense may purposefully wish to limit its cross-examination, as a matter of strategy, to avoid its use as a tool for discovery by the prosecution.[61] Where subsequent evidence either introduces new considerations or contradicts testimony given at the deposition, the defendant is denied the full cross-examination that would have been available to him at trial. Thus, cross-examination during the taking of a deposition may be inadequate to ensure fairness and reliability in the fact-finding process.

Beyond the inadequacies of cross-examination, the use of depositions as testimonial evidence against a criminal defendant critically denies the trier of fact the opportunity to consider the accuser's demeanor. In a line of decisions from *Mattox* [62] to the present,[63] the Supreme Court has recognized demeanor evidence as an essential element of confrontation that ensures the reliability and the fairness of the trial. As expressed in a recent Fifth Circuit opinion, "[w]henever a credibility choice is crucial to the resolution of an issue of fact, the defendant is entitled to have the

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[58] The prosecution stipulated at trial that Morris had received $425 from the Government in November 1969, but stated that the "pay-offs" were not connected with Singleton's case. Brief for Appellant at 19, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), *citing* Record at 454, 461, 477.

[59] In *Mancusi v. Stubbs*, the Court held that unavailability is a preliminary consideration: "Even though the witness be unavailable on retrial, his prior testimony must bear some of these indicia of reliability referred to in *Dutton*." 408 U.S. 204, 213 (1972).

[60] 460 F.2d at 1155 (Oakes, J., dissenting).

[61] In *Poe v. Turner*, the court stated that a preliminary hearing is less apt to provide an opportunity for adequate confrontation than a trial. In distinguishing between trial testimony and pretrial testimony, the court commented:

> Nor can petitioner point to any reasons counsel might have had on that occasion for exercising restraint in the conduct of the cross-examination . . . as petitioner perhaps could do had the testimony in question been offered at a preliminary hearing.

353 F. Supp. 672, 677 (D. Utah 1972).

[62] United States v. Mattox, 156 U.S. 237 (1895).

[63] In *Pointer v. Texas*, the Court stated:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

380 U.S. 400, 403 (1965). 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 the 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.

390 U.S. 719, 725 (1968).

same jury then charged with guilt determination weigh credibility on the basis of their personal observations of the appearance and demeanor of the witnesses." [64] Recent opinions have distinguished, with respect to the adequacy of confrontation, cases where the declarant has been subject to confrontation at a previous trial, from cases where the confrontation has taken place out of court.[65]

C. The Constitutionality of Section 3503

Despite apparently grave constitutional questions, the *Singleton* court failed to consider the constitutionality of the 1970 Organized Crime Control Act, which permits — for the first time in federal courts — the use of depositions by the Government in criminal prosecutions. The history of rule 15 of the Federal Rules of Criminal Procedure,[66] which presently provides a comparable deposition procedure for the accused, bears importantly upon the constitutionality of section 3503.[67] Although the courts allowed the use by defendants of depositions in exceptional circumstances as early as 1882,[68] it was not until 1941 that the Supreme Court Advisory Committee suggested that the Government be allowed to use depositions. At that time many questioned the proposal's constitutionality,[69] and the Supreme Court returned it for revisions. After several drafts, the proposal reappeared as the First Preliminary Draft of rule 18, but again its constitutionality [70] and desirability [71] were challenged. The Second Prelimin-

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[64] United States v. Edwards, 469 F.2d 1362, 1369 (5th Cir. 1972).

[65] *See* notes 61–64 *supra* and accompanying text.

[66] FED. R. CRIM. P. 15(a) provides:

> If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

[67] *See* 2 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 15:1–:34 (1966); Orfield, *Depositions in Federal Criminal Procedures,* 9 S.C.L.Q. 376, 377–92 (1957).

[68] *See* United States v. Wilder, 14 F. 393 (S.D. Ga. 1882).

[69] On June 26, 1941, the Judicial Conference of the Second Circuit raised the question whether depositions taken by the Government under the proposed rule would be constitutional. On June 30, 1941, Nathan April of New York stated that a provision for depositions should be made, but that it should be available only in instances where the defendant specifically waives his right of confrontation for each witness. L. ORFIELD, *supra* note 67, § 15:1.

[70] United States Attorney Frierson of the middle district of Tennessee opposed the subsection permitting the Government to take depositions as violative of the sixth amendment. The federal judges of Michigan similarly objected to the rule on the ground that the sixth amendment compels all material testimony to be presented in open court in the presence of the defendant. *Id.* § 15:4, at 451, 453.

[71] United States Attorney Deeb for the western district of Michigan and Judge Hall of the southern district of California favored presence of the witness at the trial even though the Constitution may not require it. The Ninth Circuit Conference passed a resolution by a vote of sixteen-to-five disapproving the rule. *Id.* at 453.

ary Draft drew criticism as well,[72] and in reviewing the final draft, submitted as proposed rule 17, the Supreme Court without comment struck the provision allowing Government use of the deposition. In 1946, the Supreme Court adopted rule 15, which provides a deposition procedure for defendants, but not for the Government. Again, in 1964, the Advisory Committee proposed making depositions available to the Government,[73] but this time, due to broad-based criticism,[74] the Standing Committee on Rules of Practice and Procedure rejected the proposed change; the Judicial Conference refused to submit it to the Court.

Thus, it would appear that section 3503 is at best of questionable validity. The *Singleton* court seemed to disregard the Supreme Court's constant repudiation of proposals to amend rule 15, and its precursors, to provide for Government use of the deposition. Ironically, in permitting administrative authorization for use of the deposition by the Government, section 3503 provides fewer safeguards for the defendant than rule 15, which requires court authorization, provides for the Government.[75]

The protections of the sixth amendment should not be emasculated in an attempt of dubious effectiveness to alleviate the problem of organized crime. *Singleton* establishes the right of the Government to use information obtained in depositions in criminal prosecutions upon a showing of unavailability of the witness. Presently limited to the somewhat broad domain of organized criminal activity, the *Singleton* rationale need be extended only slightly to permit abuses that would substantially undermine the adversary system of criminal justice. This trend is inconsistent with the Supreme Court's rulings in *Mattox*[76] and more recently in *Pointer*,[77]

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[72] Judge McGuire of the District of Columbia thought it important that the witness testify at the trial and objected to depositions taken by the Government. Similar objections were voiced by the Hudson County (New Jersey), Seattle, and California Bar Associations. A report to the Board of Governors of the Oregon State Bar objected to Government depositions on the same grounds. *Id.* at 457.

[73] 34 F.R.D. 420, 421, (1964).

[74] The Special Committee on Federal Rules of Procedure of the American Bar Association strongly objected to the proposal:

> Pretrial discovery on the part of the defense has not been expanded to a point which the defendant's rights can be fully protected in the taking of depositions. In the traditional trial setting, a witness who is excused from the stand may be recalled later in the trial if the parties later became aware of additional questions which should be asked of the witness. At least during the trial, the parties have total discovery of the evidence which is going to be admitted at trial. When depositions are to be taken in advance of trial, however, the parties may not have a complete understanding of the significance of such witness's testimony and may be unable to examine them adequately .... If the testimony of such absent witness is of such great importance that a "failure of justice" might result in the absence of his testimony it should be apparent that the witness is important enough so that the jury should have a chance to see and observe his demeanor.

Report of the ABA Special Committee on Federal Rules of Procedure, 38 F.R.D. 95, 107–08 (1965).

[75] *See* FED. R. CRIM. P. 15(a).

[76] United States v. Mattox, 156 U.S. 237 (1895).

Barber,[78] and *Mancusi*.[79] The conclusion of the dissenting opinion provides an appropriate assessment of the decision: "This case goes further than any other in the history of federal jurisprudence to make the sixth amendment and its confrontation clause a nullity." [80]

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[77] Pointer v. Texas, 380 U.S. 400 (1965).
[78] Barber v. Page, 390 U.S. 719 (1968).
[79] Mancusi v. Stubbs, 408 U.S. 204 (1972).
[80] 460 F. 2d at 1154 (Oakes, J., dissenting).