

# Update on the Law: The First Circuit Murders The Confrontation Clause

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The Sixth Amendment to the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him," but in yet another example of unwarranted judicial activism, the U.S. Court of Appeals for the First Circuit recently held that "all" does not mean "all."

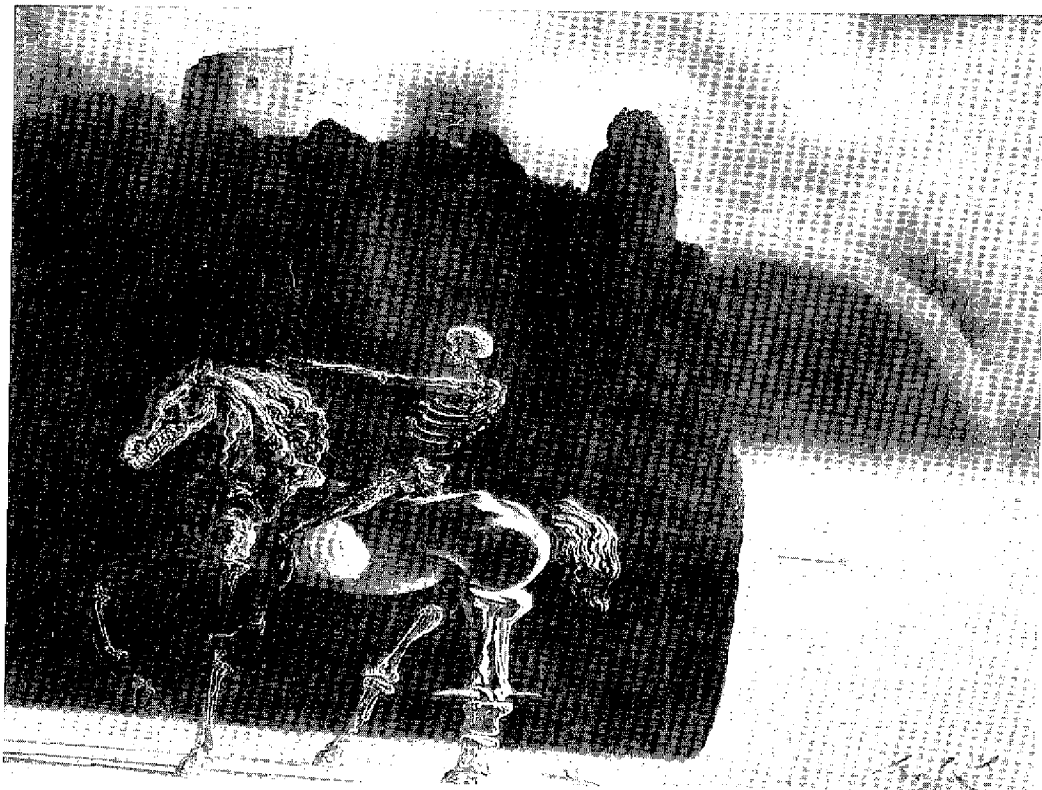
In *U.S. v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996), the Court ruled a defendant who murders a witness prior to trial waives his right of confrontation. Moreover, the Court appeared to carve out a dangerous new exception to the rule against hearsay — one which allows statements of a deceased witness into evidence whenever it can be shown, by a preponderance of the evidence, that the defendant murdered the witness.<sup>1</sup>

To be sure, a defendant who murders a government witness prior to trial is hardly a sympathetic figure, but there is no getting around the fact that the Sixth Amendment guaranty applies in *all* criminal prosecutions. This

article summarizes the *Houlihan* decision, explains why the Court's reasoning was flawed, and concludes with a call for legislation overturning it.

## *United States v. Houlihan*

The facts of *Houlihan* are relatively simple. Houlihan and Nardone operated Kerrigan's Flower Shop in Charlestown, Massachusetts. To supplement their income, they worked as drug lords. One day, one of their employees, George Sargent, was asked to discuss his employers' activities with detectives of the Boston Police Department. Sargent was in a bind. On the one hand, he had entered into an oral confidentiality agreement with his employers; on the other hand, he was facing a lengthy term of imprisonment. Ultimately, he opted to speak with the police. Upon learning of this, Houlihan and Nardone elected not to sue Sargent for breach of contract, but instead killed him.<sup>2</sup>



The Rider of Death by Salvador Dalí

After Sargent's death, federal prosecutors sought and obtained drug-trafficking and racketeering indictments against Houlihan, Nardone, and several others in their employ. At trial, the prosecution sought to introduce statements Sargent had made to the police prior to his untimely demise. Houlihan and Nardone objected to the proffered statements, contending admission of such hearsay would deprive them of their right to confront the witnesses against them.<sup>3</sup>

The trial court found sufficient evidence to believe Houlihan and Nardone had murdered Sargent, and that by doing so they had effectively waived their right of confrontation. Accordingly, it overruled their objections and allowed Sargent to testify from the grave. Notwithstanding his status as a corpse, the jury found Sargent's testimony credible and convicted the defendants. Facing multiple life sentences, Houlihan and Nardone appealed.

### ***Analysis of the Houlihan Decision***

The right to confront one's accusers can be traced to biblical times. When Festus more than two thousand years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to have stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."<sup>4</sup>

The concerns which gave rise to the right of confrontation were eloquently articulated by the Supreme Court in *Mattox v. United States*, 156 U.S. 237 (1895):

*"The primary object of the constitutional provision in question was to prevent depositions or 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 believe." Id. at 242-243.*

The right of confrontation holds an esteemed place in American jurisprudence. Nearly one hundred years ago, the U.S. Supreme Court emphasized the importance of this right:

*"The right of confrontation is one of the fundamental guarantees of life and liberty... long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all the states composing the Union." Kirby v. United States, 174 U.S. 47 at 55-56 (1899).*

If the right of confrontation was important in 1899, it is surely more important now. The criminalization of conduct which has taken place over the past two decades is unprecedented in American history.<sup>5</sup> More people are being tried for more crimes than ever before.<sup>6</sup>

The First Circuit justified its decision in *Houlihan* by resort to the judicially created fiction of implied waiver. In support of its reasoning, it cited *Taylor v. United States*, 414 U.S. 17 (1973) and *Illinois v. Allen*, 397 U.S. 337 (1970). In *Taylor*, the Court ruled the defendant had waived his right of confrontation by boycotting his trial. In *Allen*, the Court held the defendant had waived his right of confrontation by engaging in disruptive behavior which required his removal from the Courtroom.

The First Circuit's reliance on *Taylor* and *Allen* was misguided for two reasons. First, both cases were decided at the height of the Supreme Court's activist era -- a time when federal judges were ordering school children flown from Seattle to northwest Alaska so Eskimo children could attend racially balanced schools.<sup>7</sup> Consequently, it is doubtful *Taylor* and *Allen* are still good law.<sup>8</sup>

Moreover, even if we assume *Taylor* and *Allen* are still binding precedents, neither is applicable on the facts presented in *Houlihan*. Unlike *Taylor*, Houlihan and Nardone did not boycott their trial. Unlike *Allen*, they did not engage in any behavior during trial which required their removal from the courtroom. It is undisputed that they attended their trial and behaved like perfect gentlemen throughout the proceedings.

### ***A Call for Congressional Action***

The First Circuit's willingness to ignore the plain language of the Sixth Amendment is disturbing, but more disturbing is the possibility that *Houlihan* opens the door to further erosion of the Confrontation Clause. If murdering a witness constitutes a waiver of the right of confrontation, what about the defendant who merely maims a potential witness? To go one step further, what about

the defendant who employs Voodoo in the hope that his actions will prevent a witness from being unable to appear?

Having stepped onto this slippery slope, it is impossible to predict how the courts will handle these and the many other questions sure to arise in light of the First Circuit's decision. Inaction will only lead to further erosion of the Constitution. If liberal judges can chip away at the Confrontation Clause with the judicially created doctrine of implied waiver, all constitutional rights are in jeopardy.

Thankfully, both houses of Congress are now controlled by Republicans, most of whom are "strict constructionists" who believe the Constitution means what it says.<sup>9</sup> Congress must overturn *Houlihan* and restore vigor to the Confrontation Clause in accordance with the original intent of our Founding Fathers.

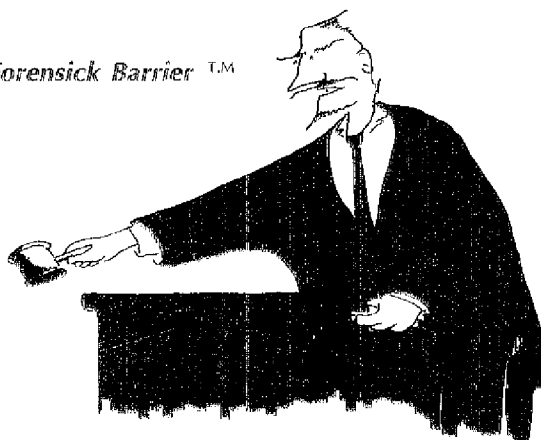
#### REFERENCES

<sup>1</sup> Though the generally recognized exceptions to the rule against hearsay have been codified in Rules 803 and 804 of the Federal Rules of Evidence and in similar rules adopted in the fifty states, many courts continue to recognize exceptions not enumerated in the rules. For an interesting discussion of this phenomenon, see, James W. McElhaney, *The Cleveland Exception to the Hearsay Rule*, pages 80-91 in *Trial Notebook*, ABA Section of Litigation, 1981. In some instances, the federal rules permit the admission of hearsay which does not qualify under a specific exception, but only if the trial court first determines there are "circumstantial guarantees of trustworthiness." Fed.R.Evid. 803(24) and 804(b)(5). What is particularly disturbing about the *Houlihan* decision is the Court's holding that the hearsay statements of murdered witnesses are admissible even if there are no "circumstantial guarantees of trustworthiness."

- <sup>2</sup> Houlihan and Nardone were not alone in their view that self-help is more effective than litigation in settling contract disputes. Between 1992 and 1995, the number of contract actions pending in the federal trial courts fell from 51,246 to 31,619. Between 1990 and 1994, the total number of murders committed in United States rose from 20,273 to 22,084. U.S. Department of Commerce, Statistical Abstract of the United States, Table No. 342 and Table No. 314 (1996).
- <sup>3</sup> They also argued such statements were hearsay which did not fall within any of the exceptions enumerated in Rules 803 and 804 of the Federal Rules of evidence.
- <sup>4</sup> The Holy Bible, King James Version, Acts 25:16, cited with approval in *Greene v. McElroy*, 360 U.S. 474 at 496, note 25 (1959).
- <sup>5</sup> See, for example, 18 U.S.C. §42, which makes it a federal offense to import mollusks into the United States. See also, 18 U.S.C. §711a which provides that any person who knowingly uses the slogan, "Give a Hoot, Don't Pollute" for profit, without permission of the Secretary of Agriculture, may be fined up to \$5,000.00 and imprisoned for up to six months, or both.
- <sup>6</sup> Between 1980 and 1995, the number of criminal prosecutions commenced in the federal courts rose from 28,000 to 44,200. U.S. Department of Commerce, Statistical Abstract of the United States, Table No. 341 (1996).
- <sup>7</sup> See, *Kwakiutl v. School Board*, as reported in Younger, *Imaginary Judicial Opinions*, 1989.
- <sup>8</sup> When the Supreme Court makes a mistake, lower courts generally ignore it, with the result that the Supreme Court eventually recognizes the error of its ways and nullifies the faulty opinion. Compare, *O'Callahan v. Parker*, 395 U.S. 258 (1969) with *Solorio v. United States*, 483 U.S. 435 (1987).
- <sup>9</sup> One author contends there are at least five different schools of constitutional interpretation -- (1) intentionalism; (2) textualism or interpretivism; (3) extratextualism or noninterpretivism; (4) in determinacy; and (5) Dworkinism. Goldstein, *In Defense of the Text*, Rowan & Littlefield Publishers, Inc., 1991. No matter which theory one subscribes to, the author believes "all" means "all."



*Judge Forensick Barrier*™



*"You stand accused of running a pyramid scam. How do you plead, Mr. Cheops?"*

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