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THE BURGER COURT AND THE CONFRONTATION
CLAUSE: A RETURN TO THE FAIR TRIAL RULE

INTRODUCTION

To no one's surprise, the four justices President Nixon appointed to the United States Supreme Court have brought the criminal justice revolution of the 1960's to an abrupt halt. There were already strong indications by the middle of 1970, when Chief Justice Burger had been sitting for a year and Justice Blackmun had just been appointed, that the new Court seemed inclined toward restricting the Warren Court decisions in the area of criminal procedure. This inclination developed into implicit policy after Justices Powell and Rehnquist joined the Court at the end of 1971, and the retreat from the landmark cases of the Sixties is now well under way.¹

Since 1970 the new Court has limited the letter or the spirit of a number of the protections afforded defendants in criminal proceedings. In the area of the privilege against self-incrimination, for instance, the Court has held that confessions taken in the absence of the Miranda warnings may nonetheless be used for impeachment (Harris v. New York²); that drivers involved in automobile accidents may be required to stop at the scene and give their names and addresses (California v. Byers³); and that use-and-derivative-use immunity satisfies the privilege (Kastigar v. United States⁴). In the area of identification, the Court has held that the Wade-Gilbert right to counsel at lineups does not arise until after the initiation of "adversary judicial criminal proceedings" (Kirby v. Illinois⁵); that showing to witnesses photographs of the defendant is not a "critical stage" and thus does not give the defendant the right to have his counsel present (United States v. Ash⁶); and that a showup conducted seven months after the crime did not violate the Stovall "unnecessarily suggestive" rule (Neil v. Biggers⁷). The Court has also held that the Brady rule requiring the prosecution to disclose evidence favorable to the accused did not apply in a case where the prosecution failed to disclose information

¹The four Nixon appointees command a majority with the concurrence of either one of the "swing" justices, White or Stewart. The libertarian wing of the Court has been reduced to three justices — Douglas, Brennan and Marshall.

⁴406 U.S. 441 (1972).
⁵406 U.S. 682 (1972).
⁷409 U.S. 188 (1972).
casting substantial doubt on the identification testimony of a chief prosecution witness (Moore v. Illinois8); that a person can give a valid consent to a search without knowing he has the right to refuse such consent (Schneckloth v. Bustamonte9); that a jury verdict need not be unanimous (Johnson v. Louisiana,10 Apodaca v. Oregon11); that the determination of the voluntariness of a confession need only be by a preponderance of the evidence (Lego v. Twomey12); and that the guarantee against double jeopardy did not bar reindictment and trial after a mistrial had been declared because of a faulty first indictment, even though the jury had already been empaneled and sworn (Illinois v. Somerville13).

It is clear, however, that the Burger Court has chosen to eliminate many of the Warren Court decisions without taking the judicially distasteful step of explicitly overruling them. It has done this by employing the same type of due process test which characterized the “Fair Trial Rule” applied by the Court during the first half of this century.

The Fair Trial Rule rejected the doctrine that the Bill of Rights applies to state proceedings, and restricted application of the Due Process Clause to a case-by-case determination of whether the proceedings in question were fundamentally “unfair.” This approach was eventually discredited by the Warren Court, which incorporated most of the Bill of Rights into the Fourteenth Amendment’s Due Process Clause and held them to be equally applicable in state and federal proceedings.

The new Court’s attempt to resurrect the straight due process approach of the Fair Trial Rule, as well as its general dissatisfaction with the expansive reading given by the Warren Court to the criminal protections of the Bill of Rights, can be seen most clearly by analyzing its treatment of the Sixth Amendment right of confrontation — a right whose contours were largely developed by the Warren Court.

THE CONFRONTATION CLAUSE UNDER THE WARREN COURT

The modern history of the Sixth Amendment right of confrontation14 began in 1965 with Pointer v. Texas.15 The prose-
The Supreme Court first held that the right of confrontation was incorporated in the Fourteenth Amendment:

[T]he Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.16

The Court then pointed out that the right of cross-examination was included in the right of confrontation,17 and held that the introduction of the preliminary hearing testimony at the trial without such cross-examination denied the defendant the right to be confronted with the witnesses against him.18

In the companion case of Douglas v. Alabama,19 an out-of-court confession of the accused's alleged accomplice, who had been tried separately, was read into evidence in a purported effort to refresh the witness' recollection. The statements incriminated both the accused and the witness, who refused to answer in spite of the trial court's ruling that he could not assert his Fifth Amendment privilege against self-incrimination.

The Court held that:

Although the Solicitor's reading of [witness] Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true . . . . Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him.20

The Court also noted that cross-examination of the law enforcement officer who took the statements from Loyd would

United States, 98 U.S. 145 (1878), holding that a defendant who had himself caused the absence of a witness could not complain of a Confrontation Clause violation; Motes v. United States, 178 U.S. 458 (1900), holding that absence of a witness due to the negligence of officers of the government was a violation of the accused's right of confrontation; Mattox v. United States, 146 U.S. 140 (1892), stating in dictum that dying declarations are admissible against the accused; and Mattox v. United States, 156 U.S. 237 (1895), allowing testimony given at defendant's first trial to be admitted at retrial, the witness having died in the meantime. See also Delaney v. United States, 263 U.S. 586 (1924), discussed in note 84 infra.

16 380 U.S. at 403.
17 Id. at 404.
18 Id. at 407-08.
20 Id. at 419.
not obviate the need to cross-examine Loyd himself, since the officers could only testify that Loyd made the statements, and not whether they were true.21

The Warren Court thus held, in the first two cases applying the Confrontation Clause to the states, that cross-examination was a basic part of the right of confrontation, that former testimony which had not been subjected to cross-examination could not be used at a defendant's trial, and that statements untested by cross-examination could not be brought to the jury's attention, whether or not they were technically part of the evidence in the case.

The following year, in *Brookhart v. Janis*,22 the Court considered the standard to be applied in testing whether a waiver of the right of confrontation had been made, and concluded that such a waiver must meet the same high standards set forth in *Johnson v. Zerbst*23 for the waiver of other constitutional rights — that it be "an intentional relinquishment or abandonment of a known right or privilege."

In *Brookhart*, the defendant's lawyer agreed to an unusual Ohio procedure which had the practical effect of a plea of guilty. Under this procedure, the defense counsel agreed that the prosecution need only present a prima facie case, with the understanding that he would not offer evidence himself on behalf of the defendant nor cross-examine the state's witnesses. The state introduced an alleged confession made out of court by one of Brookhart's codefendants, who did not testify. The Court held that the defendant's assertion that he was in no way pleading guilty indicated that a waiver had not been made, and that the denial of cross-examination and the introduction of the codefendant's out-of-court confession therefore violated his right of confrontation.

In that same year the Court expanded the confrontation right to include out-of-court remarks not subsequently admitted into evidence. In *Parker v. Gladden*,24 the Court held in a per

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21 *Id.* at 419-20.
23 304 U.S. 458 (1938).
24 The *Brookhart* Court stated that:
   "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights ... and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U.S. 458, 464. ..." 384 U.S. at 4.
curiam opinion that a bailiff's prejudicial remarks to a sequestered jury violated the defendant's right of confrontation, inasmuch as the statements were made outside the courtroom and thus were not subject to cross-examination.26

In 1968 the Court extended the Pointer rule of excluding prior testimony by an out-of-court witness to include those cases where the defendant had been represented by counsel at the earlier proceeding and had had an opportunity to cross-examine the witness. In Barber v. Page,27 the prosecution read into evidence the preliminary hearing testimony of a witness who was incarcerated in a federal prison in a neighboring state at the time of the trial. The defendant had been represented by counsel at the preliminary hearing, although no cross-examination of the witness had taken place.

After noting that the state had made no effort to secure the witness' presence at the trial, the Court held that unless the state had made such an effort, the witness could not be considered "unavailable" for purposes of introducing his earlier testimony.28 Speaking for the Court, Justice Marshall declared that even if the defendant's counsel had cross-examined the witness at the preliminary hearing, his testimony could not be admitted at the trial:

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 a 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. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.29

Barber v. Page thus emphasized the Warren Court's position that the right to cross-examine at the trial itself was paramount, and established the rule that in order to introduce the former testimony of an absent witness at the trial, there must have been both an opportunity for cross-examination at the earlier hearing and a good-faith effort on the part of the state to produce the witness. The following year the Court held in Berger v. California30 that Barber was to have retroactive effect, noting that the state's claim of reliance on previous standards was "most unpersuasive" since "Barber v. Page was clearly foreshadowed, if not

26 Id. at 364.
28 Id. at 724-25.
29 Id. at 725-26.
preordained, by the Court's decision in *Pointer v. Texas....*\textsuperscript{31}

In the same year as the *Barber* decision the Court decided *Bruton v. United States*,\textsuperscript{32} a case which has had great impact on the admission of evidence in joint trials. *Bruton* set forth the rule that limiting instructions to the jury could not cure the error of admitting out-of-court statements of a codefendant which inculpate the accused, if the codefendant does not take the stand.\textsuperscript{33} The Court held that "this encroachment on the right to confrontation" was too damaging to be cured by an instruction to the jury to disregard the statements insofar as they incriminated the defendant.\textsuperscript{34} The Court relied heavily on the reasoning in *Jackson v. Denno*,\textsuperscript{35} which held that a jury could not be expected to ignore a defendant's confession in determining guilt, even if it found the confession to be involuntary and had been instructed to disregard such a confession. Justice Brennan, speaking for the Court in *Bruton*, pointed out that even a subterfuge such as that used by the prosecution in *Douglas v. Alabama* was less damaging to a defendant than was the introduction of the statements made by Bruton's codefendant:

> Here [codefendant] Evans' oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly before the jury during its deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true — not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation.\textsuperscript{36}

Soon after the *Bruton* decision the Court held, in *Roberts v. Russell*,\textsuperscript{37} that the *Bruton* rule was to have retroactive effect. In that same year the Court once again stressed the importance of cross-examination, holding in *Smith v. Illinois*\textsuperscript{38} that a trial court's refusal to allow the defense to learn the real name of the

\textsuperscript{31}Id. at 315. For discussion of the factors to be weighed in determining whether a decision should be retroactive, see Linkletter v. Walker, 381 U.S. 618 (1965) and Stovall v. Denno, 388 U.S. 293 (1967). \textsuperscript{32}Id. at 297.

\textsuperscript{33}Id. at 123 (1968).

\textsuperscript{34}Id. at 126.

\textsuperscript{35}378 U.S. 368 (1964).

\textsuperscript{36}391 U.S. at 127-28.

\textsuperscript{37}392 U.S. 293 (1968).

\textsuperscript{38}390 U.S. 129 (1968).
prosecution's principal witness violated the defendant's right of confrontation. Foreclosing that avenue of information, the Court stated, was "effectively to emasculate the right of cross-examination itself."\(^{39}\)

While the year 1968 thus marked the high point in explanation and extension of the Confrontation Clause, it proved to be the last year the Court was to take such an expansive approach. Chief Justice Burger was appointed in 1969, followed a year later by Justice Blackmun. The new Court soon began to demonstrate its dissatisfaction with the landmark cases of *Pointer*, *Barber* and *Bruton*.

**THE BURGER COURT AND THE CONFRONTATION CLAUSE**

The Court first turned its attention to the *Bruton* rule, cutting back its protections partly by an extensive application of the "harmless error" doctrine, and partly by upholding the sufficiency of limiting instructions in a joint trial where the codefendant takes the stand. The first *Bruton* "harmless error" case, *Harrington v. California*,\(^{40}\) had been decided three weeks before Justice Burger was sworn in. It purported to apply the *Chapman v. California*\(^{41}\) rule that a federal constitutional error would not be considered harmless unless the prosecution showed it to be "harmless beyond a reasonable doubt."\(^{42}\) In *Harrington* confessions of the petitioner's three codefendants, two of whom did not take the stand, were introduced with the limiting instruction held to be inadequate in *Bruton*. The Court noted that the confessions of the two codefendants who did not take the stand merely placed Harrington at the scene of the crime, that Harrington himself had made several damaging admissions to that effect, and that several other witnesses testified he had been an active participant in the attempted robbery and murder. The Court concluded that under these circumstances the violations of *Bruton* were "harmless beyond a reasonable doubt."\(^{43}\)

Justice Brennan, in a dissent joined by Chief Justice Warren and Justice Marshall, pointed out that the testimony of the three witnesses who had testified to Harrington's actual participation had been impeached, thus raising the possibility that the less self-serving, improperly admitted confessions might have tipped the balance in favor of conviction. The existence of such a possibility, Justice Brennan argued, demonstrated that the

\(^{39}\) *Id.* at 131.
\(^{41}\) 386 U.S. 18 (1967).
\(^{42}\) *Id.* at 24.
\(^{43}\) 395 U.S. at 254.
The state had not proved beyond a reasonable doubt that the error was harmless.\(^4\)

The first Burger Court "harmless error" case, Schneble v. Florida,\(^4\) involved an even more questionable use of the doctrine than that employed in Harrington. In Schneble the trial court permitted an investigating officer to testify to statements made by petitioner's codefendant, who did not take the stand. The codefendant's statements contradicted the petitioner's version of events as he had first recounted them to the police, although that version was subsequently repudiated in the petitioner's out-of-court confession. The Court, which did not consider the propriety of admitting the petitioner's confession because it had limited the grant of certiorari to the Bruton issue, held that the confession provided such overwhelming evidence of guilt that the improperly admitted statements of the codefendant amounted to no more than "harmless error".\(^6\)

Justices Marshall, Douglas and Brennan argued in dissent that the jury might well have based its conviction in large part on the unconstitutionally admitted statements of the codefendant, since it had been instructed to disregard the petitioner's confession if it found it to be involuntary. Justice Marshall concluded:

In light of these uncertainties I find it impossible to perceive how the Court can conclude that the violation of Bruton was harmless error. . . . Unless the Court intends to emasculate Bruton . . . or to overrule Chapman v. California . . . sub silentio, then I submit that its decision is clearly wrong.\(^4\)

In a third Bruton "harmless error" case, Brown v. United States,\(^4\) photographs of the crime in progress and testimony from a number of witnesses were introduced in evidence in addition to improperly admitted statements made by a codefendant who did not take the stand. Chief Justice Burger, speaking for a unanimous Court, held that the erroneously admitted testimony was "merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury."\(^4\)

These three cases make it clear that the Court will sanction Bruton violations so long as a plausible "harmless error" argument can be made. As the dissenting justices in Harrington and Schneble illustrated, it is doubtful that at least those two cases

\(^4\) Id. at 257.
\(^4\) 405 U.S. 427 (1972).
\(^4\) Justice Rehnquist, who wrote the opinion for the majority, was reluctant even to acknowledge that there had been a Bruton violation, stating "we find that any violation of Bruton that may have occurred at petitioner's trial was harmless beyond a reasonable doubt." Id. at 428.
\(^4\) Id. at 437.
\(^4\) Id. at 231.
were actually consonant with the Chapman standard of "harmless beyond a reasonable doubt." These decisions have given lower courts the cue that little more is needed to sustain convictions procured in violation of a defendant's constitutional rights than to attach a "harmless error" label to the violations.¹⁰

A second path of retreat from Bruton was taken in Nelson v. O'Neil, a 1971 case in which the Court held that if a codefendant takes the stand and testifies favorably to the accused, the admission into evidence of statements allegedly made by him incriminating the accused does not violate the latter's right of confrontation. In that case, a policeman testified for the prosecution that O'Neil's codefendant, Runnels, had made an unsworn oral statement implicating himself and O'Neil. As required under California law, the trial judge instructed the jury that the statement could be considered only against Runnels. Both defendants then took the stand and testified by way of alibi that they were together at O'Neil's home at the time the crimes in question were committed. Runnels also testified that he had not made the statement attributed to him by the policeman.

Justice Stewart, speaking for the Court, held that since O'Neil's codefendant had taken the stand and was available for cross-examination by O'Neil as well as by the prosecution, no Bruton violation had occurred:

It was clear in Bruton that the 'confrontation' guaranteed by the Sixth and Fourteenth Amendments is confrontation at trial — that is, that the absence of the defendant at the time the codefendant allegedly made the out-of-court statement is immaterial, so long as the declarant can be cross-examined on the witness stand at trial.¹²

Justices Brennan, Douglas and Marshall dissented, contending that the majority had ignored the real issue. Justice Brennan noted that at the time of the trial, California did not permit admissions made to a police officer after an arrest to be used against other defendants, whether or not the declarant testified at trial.¹³ He argued that the real question was, therefore, whether California, having determined for whatever reason that the statement involved in this case was inadmissible against respondent, may nevertheless present the statement to the jury that was to decide respondent's guilt, and instruct that jury that it

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¹⁰ An illustration of the extremes to which a court will go in finding "harmless error" is found in State v. Camerlin, 108 R.I. 524, 277 A.2d 291 (1971), cert. denied, 404 U.S. 1022 (1972). In that case the former wife of Camerlin's codefendant Souza testified that Souza told her he and Camerlin had committed the murder of a liquor store operator, describing events that corroborated the version of an eyewitness. The court conceded that the admission of the out-of-court statement of Camerlin's codefendant violated the Bruton rule — but held it was only "harmless error"!


¹² Id. at 626.

¹³ Id. at 632.
should not be considered against respondent. I think our cases compel the conclusion that it may not.54

Although the Burger Court has clearly been chipping away at the Bruton rule whenever possible, it has left untouched the core of the rule. Statements of a codefendant which inculpate the accused still cannot be admitted into evidence when the codefendant does not take the stand. The Court's treatment of the Pointer and Barber doctrines, however, has been far more devastating, for it has undercut the basic rationales of those decisions.

In the 1972 case, Mancusi v. Stubbs,55 the Burger Court eased the burden placed on the prosecution in Barber. In Stubbs the state read into evidence at the defendant's second trial the testimony given at the first trial by a witness who had moved to Sweden in the interim. The Court held there had been no Confrontation Clause violation, noting that since the witness had moved out of the country, he was beyond the reach of the State of Tennessee.56

In a dissent joined by Justice Douglas, Justice Marshall pointed out that the state had "made absolutely no effort" to secure the witness' presence at the second trial,57 and contended that this clearly violated the rule in Barber:

In that case [Barber], the claim was made that the Court had no power to compel the absent witness to appear. We held that nevertheless the State was obliged to make a good-faith effort to secure his appearance, for 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.'58

Stubbs, although a clear retreat from Barber, presumably is limited to situations where the witnesses are beyond the reach of the trial court. The case should thus have little effect on future proceedings, since the Uniform Act to Secure the Attendance of Witnesses from without a state and the availability of state and federal writs of habeas corpus ad testificandum59 effectively limit the jurisdictional unavailability of witnesses to those living abroad.

Far more significant than Stubbs are two 1970 confrontation cases, California v. Green60 and Dutton v. Evans.61 These cases take several giant steps backward from the Warren Court confrontation decisions, leaving substantial confusion as to the present scope of the confrontation right in the process.

54 Id. at 633.
55 408 U.S. 204 (1972).
56 Id. at 212.
57 Id. at 220.
58 Id. at 221.
59 See id. at 212.
California v. Green

California v. Green involved the introduction at trial of a witness' earlier statements after the witness, Melvin Porter, testified that he had been under the influence of LSD at the time of the incident in question and therefore could not remember what had happened. These statements consisted of out-of-court remarks made to a police officer and testimony given at the defendant's preliminary hearing — both of which were admitted under a provision of the California Evidence Code permitting prior inconsistent statements to be admitted for the truth of the matter contained therein, rather than for impeachment.

The Supreme Court held that the out-of-court statement was properly admitted if the declarant could be considered available at the trial and subject to cross-examination. Further, the preliminary hearing testimony, inasmuch as it was subject to contemporaneous cross-examination, was held to have been properly admitted whether the witness was considered available or unavailable, provided that in the latter case the state had made a good-faith effort to produce him. The Court remanded the case to the California Supreme Court for a determination of whether Porter's claimed lack of memory made him unavailable, and if so whether the admission of the statement made to the

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62 The witness was a minor who named the accused as his supplier after being arrested for selling marihuana to an undercover police officer. 399 U.S. at 151-52.
63 Id. at 151, 152. A similar rule was adopted in the Federal Rules of Evidence for the United States Courts and Magistrates sent by the U.S. Supreme Court to Congress on November 20, 1972. 56 F.R.D. 183 (1972). (Now stayed by Pub. L. No. 93-12 (Mar. 30, 1973)). Rule 801(d)(1)(A) read:

A statement is not hearsay if — (1) Prior statement by witness.

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony.

The Advisory Committee Note remarked that the constitutionality of the provision had been upheld in California v. Green. 56 F.R.D. at 296.

Following the stay of the Rules, the House of Representatives Subcommittee on Criminal Justice drafted a revised version, which was further amended by the House Committee on the Judiciary. (This version passed the House on February 6, 1974 with floor amendments not affecting the provisions cited in this article. The bill was referred on February 7, 1974 to the Senate Committee on the Judiciary.) Rule 801(d)(1)(A) now reads:

A statement is not hearsay if — (1) Prior statement by witness.

— The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony and was given under oath subject to cross-examination, and subject to the penalty of perjury at a trial or hearing or in a deposition.

64 399 U.S. at 164.
65 Id. at 165.
66 The California Supreme Court had affirmed a lower court's reversal of the conviction on the ground the Confrontation Clause had been violated by admission of the out-of-court statements for the truth of the matter contained therein. Id. at 153.
police officer was harmless error in light of the Court's holding that the preliminary hearing testimony was not barred.67

In the Court's majority opinion, Justice White observed that the Confrontation Clause was originally designed to prevent the use of depositions and ex parte affidavits against criminal defendants in lieu of cross-examination at trial.68 Therefore, he reasoned, the lack of contemporaneous cross-examination of an out-of-court statement is immaterial if the witness testifies at the trial itself, since the cross-examination at the trial would suffice to expose any discrepancies between the witness' current testimony and his earlier statements.69

Notwithstanding the emphasis which Barber v. Page had placed on the importance of cross-examination at the trial,70 Justice White also held that Porter's preliminary hearing testimony would have been admissible under Barber even if the witness were unavailable at the trial, so long as the state had made a good-faith effort to produce him, since he had been subject to cross-examination at the preliminary hearing.

Finally, Justice White raised the specter of a constitutionalization of the hearsay rule and its exceptions via the Confrontation Clause:

The issue before us is... whether a defendant's constitutional right 'to be confronted with the witnesses against him' is necessarily inconsistent with a State's decision to change its hearsay rules to reflect the minority view described above [i.e., admitting the out-of-court statements of the witness for the truth of the matter contained therein, rather than for impeachment purposes.] While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values,[71] it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or

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67 On remand, the California Supreme Court affirmed the conviction, implicitly finding Porter to have been available. The court stated that since at the trial Porter affirmed the earlier statements as his, the defendant's counsel had the opportunity to probe by cross-examination the inconsistency between those statements and Porter's trial testimony. It is of course clear that the statutory provision permitting introduction of prior inconsistent statements for the truth of the matter contained therein presupposes availability, since otherwise there would be no trial testimony with which prior statements could be inconsistent. The California Supreme Court pointed out that "in normal circumstances" testimony by a witness that he does not remember an event was clearly an evasion and could therefore be taken as a denial of the substance of his earlier statement. People v. Green, 3 Cal. 3d 981, 92 Cal. Rptr. 494, 979 P.2d 985 (1981); petition for cert. dismissed, 404 U.S. 801 (1971).

68 399 U.S. at 157-58.

69 Id. at 164.

70 See text accompanying note 29 supra.

71 Justice White listed the following purposes of confrontation: (1) it serves that the witness will give his statements under oath — thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces
less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence. . . .72

Justice Brennan dissented, contending that both the out-of-court statement and the preliminary hearing testimony were improperly admitted. He pointed out that the witness' claimed lack of memory clearly made him unavailable for cross-examination as to the truth of both the earlier statements,73 and argued that introduction of the statements in such a case was no different in principle than the situation encountered in Douglas v. Alabama,74 in which the Court had found a clear Confrontation Clause violation:

For purposes of the Confrontation Clause, there is no significant difference between a witness who fails to testify about an alleged offense because he is unwilling to do so and a witness whose silence is compelled by an inability to remember . . . . in neither instance are the purposes of the Confrontation Clause satisfied, because the witness cannot be questioned at trial concerning the pertinent facts. In both cases, if a pre-trial statement is introduced for the truth of the facts asserted, the witness becomes simply a conduit for the admission of stale evidence, whose reliability can never be tested before the trial factfinder by cross-examination of the declarant about the operative events, and by observation of his demeanor as he testifies about them.75

Justice Brennan also argued that cross-examination at the preliminary hearing could not substitute for cross-examination at the trial because, as Barber recognized, the purposes of the two proceedings were vastly dissimilar. At the preliminary hearing, Justice Brennan pointed out, the state need only establish probable cause, both parties are reluctant to disclose their respective cases, the hearing occurs before either has had a chance for much preparation, and the schedules of court and counsel are not geared to lengthy preliminary hearing proceedings. There is therefore little probability that a thorough and effective cross-examination would be made at a preliminary

the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth' (5 Wigmore §1367); (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

399 U.S. at 158.

Compare Justice White's assessment of confrontation with this statement of the purpose of the hearsay rule:

[T]he Anglo-American tradition evolved three conditions under which witnesses ordinarily will be required to testify: oath, personal presence at the trial, and cross-examination. The rule against hearsay is designed to insure compliance with these ideal conditions, and when one of them is absent the hearsay objection becomes pertinent.


72 399 U.S. at 155.
73 Id. at 193.
74 See text accompanying notes 19-21 supra.
75 399 U.S. at 194.
hearing. Furthermore, Justice Brennan noted, the introduction of preliminary hearing testimony at the trial deprives the fact-finder of the opportunity of observing the demeanor of the witness as he answers the questions.\(^7^6\)

Justice Brennan conceded that preliminary hearing testimony may be used if the witness cannot physically be produced at the trial despite the state’s good-faith efforts to do so. But he distinguished these situations from those in which the witness refuses to testify or claims he cannot remember, contending that the out-of-court statements in the latter category are far more likely to be unreliable.\(^7^7\)

Under the *California v. Green* ruling, courts are now free to allow the introduction of a witness’ preliminary hearing testimony at the trial as long as the witness takes the stand, regardless of whether he then testifies and regardless of the reasons for a failure to do so.\(^7^8\) The difficulty with this rule is apparent from the illogic of Justice White’s reasoning. If, on the one hand, Porter’s claimed lack of memory is held to make him unavailable, his earlier statements could not be tested by cross-examination at the trial, as Justice White supposed.\(^7^9\) On the other hand, if Porter were held to be available, the very condition for permitting admission of his earlier statements — unavailability — fails. Whichever position is taken, the rationale of the earlier Supreme Court confrontation cases argues against admissibility. It seems clear that the Burger Court majority in *Green* simply decided

\(^7^6\) *Id.* at 196-98.

\(^7^7\) *Id.* at 201-02:

Whether a witness’ assertions are reliable ordinarily has little or no bearing on their admissibility, for they are subject to the corrective influences of his demeanor and cross-examination. If, however, there is no possibility that his assertions can be so tested at trial, then their reliability becomes an important factor in deciding whether to permit their presentation to the factfinder. . . .

Physical unavailability is generally a neutral factor; in most instances, it does not cast doubt on the witness’ assertions. Inability to remember the pertinent events, on the other hand, or unwillingness to testify about them, whether because of feigned loss of memory or fear of self-incrimination, does cast such doubt. Honest inability to remember at trial raises serious questions about clarity of memory at the time of the pretrial statement. The deceit inherent in feigned loss of memory lessens confidence in the probity of prior assertions. And fear of self-incrimination at trial suggests that the witness may have shaped prior testimony so as to avoid dangerous consequences for himself. Reliability cannot be assumed simply because a prior statement was made at a preliminary hearing.

\(^7^8\) *Id.* at 167-68:

[The state] produced Porter at trial, swore him as a witness, and tendered him for cross-examination. Whether Porter then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against Green.

\(^7^9\) *Id.* at 166-68.
that the Confrontation Clause had been extended too far, and, while paying lip service to the Warren Court decisions, ignored the rationale of those decisions in an effort to restrict the scope of the confrontation right.

_Dutton v. Evans_

Shortly after _California v. Green_, the Court took the opportunity to consider the constitutionality of an even more extreme use of an out-of-court statement, and again failed to find any Confrontation Clause violation. In _Dutton v. Evans_, a prison inmate by the name of Shaw testified at the trial that while in prison he had heard defendant Evans' alleged accomplice, Venson Williams, remark, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Although Williams did not testify at the trial, Shaw's testimony was admitted under a Georgia statute making declarations of one conspirator admissible against all, even in the concealment phase of the conspiracy. The Court of Appeals for the Fifth Circuit held that the introduction of this statement violated Evans' Sixth Amendment right of confrontation.

In a four-one-four plurality decision, the Supreme Court reversed the Court of Appeals. Justice Stewart wrote the lead opinion, which was joined by Chief Justice Burger and Justices Blackmun and White. Justice Blackmun, joined by the Chief Justice, also appended a brief concurring opinion, while Justice Harlan wrote an opinion concurring in the result. Justice Marshall was joined in dissent by Justices Black, Douglas and Brennan.

Justice Stewart, proceeding from the seemingly neutral proposition that the Confrontation Clause is not coextensive with the hearsay rule, concluded that Georgia's statutory exception to the hearsay rule did not violate the Confrontation Clause under the facts of the case, since there were present "indicia of

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81 Id. at 77.
82 Id. at 78.
83 Id. at 76.
reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." Citing California v. Green, he declared:

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by conspiracy violate the Confrontation Clause, inasmuch as the agency theory of conspiracy law is little more than a fiction designed to admit hearsay statements.

A number of Circuits have re-examined the federal conspiracy rules of evidence in light of the recent Supreme Court Confrontation Clause cases. Parness v. United States, 415 F.2d 346 (3d Cir. 1969), Campbell v. United States, 415 F.2d 356 (6th Cir. 1969), and United States v. Lawler, 413 F.2d 622 (7th Cir. 1969), cert. denied, 396 U.S. 1046 (1970), all held that admission of a coconspirator's out-of-court statements made in furtherance of the conspiracy do not violate the Bruton rule. United States v. American Radiator and Standard Sanitary Corporation, 433 F.2d 174 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971), held that California v. Green did not alter the court's conclusion in Parness that such statements do not require confrontation.


However, United States v. Adams, 446 F.2d 681 (9th Cir. 1971), cert. denied, 404 U.S. 943 (1971), and United States v. Puco, 476 F.2d 1099 (2d Cir. 1973), cert. denied, 405 U.S. 1021 (1972), both concluded that since Dutton and Green emphasized that the hearsay rule and the Confrontation Clause are not equivalent, it could not be assumed that the coconspirator exception to the hearsay rule necessarily conformed to the requirements of the Confrontation Clause. The two courts decided that each case had to be individually considered to determine whether the out-of-court statements bore "sufficient indicia of reliability." 476 F.2d 1099, 1107, and afforded the trier of fact an adequate basis for evaluating the truth of the declarations. 476 F.2d at 1107; 446 F.2d 681, 683.

Although the Supreme Court decided in 1924 that the out-of-court statement of a dead coconspirator made during the progress of the conspiracy did not violate the defendant's right of confrontation, Delaney v. United States, 263 U.S. 586, 590, there has been no recent consideration by the Court of the conspiracy-confrontation question. Justice Douglas indicated in a dissent to the denial of certiorari in Addonizio v. United States, 405 U.S. 936 (1972), that he would have liked to consider "whether the extensive reliance by the prosecutor on the coconspirator exception to the hearsay rule ... deprived these petitioners of constitutional rights [including the right to confrontation]." Id. at 944.

400 U.S. at 89. These "indicia of reliability" Justice Stewart identified as:

First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by [accomplice] Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that
assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." California v. Green.

Evans exercised, and exercised effectively, his right to confrontation on the factual question whether Shaw had actually heard Williams make the statement Shaw related. And the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal.

Justice Blackmun, in his concurring opinion, thought the conviction should be sustained for a reason seemingly incompatible with that of Justice Stewart. The circumstances surrounding the making of the alleged statement, Justice Blackmun concluded, were so unbelievable that Shaw's testimony could not have helped the prosecution's case, and admission of the statement was, at the worst, "harmless error."87

Justice Harlan concurred in the result on the ground that admission of the out-of-court statement did not deprive Evans of his due process right to a "fair trial." He contended that a fair trial standard, rather than the Confrontation Clause, should be used in analyzing evidentiary questions arising under the hearsay rule:

Regardless of the interpretation one puts on the words of the
Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it.

The phrase "indicia of reliability" was also used in California v. Green, 399 U.S. at 161-62, but in explanation of the cases in which out-of-court statements of an unavailable declarant were said to be admissible if there had been prior cross-examination and a good faith effort by the prosecution to produce the witness. In Dutton there was neither. Justice Stewart remarked that Shaw himself could have subpoenaed Williams if he had wanted to test the truth of his statement, 400 U.S. at 88 n. 19, ignoring the Barber v. Page requirement that the burden is on the prosecution to produce, or make a good faith effort to produce, the witnesses against the accused. See the dissent's comment to this effect, Id. at 102 n. 4.

It is interesting to note that in spite of his finding of "indicia of reliability," Justice Stewart thought the defense cross-examination of Shaw "was such as to cast doubt on Shaw's credibility and, more particularly, on whether the conversation which Shaw related ever took place." Id. at 87 n. 18.


The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." Following the stay of the Rules, the House of Representatives Subcommittee on Criminal Justice drafted a revised version, with subsequent amendments in the House Committee on the Judiciary, in which Rule 804(b)(6) was deleted. H.R. 5463, 93rd Cong., 1st Sess. (Nov. 15, 1973). (See note 63 supra for the current status of the Rules.)

400 U.S. at 90. This conclusion is somewhat startling in light of the fact that both Justice Blackmun and Chief Justice Burger joined in Justice Stewart's opinion.
Confrontation Clause, the clause is simply not well designed for
taking into account the numerous factors that must be weighed in
passing on the appropriateness of rules of evidence. The failure
of Mr. Justice Stewart's opinion to explain the standard by which
it tests Shaw's statement, or how this standard can be squared
with the seemingly absolute command of the clause, bears witness
to the fact that this clause is being set a task for which it is not
suited. The task is far more appropriately performed under the
aegis of the Fifth and Fourteenth Amendments' commands that
federal and state trials, respectively, must be conducted in ac-
cordance with due process of law. It is by this standard that I
would test federal and state rules of evidence.88

The four dissenting Justices in Dutton argued that the result
reached by the majority was wholly inconsistent with the earlier
Confrontation Clause decisions, in particular Douglas v. Alabama
and Bruton v. United States.89 To Justice Marshall, the case
was one:

with all the unanswered questions that the confrontation of wit-
tnesses through cross-examination is meant to aid in answering:
What did the declarant say, and what did he mean, and was it the
truth? If Williams had testified and been cross-examined, Evans'
counsel could have fully explored these and other matters. The
jury then could have evaluated the statement in the light of Wil-
liams' testimony and demeanor. As it was, however, the State was
able to use Shaw to present the damaging evidence and thus to
avoid confronting Evans with the person who allegedly gave wit-
tness against him. I had thought that this was precisely what the
Confrontation Clause as applied to the States in Pointer and our
other cases prevented.90

As to Justice Stewart's "indicia of reliability," the dissent
noted:

If 'indicia of reliability' are so easy to come by, and prove so
much, then it is only reasonable to ask whether the Confrontation
Clause has any independent vitality at all in protecting a criminal
defendant against the use of extrajudicial statements not subject
to cross-examination and not exposed to a jury assessment of the
declarant's demeanor at trial. I believe the Confrontation Clause
has been sunk if any out-of-court statement bearing an indicium of
a probative likelihood can come in, no matter how damaging the
statement may be or how great the need for the truth-discovering
test of cross-examination.91

It is clear from Dutton that by 1970 a majority of the
Court not only had become unwilling to carry the holdings of
earlier Supreme Court confrontation cases to their logical con-
clusion, but also was trying to avoid their application entirely by
substituting either an "indicia of reliability" test or a due process
approach. The due process approach of Justice Harlan is, of

88 Id. at 96-97.
89 Id. at 100.
90 Id. at 104.
91 Id. at 110.
course, identical to the “Fair Trial Rule” applied by the Supreme Court in the pre-Warren years. Under that rule, state proceedings could be scrutinized only for the purpose of determining whether they had been fundamentally unfair, and thus in violation of the Fourteenth Amendment’s Due Process Clause.

The Warren Court abandoned the Fair Trial Rule in favor of selective incorporation, whereby explicit guarantees of the Bill of Rights were held to be incorporated in the Fourteenth Amendment and therefore applicable to the states. Justice Harlan refused to go along with the Warren Court on this issue, believing that selective incorporation was incompatible with a federal system. Justice Harlan’s approach in *Dutton* is clearly consistent with his long standing disagreement with that Court over its doctrine of selective incorporation in general and its Confrontation Clause case law in particular. But the “indicia of reliability” test applied in *Dutton* by Justice Stewart, despite his labored effort to make the test seem consistent with the Warren Court case law, is just as incompatible with the rationale of those cases as is Justice Harlan’s approach — and for a good reason. For all practical purposes, the two tests are interchangeable: an out-of-court statement bearing indicia of reliability and thus admissible under the Stewart test would likewise be held not to have deprived the defendant of a fair trial, and thus would also be admissible under the Harlan standard. The two tests are both unavoidably nebulous and subjective in nature. Therefore, whether the Burger Court purports in the future to apply the Stewart test or the Harlan test, it will in practical effect be utilizing the once discarded Fair Trial Rule of the pre-Warren years — and, in so doing, will be undercutting the body of case law built up by the Warren Court interpretations of the Confrontation Clause.

*Chambers v. Mississippi*

A 1973 decision implicitly applying the Harlan test illustrates how easily the Warren Court confrontation cases can be avoided by means of the straight due process approach. In *Chambers v. Mississippi*, the majority opinion managed to discuss the right of confrontation without a single mention of the Confrontation Clause; the defendant, said the Court, had a “due process”

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93 See 400 U.S. at 83-87.

94 Compare “indicia of reliability” with Justice Harlan’s wording of the test he used in his concurring opinion in *California v. Green*: “whether this conviction stands on such unreliable evidence that reversal is required.” 399 U.S. at 189 (1970).

right to confront and cross-examine witnesses. This right turned out not to resemble the Sixth Amendment Confrontation Clause right at all.

The defendant in *Chambers* called as a witness at his trial Gable McDonald, who had earlier given Chambers' lawyers a sworn confession to the murder with which Chambers was charged. On the stand McDonald denied any guilt and claimed he gave the statement because he had been promised a share in the proceeds of a lawsuit Chambers supposedly was to bring against the town of Woodville, presumably for false arrest. The trial court refused to allow Chambers to cross-examine McDonald as an adverse witness because of a Mississippi common law rule that a party may not impeach his own witness. The court also refused to allow three other defense witnesses to testify that McDonald had orally made out-of-court confessions to each of them. This testimony was excluded as hearsay.

In the Supreme Court, Chambers argued that the trial judge's evidentiary rulings denied him due process. The Court agreed,

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96 *Id.* at 294.
97 *Id.* at 295. The trial court stated that "[h]e may be hostile, but he is not adverse in the sense of the word, so your request will be overruled." 410 U.S. at 291. The Supreme Court of Mississippi, in affirming, remarked: "McDonald's testimony was not adverse to appellant; it was merely in McDonald's defense and in explanation of his rather unusual confession. Nowhere did he point the finger at Chambers." Chambers v. State, 252 So. 2d 217, 220 (Miss. 1971).
98 The testimony of one witness was given in the jury's presence, with a subsequent instruction from the court that it be disregarded. The testimony of the other two witnesses was given out of the presence of the jury and then ruled inadmissible. 410 U.S. at 292 n. 4.
99 The court sustained the state's objection as to two of the witnesses on the ground the testimony was hearsay, but did not state its reason for exclusion of the third witness' testimony. The state objected to this testimony on the ground that it was an attempt by Chambers to impeach one of his own witnesses (McDonald). The Mississippi Supreme Court considered the confessions to which the two witnesses had testified out of the presence of the jury as hearsay, and did not discuss the testimony of the other witness, which the trial court had directed the jury to disregard on the basis of hearsay. 252 So. 2d at 220.

Since Chambers was prevented from cross-examining McDonald, there was no need for McDonald to assert his Fifth Amendment privilege against self-incrimination. Had he done so, the question would have arisen as to whether this made him "unavailable" for purposes of introducing hearsay falling within any of the recognized exceptions. There is no consistent position as to whether a claim of the privilege against self-incrimination suffices to make a declarant unavailable. C. McCORMICK, *Evidence* § 280, at 678-79 (2d ed. 1972). Under such a circumstance, McDonald's confessions could be admitted in a jurisdiction recognizing declarations against penal interest as an admissible exception to the hearsay rule. Most jurisdictions do not (id. § 278, at 673), including Mississippi. Brown v. State, 69 Miss. 719, 55 So. 961 (1911). The trend, however, is towards admitting such declarations. See the dissenting opinion in Chambers v. State, 252 So. 2d at 220-21; People v. Brown, 26 N.Y.2d 88, 308 N.Y.S.2d 825, 257 N.E.2d 16 (1970); People v. Spriggs, 60 Cal. 2d 868, 36 Cal. Rptr. 841, 389 P.2d 377 (1964); People v. Lettrich, 415 Ill. 172, 108 N.E.2d 488 (1952) (limiting departure from the usual rule against admission to those cases where "justice demands" it, *Id.* at 178, 108 N.E.2d at 492). No confrontation
but Justice Powell's majority opinion\textsuperscript{100} couched the Court's holding in extremely limiting terms:

We conclude that the exclusion of this critical evidence [i.e.,

problem arises as to McDonald, of course, since he was not the accused. The Court pointed out (410 U.S. at 259 & n. 18) that exclusion would only be required under Rule 804 of the Federal Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183, 321 (1972), sent by the Court to Congress on November 20, 1972 and now stayed by Pub. L. No. 93-12 (Mar. 30, 1973). Rule 804(b)(4) provided that a statement against interest may be admitted if the declarant is unavailable (a term including his exemption by the judge from testifying under a claim of the Fifth Amendment privilege, and a simple refusal to answer despite an order of the judge that he do so). "Statement against interest" was defined as:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

The Advisory Committee's Note explained that the corroboration requirement was inserted to lessen the possibility "of fabrication either of the fact of the making of the confession or in its contents". 56 F.R.D. at 327. This leaves the rule unclear as to how much corroboration would be needed, and whether corroboration either of the making of the confession or of its contents would be sufficient, or specifically one or the other, or, possibly, both. Chambers indicated the Court would probably interpret corroboration in this context to mean corroboration of the truth of the confession:

Each one of McDonald's out-of-court confessions was corroborated by some other evidence in the case — McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each.

410 U.S. at 300.

It is also noteworthy that hearsay against interest incriminating the accused would not require corroboration under this rule. Whether such incrimination violates the accused's right of confrontation was apparently to have been left to the courts for resolution. The Committee's Note observed: "The rule does not purport to deal with questions of the right of confrontation." 56 F.R.D. at 328.

The House of Representatives Subcommittee on Criminal Justice (see notes 63 and 86 supra) revised Rule 804(b)(4) (now Rule 804(b)(3)) to read:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to criminal liability, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.


The Report of the House Committee on the Judiciary explained that the stiffer corroboration requirement was added to make it clear the accused's own testimony would not be sufficient corroboration. The last sentence was added, the Report stated, to codify the 

100 Justice Rehnquist dissented on the ground the Court did not have jurisdiction, and he therefore did not discuss the constitutional issue. However, he remarked that "[w]ere I to reach the merits in this case, I would have considerable difficulty in subscribing to the Court's further constitu-
the hearsay confession of McDonald], coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.\(^{101}\)

The Court thus completely ignored the Sixth Amendment confrontation right and limited its analysis to the question of whether, under the particular facts of the case, Chambers had had "a fair trial." Although it is possible to argue that an accused's Sixth Amendment right to be confronted with the witnesses "against him" does not apply to witnesses called by the defendant, the Court itself rejected the idea that the right of cross-examination hinges on the circumstances of who calls the witness:

The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of

\(^{101}\) 410 U.S. at 302-03. The Court also refused to hold that the voucher ruling barring cross-examination of McDonald was in itself sufficient grounds for reversal, thus further weakening the precedential value of the confrontation point. \(\text{id. at 298}\).
the word 'against.' The 'voucher' rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.\footnote{Id. at 297-98.}

It is quite apparent from Justice Powell's holding that he regards the "right of confrontation" only as one factor to be considered in applying a straight due process analysis of whether the trial had been "fair."\footnote{Id. at 295; e.g., Dutton v. Evans, 400 U.S. 74 (1970); Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Mancusi v. Stubbs, 408 U.S. 204 (1972); Berger v. California, 393 U.S. 314 (1969).} Earlier Confrontation Clause cases are cited,\footnote{The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. . . . Both of these elements of a fair trial are implicated in the present case. Id. at 294-95.} but only as support for the general proposition that cross-examination is an important protection for the accused in a criminal proceeding; no attempt was made by Justice Powell to apply the specific interpretations of the Sixth Amendment right set forth in those cases to the situation in Chambers.

Remarkably, Justice Powell thus managed to convert a Confrontation Clause problem to one of due process, implicitly utilizing the Fair Trial Rule advocated by Justice Harlan and applied by the pre-Warren Court. He also succeeded in limiting the holding of Chambers to its own facts in the process, for, as will be seen in the following discussion of the Fair Trial Rule, a determination that the circumstances of a particular proceeding rendered it "fair" or "unfair" has slight precedent value for cases involving a different combination of facts. The facts involved in Chambers would obviously be hard to duplicate, and there will consequently be scant opportunity to utilize the Court's holding in future proceedings.\footnote{Id. at 292.}

\footnote{The Illinois Supreme Court has interpreted Chambers as being essentially limited to its own facts. In People v. Craven, 54 Ill. 2d 419, 299 N.E.2d 1 (1973), the court held that a defense witness could not testify that a third person had confessed to the homicide for which the defendant was charged. The court noted that the Chambers Court relied on "objective indicia of trustworthiness regarding the proffered hearsay testimony of the three defense witnesses. . . ." Id. at 428, 299 N.E.2d at 6. The Illinois court concluded:

In this case the measures of reliability suggested by the Chambers analysis are not present; the purported statement was heard only by a woman with whom defendant then lived and is unsupported by independent evidence. Also, in Chambers the third party was available to testify, while here Lopez remained unapprehended during defendant's trial. In our opinion, the trial court's determination that the offered testimony of Mrs. Dawson lacked sufficient threshold reliability to fall within our limited admission-against-penal-interest hearsay exception was correct and such testimony was properly withheld from the jury. Id. at 429, 299 N.E.2d at 6.

Two justices dissented, arguing that the proffered testimony bore marks of reliability and should have been admitted. Id. at 430-31, 299 N.E.2d at 7.}
DUE PROCESS AND THE FAIR TRIAL RULE

As has been seen, the Burger Court’s treatment of the right of confrontation, whether it be the “indicia of reliability” test of Dutton or the straight “due process” approach of Chambers, results in practical effect in a rejection of the Confrontation Clause case law developed by the Warren Court, and in a re-adoption of the Fair Trial Rule\textsuperscript{106} utilized by the Court during the first half of this century. Well before its rejection by the Warren Court, the Fair Trial Rule had been the subject of considerable criticism, both on constitutional and practical grounds.

The very nature of the rule, which requires that the particular facts of each case be analyzed to see whether the defendant had received a “fair” trial or not, involved a highly subjective value judgment by the Court. A summary of some of the tests used by the pre-Warren Court to determine whether a trial had been “unfair” illustrates how nebulous such a determination must be:

[I]t has been said that this Court can forbid state action which ‘shocks the conscience’... sufficiently to ‘shock itself into the protective arms of the Constitution’. ... It has been urged that States may not run counter to the ‘decencies of civilized conduct’... or ‘some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental’... or to ‘those canons of decency and fairness which express the notions of justice of English-speaking peoples’... or to ‘the community’s sense of fair play and decency’. ...\textsuperscript{107}

Obviously, the application of such tests could only be subjective, despite the protestations of the justices that they were

\textsuperscript{106}This label was apparently coined by John Raeburn Green in “The Bill of Rights, the Fourteenth Amendment and the Supreme Court,” 46 Mich. L. Rev. 869, 890 (1948) [hereinafter cited as Green].

Interestingly, although Palko has often been cited as authority for the Fair Trial Rule, it can as readily be read as support for selective incorporation — and was so cited by Justice Black in his dissent in Adamson v. California, 332 U.S. 46, 85-86 (1947).

The Fair Trial passage in Palko:
The decision [in Powell v. Alabama, 287 U.S. 45 (1932)] did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those ‘fundamental principles of liberty and justice which lie at the base of
not relying on their own senses of justice and decency.\textsuperscript{108} Justice Black vehemently condemned the Fair Trial Rule for this reason, believing that such vague standards endangered both states' rights and individual liberties and could not be squared with the Constitution:

There is . . . no express constitutional language granting judicial power to invalidate [state law] . . . deemed 'unreasonable' or contrary to the Court's notion of civilized decencies; yet the constitutional philosophy used by the [pre-Warren Court] majority has, in the past, been used to deny a state the right to fix the price of gasoline . . . and even the right to prevent bakers from palming off smaller for larger loaves of bread. . . . These cases, and others, show the extent to which the evanescent standards of the majority's philosophy have been used to nullify state legislative programs passed to suppress evil economic practices. . . . Of even graver concern, however, is the use of the philosophy to nullify the Bill of Rights. I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.\textsuperscript{109} This was indeed a prophetic warning, as the Burger Court's

\textsuperscript{108} As Justice Black remarked in his concurring opinion in Rochin v. California:

The majority emphasize that these statements do not refer to their own consciences or to their senses of justice and decency. For we are told that 'we may not draw on our merely personal and private notions'; our judgment must be grounded on 'considerations deeply rooted in reason and in the compelling traditions of the legal profession'. . . . One may well ask what avenues of investigation are open to discover 'canons' of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an 'evaluation based on a disinterested inquiry pursued in the spirit of science on a balanced order of facts.'

\textsuperscript{109} Id. at 176-77. Justice Black, while believing that the Fourteenth Amendment incorporated the Bill of Rights as a whole, supported selective incorporation as the next best thing. Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (concurring opinion). Since the adoption of the Fourteenth Amendment, ten justices of the Supreme Court, including Justice Black,
treatment of the Sixth Amendment confrontation right demonstrates.

In addition to the constitutional objections to the Fair Trial Rule voiced by Justice Black and others, the pre-Warren Court faced severe practical difficulties in its application. The varying fact situations of each case, added to the inevitably subjective determination of whether a trial had been "fair" or "unfair," resulted in an unevenness of application and created a welter of conflicting precedents that left the state courts in the awkward position of having to guess how the Supreme Court would react to each case. After twenty years of struggling with the *Betts v. Brady* right-to-counsel version of the Fair Trial Rule, twenty-two states filed an amicus curiae brief in *Gideon v. Wainwright*, urging that *Betts* be overruled.

The case-by-case approach also made it difficult for the Court to handle the flood of petitions for certiorari from state criminal proceedings. Selecting from among them was of necessity quite arbitrary, since the bulk of them presented the same legal question — whether the trial in each case was "fair" or not.

The Warren Court finally abandoned the Fair Trial Rule in

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Selective incorporation, of course, differs significantly from the Fair Trial Rule, since once a particular guarantee of the Bill of Rights is held to be incorporated in the Fourteenth Amendment there is no longer any basis for a case-by-case determination of whether the trial as a whole seemed "fair" or not.

*Betts* contains a typical discussion of the Fair Trial Rule:

> The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth. Due process of law is secured against invasion by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.

*Id. at 461-62.*

*Gideon, supra note 106, at 896-97.* See statistics, *id. at 896 n. 120.*
favor of selective incorporation. Beginning in 1961 with *Mapp v. Ohio*, the Court gradually incorporated in the Fourteenth Amendment almost all of the guarantees of the Bill of Rights, carrying over the body of federal case law built up in interpretation of those guarantees. The Court thereby eliminated as much of the subjective element as possible in its review of state criminal proceedings, and provided state courts with fairly explicit and consistent principles by which to judge the constitutionality of their rulings. Thus, contrary to Justice Harlan’s arguments, selective incorporation, in practical effect at least, actually tended to reduce the strain which the Fair Trial Rule had placed on the federal system.

**A Return to the Fair Trial Rule**

The constitutional objections and practical difficulties surrounding the Fair Trial Rule have been forgotten, or are being disregarded, by the Burger Court. The same subjective, case-by-case determinations characteristic of the Fair Trial Rule are unavoidable under either a *Dutton* “indicia of reliability” test or a *Chambers* “due process” right of confrontation approach, and will doubtless lead to the same problems the pre-Warren Court experienced with the Fair Trial Rule.

The Burger Court’s treatment of the confrontation right demonstrates most clearly its desire to circumvent the Warren Court selective incorporation approach to the review of state proceedings. But that desire — as well as the Court’s reliance on straight “due process” — can also be seen in cases involving other guarantees of the Bill of Rights, particularly in the opinions of Justices Powell and Rehnquist.

**The Right to Counsel**

In *Argersinger v. Hamlin*, for instance, Justice Powell,

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116 The following Bill of Rights protections in criminal proceedings have been incorporated in the Fourteenth Amendment and are thus applicable to the states:

117 The Court held that the guarantees were to be interpreted identically in state and federal proceedings. See note 155 and accompanying text, *infra*.
joined by Justice Rehnquist, advocated a Betts v. Brady approach to the problem of providing counsel in non-felony cases.\textsuperscript{119} The majority in Argersinger held that the Gideon right to counsel extended to all cases where the defendant faced a possible sentence of imprisonment. Justice Powell, in an opinion concurring in the result, felt that a case-by-case determination based on "fairness" would have been a more appropriate standard:

I would adhere to the principle of due process that requires fundamental fairness in criminal trials, a principle which I believe encompasses the right to counsel in petty cases whenever the assistance of counsel is necessary to assure a fair trial.

Due process, perhaps the most fundamental concept in our law, embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial. . . .

I would hold that the right to counsel in petty-offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case-by-case basis. . . .\textsuperscript{120}

It would be difficult to find a statement more expressive of the Fair Trial Rule. This opinion, when considered in conjunction with his majority opinion in Chambers, demonstrates that Justice Powell is clearly anxious to substitute a straight due process approach for that of selective incorporation.

The Right to a Jury

Impartiality

In Ham v. South Carolina,\textsuperscript{121} a case involving jury prejudice, Justice Rehnquist substituted a straight "due process" approach for the Sixth Amendment jury right in much the same fashion as Justice Powell had substituted it for the confrontation right in Chambers. Justice Rehnquist, in a majority opinion, held that the trial judge's refusal to question the jury about possible racial bias at the request of the bearded, black defendant was a violation of the Due Process Clause. However, he also held that the refusal to ask questions about possible prejudice towards persons wearing beards was not a due process violation. Justice Rehnquist cited the 1873 Slaughter-House Cases\textsuperscript{122} in an attempt to rationalize this distinction, stating that:

[S]ince a principle purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race . . . we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice. . . .

While we cannot say that prejudice against people with beards

\textsuperscript{119} Id. at 65.
\textsuperscript{120} Id. at 47, 49, 63.
\textsuperscript{121} 409 U.S. 524 (1973).
\textsuperscript{122} 83 U.S. (16 Wall.) 36 (1873).
might not have been harbored by one or more of the potential jurors in this case. . . . [g]iven the traditionally broad discretion accorded to the trial judge in conducting voir dire . . . and our inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices, we do not believe the petitioner's constitutional rights were violated when the trial judge refused to put this question.\textsuperscript{123}

Putting aside the obvious fact that the Due Process Clause has been greatly extended beyond its initial objective of protecting “the freedom of the slave race,”\textsuperscript{124} the problem in Ham should more properly have been dealt with under the Sixth Amendment. As Witherspoon \textit{v. Illinois}\textsuperscript{125} made clear, the Sixth Amendment right to a jury embodies the right to an impartial jury.\textsuperscript{126} If Ham had been analyzed in accord with this rationale, it would have been apparent that no meaningful distinction can be drawn between racial bias and bias towards bearded men. The question simply becomes one of whether the trial judge's refusal to ask the suggested voir dire questions about potential prejudices violated the right to an impartial jury.

\textit{Unanimity of Verdict}

Justice Powell, in addition to his adoption of a straight due process standard, has also indicated in the companion cases of \textit{Johnson v. Louisiana}\textsuperscript{127} and \textit{Apodaca v. Oregon}\textsuperscript{128} that he is willing to undercut the basic premise of selective incorporation by applying a “watered-down” version of the Bill of Rights in state

\textsuperscript{123} 409 U.S. 524, 526-28.
\textsuperscript{124} 83 U.S. (16 Wall.) at 71.

Justices Marshall and Douglas dissented as to that part of the Court’s opinion which held that the trial court’s refusal to explore possible bias towards beards was not constitutional error. Justice Marshall observed: Long before the Sixth Amendment was made applicable to the States through the \textit{Due Process Clause of the Fourteenth Amendment}, see Duncan \textit{v. Louisiana}, 391 U.S.145 . . . this Court held that the right to an ‘impartial’ jury was basic to our system of justice.

We have never suggested that this right to impartiality and fairness protects against only certain classes of prejudice or extends to only certain groups in the population. It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict. . . .

\textsuperscript{125} 391 U.S. 510 (1968).
\textsuperscript{126} Id. at 518. The Sixth Amendment, of course, speaks of “an impartial jury.”

\textsuperscript{127} 406 U.S. 356 (1972).
\textsuperscript{128} 406 U.S. 404 (1972).
proceedings. The question in Apodaca was whether the Sixth Amendment right to trial by jury in criminal cases, which Duncan v. Louisiana had incorporated in the Fourteenth Amendment, included the right to a unanimous verdict. The plurality decision held that the Sixth Amendment requires a unanimous verdict in federal courts, but not in state courts — even though Justice Powell was the sole member of the Court to advocate that position. This freakish result was reached because four justices believed the Sixth Amendment did not require a unanimous verdict in either federal or state courts, and four justices believed it required a unanimous verdict in both. Justice Powell broke the deadlock.

In his opinion, Justice Powell acknowledged that it was "perhaps late in the day for an expression of my views [on incorporation]" but went on to say:

I do not think that all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment.

The question, therefore, that should be addressed in this case is whether unanimity is in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth Amendment.

At least in defining the elements of the right to jury trial, there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards.

Justice Douglas, joined in dissent by Justices Brennan and Marshall, pointed out that all of the incorporated provisions of the Bill of Rights had already been held to apply in the same measure to federal and state proceedings. He decried Justice Powell's position, stating that:

My chief concern is one often expressed by the late Mr. Justice Black, who was alarmed at the prospect of nine men appointed for life sitting as a superlegislative body to determine

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130 Johnson v. Louisiana, 406 U.S. 356 (1972), dealt with the question of whether there was a due process or equal protection right to a unanimous verdict, and concluded there was not. The question arose because the trial had taken place before Duncan was decided, and Duncan had been held not to be retroactive. DeStefano v. Woods, 392 U.S. 631 (1968).
131 Burger, White, Blackmun and Rehnquist.
133 406 U.S. at 375.
134 Id. at 369, 373, 375.
whether government has gone too far. The balancing was done when the Constitution and Bill of Rights were written and adopted. For this Court to determine, say, whether one person but not another is entitled to free speech is a power never granted it. But that is the ultimate reach of decisions that let the States, subject to our veto, experiment with rights guaranteed by the Bill of Rights.

I would construe the Sixth Amendment, when applicable to the States, precisely as I would when applied to the Federal Government.\textsuperscript{136}

Thus far Justice Powell seems to be the only member of the Court willing to espouse a “watered-down” theory of incorporation, but if he can persuade four others to adopt his position he will have found another method by which to circumvent the body of case law interpreting the Bill of Rights, just as those cases were circumvented by the approaches taken in \textit{Dutton v. Evans} and \textit{Chambers v. Mississippi}.

\textbf{CONCLUSION}

The amorphous due process approach taken to constitutional questions in \textit{Dutton v. Evans}, \textit{Chambers v. Mississippi}, \textit{Ham v. South Carolina} and the Powell opinions in \textit{Argersinger v. Hamlin} and \textit{Apodaca v. Oregon} can easily lead to the abuses formerly encountered under the Fair Trial Rule. By simply deciding in any given case that due process had or had not been violated, the Court could, on the one hand, effectively extend its federal rule-making power to encompass the state courts. This could result, for example, in the forced adoption by the states of the proposed Federal Rules of Evidence. Such a use of the Due Process Clause would realize the late Justice Black’s worst fears of interference with states’ rights.

On the other hand, it is at least equally possible that the due process approach will be used to avoid overturning state criminal convictions that involve violations of the Bill of Rights. In the less flagrant cases at least, the Court can simply ignore the specific guarantees of the Bill of Rights, identify the issue as one of due process, as it did in \textit{Chambers} and \textit{Ham}, and decide that under the particular circumstances of the case, due process had not been violated.

If it does so, the Court will once again find itself flooded with petitions for certiorari from state courts, all presenting the same basic question of fairness. The subjective, case-by-case approach of the due process standard will again force state courts to guess about the constitutionality of their rulings, produce inconsistent

\textsuperscript{136} 406 U.S. at 388.
holdings, and thus call for increased interference by the Supreme Court, just as in the pre-Warren years. And such interference will inevitably place the same strain on federal-state relations that led twenty-two states to file an amicus curiae brief in *Gideon v. Wainwright* in protest of the Fair Trial Rule. Whether such a strain will be accompanied by more "law and order" is questionable, but it will surely be an ironic by-product of rulings handed down by those avowed advocates of federalism, the Nixon appointees.

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