statement by a witness who is under oath, in the presence of the jury, and subject to cross-examination by the defendant is only one way of complying with the Confrontation Clause, four Justices concluded. Thus, at least in the absence of prosecutorial misconduct or negligence and where the evidence is not "crucial" or "devastating," these Justices found that the Confrontation Clause could be satisfied if "the trier of fact [has] a satisfactory basis for evaluating the truth of the [hearsay] statement." The reliability of a statement was to be ascertained in each case by an inquiry into the likelihood that cross-examination of the declarant at trial could successfully call into question the declaration's apparent meaning or the declarant's sincerity, perception, or memory.[218]

In *Ohio v. Roberts*,[219] a Court majority adopted a reliability test for satisfying the confrontation requirement through use of a statement by an unavailable witness.[220] Over the course of 24 years, *Roberts* was applied, narrowed,[221] and finally overruled in *Crawford v.*

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[218] 400 U.S. at 86–89. The quoted phrase is at 89, (quoting California v. Green, 399 U.S. 149, 161 (1970)). Justice Harlan concurred to carry the case, on the view that (1) the Confrontation Clause requires only that any testimony actually given at trial must be subject to cross-examination, but (2) in the absence of countervailing circumstances introduction of prior recorded testimony—"trial by affidavit"—would violate the clause. Id. at 93, 95, 97. Justices Marshall, Black, Douglas, and Brennan dissented, id. at 100, arguing for adoption of a rule that: "The incriminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule." Id. at 110–11. The Clause protects defendants against use of substantive evidence against them, but does not bar rebuttal of the defendant's own testimony. Tennessee v. Street, 471 U.S. 409 (1985) (use of accomplice's confession not to establish facts as to defendant's participation in the crime, but instead to support officer's rebuttal of defendant's testimony as to circumstances of defendant's confession; presence of officer assured right of cross-examination).

[219] 448 U.S. 56 (1980). The witness was absent from home and her parents testified they did not know where she was or how to get in touch with her. The state's sole effort to locate her was to deliver a series of subpoenas to her parents' home. Over the objection of three dissenters, the Court held this to be an adequate basis to demonstrate her unavailability. Id. at 74–77.

[220] "[O]nce a witness is shown to be unavailable . . . , the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" 448 U.S. at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)). The Court indicated that reliability could be inferred without more if the evidence falls within a firmly rooted hearsay exception.

[221] Applying *Roberts*, the Court held that the fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986). *Roberts* was narrowed in United States v. Inadi, 475 U.S. 387 (1986), which held that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements. See also White v. Illinois, 502 U.S. 346, 357 (1992) (holding admissible "evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment"); and Idaho v. Wright, 497 U.S. 805, 822–23 (1990) (in-