

1972

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Recommended Citation

The Hearsay Rule and the Right to Confrontation: States' Leeway in Formulating Evidentiary Rules, 40 Fordham L. Rev. 595 (1972).

Available at: <https://ir.lawnet.fordham.edu/flr/vol40/iss3/4>

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COMMENT

THE HEARSAY RULE AND THE RIGHT TO CONFRONTATION: STATES' LEEWAY IN FORMULATING EVIDENTIARY RULES

I. INTRODUCTION

The first ten amendments were adopted by the founding fathers to alleviate the fears of the ratifying state legislatures that the Constitution, absent such protections, would abrogate many of the rights long recognized by English common law.¹ Thus, the purpose of the confrontation clause of the sixth amendment was to guarantee that, in a criminal case, a defendant would have substantially the same rights that were afforded by the hearsay rule—confrontation and cross-examination.² Since the hearsay rule and the right to confrontation both reflect the view that some evidence should not be admitted unless the declarant testifies at trial or has been subjected to cross-examination,³ it was thought that allowing a statement to be admitted only under a hearsay exception would provide adequate protection⁴ and, thus, would not violate a defendant's constitutional rights.⁵ However, as a result of a series of Supreme Court cases beginning with *Pointer v. Texas*⁶ and ending with *Bruton v. United States*,⁷ the lower courts⁸ have held, with the approval of the commentators,⁹ that the rights provided by the confrontation clause were *so basic* that even the admission of an extrajudicial statement admissible under a hearsay exception would violate

1. See Sources of Our Liberties 420 (R. Perry & J. Cooper eds. 1959) [hereinafter cited as Perry & Cooper]; Larkin, The Right of Confrontation: What Next?, 1 Texas Tech. L. Rev. 67, 76 (1969) [hereinafter cited as Larkin]; Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 399 (1959).

2. 5 J. Wigmore, Evidence §§ 1365, 1395 (3d ed. 1940) [hereinafter cited by volume as Wigmore].

3. *Id.*

4. *Id.* § 1397, at 130-31.

5. See, e.g., *Salinger v. United States*, 272 U.S. 542, 548 (1926); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) ("[T]he first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties [sic] and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed."); Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. Pa. L. Rev. 741, 746 (1965) [hereinafter cited as Preserving the Right to Confrontation].

6. 380 U.S. 400 (1965).

7. 391 U.S. 123 (1968).

8. See notes 81-90 and accompanying text *infra*.

9. See notes 77-80 and accompanying text *infra*.

the clause. This view lead to an inevitable question regarding the breadth of a defendant's right to confrontation: Does it prohibit the use of all evidence admitted under traditional hearsay exceptions? It was in the face of this uncertainty that the Supreme Court decided a trilogy of cases—*California v. Green*,¹⁰ *Dutton v. Evans*,¹¹ and *Nelson v. O'Neil*¹²—which indicate that the right to confrontation is not as broad as it was originally thought to be. This comment will examine these cases and the apparent trend of the Court's thinking in this area.

II. HISTORY OF THE HEARSAY RULE

Hearsay evidence was freely admitted at early common law.¹³ This was the natural consequence of Sixteenth Century thinking regarding the criminal trial—a proceeding of "inquest or recognition."¹⁴ During this period, witnesses were not called to testify as to their personal knowledge.¹⁵ Rather, it was the normal function of the jury to seek them out and gather information from those not called into court.¹⁶ However, as the trial evolved from an investigative to an adversary proceeding, hearsay came to be regarded as a threat to the fact-finding process.¹⁷ Jurors became triers of fact who relied upon testimony presented in court.¹⁸ In response, courts soon developed a rule excluding extrajudicial statements offered to prove the truth of the proposition stated.¹⁹ The admission of

10. 399 U.S. 149 (1970).

11. 400 U.S. 74 (1970).

12. 402 U.S. 622 (1971).

13. Wigmore, *The History of the Hearsay Rule*, 17 *Harv. L. Rev.* 437, 443 (1904). A famous example is provided by the trial of Sir Walter Raleigh for treason in 1603. Raleigh was implicated in a plot to seize the throne by the statements of one Cobham. However, when Raleigh received a written retraction from Cobham, he believed that Cobham would testify in his favor. After a dispute over Raleigh's right to have Cobham called as a witness, he was not called and Raleigh was convicted. See 9 W. Holdsworth, *A History of English Law* 216-17, 226-28 (1926).

14. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 *Harv. L. Rev.* 177, 180 (1948) [hereinafter cited as Morgan].

15. 5 Wigmore § 1364, at 10-12.

16. *Id.*; II F. Pollock & R. Maitland, *The History of English Law* 622 (2d ed. 1968). "Indeed it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony . . ." *Id.* at 624-25 (footnote omitted). "At the least a fortnight had been given them in which to 'certify themselves' of the facts. We know of no rule of law which prevented them from listening during this interval to the tale of the litigants. . . ." *Id.* at 627 (footnote omitted). "Separately or collectively, in court or out of court, they have listened to somebody's story and believed it." *Id.* at 628. See Wigmore, *The History of the Hearsay Rule*, 17 *Harv. L. Rev.* 437, 438-41 (1904).

17. 5 Wigmore § 1364, at 12-15; Comment, *Confrontation, Cross-Examination, and the Right to Prepare a Defense*, 56 *Geo. L.J.* 939, 940 (1968) [hereinafter cited as *Right to Prepare a Defense*]; Wheaton, *What is Hearsay?*, 46 *Iowa L. Rev.* 210, 219-22 (1961).

18. 5 Wigmore § 1364, at 12; Morgan 181.

19. C. McCormick, *Evidence* § 223 (1954) [hereinafter cited as McCormick]; see *La Placa v. United States*, 354 F.2d 56 (1st Cir. 1965), cert. denied, 383 U.S. 927 (1966); *Cannady v.*

such statements was prohibited because they did not provide sufficient probative force to convince a trier of fact that the proposition offered was true.²⁰ The first objection to the admission of extrajudicial statements was that its declarant had not made it under oath.²¹ A witness under oath was thought less likely to lie because he feared both violating a religious symbol and incurring punishment for perjury.²² However, the force of this objection has been blunted somewhat by the fact that out-of-court statements made under oath are now, on occasion, excluded.²³ A second objection to hearsay evidence is that the jury has not been able to test the declarant's credibility by observing his demeanor while on the witness stand.²⁴ The final and, perhaps, most cogent objection to the admission of such evidence is that the declarant can not be subjected to cross-examination—"the greatest legal engine ever invented for the discovery of truth."²⁵ Realizing, however, that the total exclusion of hearsay evidence would defeat the ends of justice, courts permitted exceptions where necessity and reliability provided an adequate substitute for cross-examination.²⁶ Thus, for example, dying declarations are not proscribed since it is universally agreed that the "approach of death produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to mis-state."²⁷

United States, 351 F.2d 796 (D.C. Cir. 1965); *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966); *Baber v. United States*, 324 F.2d 390 (D.C. Cir. 1963), cert. denied, 376 U.S. 972 (1964); *United States v. Campanaro*, 63 F. Supp. 811 (E.D. Pa. 1945); *People v. Kynette*, 15 Cal. 2d 731, 104 P.2d 794 (1940) (per curiam); *Dolan v. United Cas. Co.*, 259 App. Div. 784, 18 N.Y.S.2d 387 (4th Dep't 1940). See generally *Morgan, The Hearsay Rule*, 12 Wash. L. Rev. & St. B.J. 1 (1937).

20. *Weinstein, Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961); see *Sawyer v. Barczak*, 229 F.2d 805 (7th Cir.), cert. denied, 351 U.S. 966 (1956); *Papadakis v. United States*, 208 F.2d 945, 952 (9th Cir. 1953) (dictum); *Kinder v. Commonwealth*, 306 S.W.2d 265, (Ky. Ct. App. 1957).

21. *McCormick* § 224, at 457. See *Gilbert, The Law of Evidence* (6th ed. 1801) "[T]hough a person testify what he hath heard upon oath, yet the person who spake it was not upon oath; and if a man had been in Court, and said the same thing, and had not sworn it, he had not been believed in a Court of justice . . ." *Id.* at 135.

22. *McCormick* § 224, at 457.

23. *Morgan* 185-86; see *Gambino v. United States*, 108 F.2d 140 (3d Cir. 1939).

24. *McCormick* § 224, at 457-58; see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 495-96 (1951). See generally *Sham, Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A.J. 580 (1961).

25. 5 *Wigmore* § 1367, at 29.

26. *Id.* §§ 1420-22, at 202-05; see *Sica v. United States*, 325 F.2d 831 (9th Cir. 1963), cert. denied, 376 U.S. 952 (1964).

27. 5 *Wigmore* § 1438, at 230 (emphasis omitted). See *Shepard v. United States*, 290 U.S. 96 (1933); *People v. Bartelini*, 285 N.Y. 433, 35 N.E.2d 29 (1941). See generally *Quick, Some Reflections on Dying Declarations*, 6 *How. L.J.* 109 (1960); *Comment, The Admissibility of Dying Declarations*, 38 *Fordham L. Rev.* 509 (1970); *Comment, Dying Declarations in Louisiana Law*, 22 *La. L. Rev.* 651 (1962).

III. HISTORY OF THE RIGHT TO CONFRONTATION

The hearsay rule also provided the historical basis for the sixth amendment confrontation rule.²⁸ When the Constitution was first drafted by the Second Continental Congress, it was devoid of any guarantee of procedural rights.²⁹ This led to strong protest in the state legislatures. The statements of the Massachusetts convention are typical.³⁰ "[W]hether [a defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . [W]e have not the smallest constitutional security that we shall be allowed the exercise of these privileges."³¹ To alleviate these fears, the confrontation provision³² was included in the Bill of Rights and was presented to, and subsequently ratified by, the several states.³³ In construing the confrontation clause, the Supreme Court has said:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.³⁴

Early courts,³⁵ in applying the confrontation clause, reasoned that the adop-

28. See F. Heller, *The Sixth Amendment to the Constitution of the United States, A Study in Constitutional Development* 104 (1951); *Preserving The Right To Confrontation* 746 & n.31.

29. Perry & Cooper 420; Larkin 76.

30. See 2 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 1-183 (2d ed. 1836).

31. *Id.* at 111.

32. U.S. Const. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" For studies on the historical setting in which the right to confrontation arose see Larkin 70-75; Pollitt, *supra* note 1, at 388-98.

33. See Pollitt, *supra* note 1, at 399.

34. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). See *Kirby v. United States*, 174 U.S. 47 (1899), where it was stated: "[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." *Id.* at 55. 5 Wigmore § 1365, at 27 states: "The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, i.e., it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable."

35. In *Salinger v. United States*, 272 U.S. 542 (1926), the Supreme Court stated: "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the

tion of the sixth amendment was "not [a] reaching out for new guaranties,"³⁶ *i.e.*, that it did not create any additional rights. Rather, the right to confrontation was believed to only guarantee those rights long established by the common law hearsay rule—cross-examination and confrontation.³⁷ Moreover, since the right to confrontation and the hearsay rule were considered similar in concept, an exception to one would be an exception to the other. Thus, it was early stated that hearsay exceptions "well established before the adoption of the constitution . . . [were] not intended to be abrogated."³⁸ This interpretation of the confrontation clause continued until first varied in *Snyder v. Massachusetts*.³⁹ Noting that a hearsay exception need not be long established to be an exception to the confrontation clause, Mr. Justice Cardozo stated, in dicta, that the exceptions to the right of confrontation "are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general rule."⁴⁰ This limited view of confrontation was prevalent until a number of "watershed" cases were decided, beginning in 1965 with *Pointer v. Texas*.⁴¹ These decisions involved two types of cases. The first dealt with actual hearsay situations where the statements were admitted against the defendant for their truth. The second, on the other hand, concerned statements which were not technically hearsay since they were not so admitted against the defendant, but which created situations that were so prejudicial to him that their admission was tantamount to the admission of hearsay.

IV. THE WATERSHED

A. *Technical Hearsay Situations*

In *Pointer v. Texas*, the Supreme Court held that the constitutional right of a defendant to confront witnesses against him is made obligatory on the states exceptions." *Id.* at 548; see *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Kirby v. United States*, 174 U.S. 47, 61 (1899); *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897); *Mattox v. United States*, 156 U.S. 237, 243 (1895).

36. *Mattox v. United States*, 156 U.S. 237, 243 (1895).

37. *Salinger v. United States*, 272 U.S. 542, 548 (1926); see *Larkin* 68; *Right to Prepare a Defense* 941; *Comment, The Use of Prior Recorded Testimony and The Right of Confrontation*, 54 *Iowa L. Rev.* 360, 364 (1968); *Comment, Hearsay, The Confrontation Guarantee and Related Problems*, 30 *La. L. Rev.* 651, 652 (1970). See also cases cited at note 35 *supra*.

38. *Kirby v. United States*, 174 U.S. 47, 61 (1899). See *McCormick* § 231, at 486.

39. 291 U.S. 97 (1934). See *Kay v. United States*, 255 F.2d 476 (4th Cir.), cert. denied, 358 U.S. 825 (1958), where the court noted that the confrontation clause "was intended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule." *Id.* at 480. In *Matthews v. United States*, 217 F.2d 409 (5th Cir. 1954), the Court of Appeals for the Fifth Circuit acknowledged that the confrontation clause allows "new exceptions to the hearsay rule based upon real necessity and adequate guarantees of trustworthiness . . ." *Id.* at 418.

40. 291 U.S. at 107.

41. 380 U.S. 400 (1965). The other decisions involved were *Bruton v. United States*, 391 U.S. 123 (1968); *Barber v. Page*, 390 U.S. 719 (1968); and *Douglas v. Alabama*, 380 U.S. 415 (1965).

by the fourteenth amendment.⁴² In *Pointer*, the Court examined the "cross-examination" requirement of the prior recorded testimony exception to the hearsay rule.⁴³ The prosecution had introduced a transcript of an absent witness' testimony taken at a preliminary hearing. The defendant, though present at the hearing, was not represented by counsel and did not cross-examine the witness. The state court admitted the testimony on the ground that the defendant's presence at the hearing afforded him an opportunity to cross-examine the witness. Viewing the right to confrontation as a fundamental right essential to the conduct of a fair trial, the Supreme Court held that the use of a statement given at a preliminary hearing where the defendant did not have an adequate opportunity for cross-examination violated his constitutional right to confront the witnesses against him.⁴⁴ The Court stated:

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. . . . There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.⁴⁵

Examining the circumstances under which the testimony was given, the Court noted that a mere technical opportunity to cross-examine is not sufficient grounds for the admission of extrajudicial testimony under the prior recorded testimony exception.⁴⁶ Since the testimony was not subjected to complete and adequate cross-examination, it could not qualify as prior recorded testimony within the exception, and therefore its admission at defendant's trial was violative of the hearsay rule and at the same time constituted an abridgement of the confrontation clause.⁴⁷

42. 380 U.S. at 403. In applying the confrontation clause to the states, the Court overruled its decisions in *Stein v. New York*, 346 U.S. 156, 195-96 (1953), and *West v. Louisiana*, 194 U.S. 258, 264 (1904).

43. The admission of prior recorded testimony is based upon "1) an inability to obtain the witness, 2) an opportunity to cross-examine the witness in the former trial, 3) an identity or substantial identity of issues in the two proceedings and 4) substantial identity of parties. The opportunity for cross-examination is considered the most essential because the credibility of the witness can be tested through direct confrontation." Comment, *The Use of Prior Recorded Testimony*, supra note 37, at 362 (footnotes omitted). The origins of the prior recorded testimony exception can be traced back to the common law. See *The King v. Jolliffe*, 100 Eng. Rep. 1022 (K.B. 1791); *The King v. Vipont*, 97 Eng. Rep. 767 (K.B. 1761). Prior testimony has also been held admissible as an exception to the confrontation clause in *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Mattox v. United States*, 156 U.S. 237, 240 (1895). For a general discussion of this exception see McCormick §§ 230-38.

44. 380 U.S. at 406-07.

45. *Id.* at 404-05.

46. *Id.* at 407-08. See also *Brookhart v. Janis*, 384 U.S. 1 (1966), where the Court held that the right to confrontation is so important that counsel can not waive it without the consent of the defendant. *Id.* at 7.

47. 380 U.S. at 407.

A similar situation arose in *Barber v. Page*.⁴⁸ There, the Supreme Court examined the "unavailability" requirement of the prior recorded testimony exception to the hearsay rule.⁴⁹ In *Barber*, the prosecution introduced the prior recorded testimony of a witness who was in a federal prison in another state.⁵⁰ The defendant had been present at the prior proceeding and had cross-examined the witness. However, the prosecution made no attempt to produce the witness at trial.⁵¹ According to traditional hearsay rules, testimony given at a prior proceeding would be admissible if the witness was out of the jurisdiction and beyond the compulsory process of the court.⁵² Emphasizing that "[t]he right of confrontation may not be dispensed with so lightly,"⁵³ the Court held that a witness is not unavailable, as a constitutional matter, unless the prosecution has made a good faith effort to obtain his presence.⁵⁴ Whatever may have been the efficacy of the traditional unavailability requirement, it no longer had any validity in view of the expanded cooperation between the states.⁵⁵ Although the witness was out of the jurisdiction, he was not *in fact* unavailable. Therefore, since the testimony did not come within the exception, it was hearsay and, as such, violative of the defendant's right of confrontation.⁵⁶ Noting that "[t]he right of confrontation is basically a trial right,"⁵⁷ the *Barber* Court reiterated that a jury must be allowed to weigh the credibility of a witness by observing his demeanor at trial.⁵⁸ It is only in this manner that a defendant may be provided with protec-

48. 390 U.S. 719 (1968).

49. See note 43 supra.

50. 390 U.S. at 722.

51. *Id.* at 723. See *United States ex rel. Stubbs v. Mancusi*, 442 F.2d 561 (2d Cir. 1971), wherein the court was confronted with the issue of whether a witness was per se "unavailable" in order that his prior recorded testimony could be introduced at trial. The witness was out of the country, and the prosecution made no attempt to obtain his presence. Relying on *Barber*, the court held that the prosecution must make a good faith effort to produce a witness who, unlike the *Barber* witness, was not in custody. *Stubbs* would seem to raise questions as to the validity of the criminal deposition section of the Organized Crime Control Act, 18 U.S.C. § 3503(f) (1970), which provides for the use of a witness' deposition based on the sole requisite of his absence from the country.

52. 5 Wigmore § 1404; see note 43 supra.

53. 390 U.S. at 725.

54. *Id.* at 724-25. See *Berger v. California*, 393 U.S. 314 (1969), where the Court acknowledged that "one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." *Id.* at 315. In so holding, the Court gave *Barber* retroactive effect. *Id.*

55. 390 U.S. at 723-24.

56. *Id.* at 724-25.

57. *Id.* at 725.

58. *Id.* The *Barber* Court indicated that had the witness been actually unavailable, then the use of his testimony given at a preliminary hearing subject to cross-examination would not have denied the defendant of his right of confrontation. *Id.* at 725-26; cf. *Virgin Islands v. Aquino*, 378 F.2d 540 (3rd Cir. 1967); *Holman v. Washington*, 364 F.2d 618 (5th Cir. 1966).

tion equivalent to that afforded by actual confrontation. The Court thus held that to deny confrontation of a witness, he must actually be unavailable.⁵⁹

In *Pointer* and *Barber*, the Supreme Court illustrated its willingness to scrutinize the admission of out-of-court testimony to determine if it provided adequate protection to justify a denial of confrontation. The mere fact that testimony was introduced under a traditional hearsay exception did not, in and of itself, satisfy the confrontation clause. The Court examined the circumstances of the admission to see if the requirements of the hearsay exception—real necessity and reliability—were fulfilled.

B. *Non-Technical Hearsay Situations*

The second group of cases, beginning with *Douglas v. Alabama*,⁶⁰ involved situations in which the out-of-court statements were not admitted against the defendant for their truth.⁶¹ The introduction of these statements, though not technically hearsay, was so prejudicial to the defendant as to result in a denial of confrontation. In *Douglas*, the prosecution introduced a statement made by an alleged accomplice at a separate trial. Although the accomplice was called as a witness at the defendant's trial, he refused to respond to any questions, claiming his right against self-incrimination.⁶² The prosecution, under the guise of refreshing the accomplice's memory, read the testimony which he had given at the prior trial. Because the statement was not introduced to prove the truth of its content, it was not technically hearsay.⁶³ However, the accomplice's refusal to acknowledge his statements created, in effect, a hearsay problem as well as one of confrontation.⁶⁴ As the Court noted, the prosecution's "reading may well have been

59. 390 U.S. at 724-25.

60. 380 U.S. 415 (1965).

61. For testimony to be hearsay it must be offered to prove the truth of the matter stated. However, if the testimony is used non-assertively, then it is admissible. McCormick § 225, at 459-61. Whether it is hearsay or not, then depends on the purpose for which it is introduced. Thus, evidence offered to show that a statement was made or to show a state of mind or knowledge is not hearsay. *Glassman v. Barron*, 277 Mass. 376, 178 N.E. 628 (1931); *Patterson-Stocking, Inc. v. Dunn Bros. Storage Warehouses*, 201 Minn. 308, 276 N.W. 737 (1937); see *Hooper-Holmes Bureau, Inc. v. Bunn*, 161 F.2d 102 (5th Cir. 1947) (statement in slander action held admissible to show malice); *Callen v. Gill*, 7 N.J. 312, 81 A.2d 495 (1951) (testimony held admissible as to statements by child to show state of mind); *Loetsch v. New York City Omnibus Corp.*, 291 N.Y. 308, 52 N.E.2d 448 (1943) (statement in deceased's will held admissible in wrongful death action to show hostility of husband). The Loetsch court stated: "No testimonial effect need be given to the declaration, but the fact that such a declaration was made by the decedent, whether true or false, is compelling evidence of her feelings toward, and relations to, her husband." *Id.* at 311, 52 N.E.2d at 449.

62. 380 U.S. at 416. The accomplice, who had been tried separately and convicted, planned to appeal. He, therefore, invoked his fifth amendment right against self-incrimination. *Id.*

63. See note 61 *supra*.

64. 380 U.S. at 419; see Comment, *Federal Confrontation: A Not Very Clear Say On Hearsay*, 13 U.C.L.A.L. Rev. 366 (1966), where the author stated: "Douglas demonstrated that testimony need not actually be offered for the probative value of its content to deny

the equivalent in the jury's mind of testimony that [the accomplice] in fact made the statement; and [his] 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."⁶⁵ The Court thus held that, although the statement was not hearsay, the defendant was denied his right to confrontation.⁶⁶ Cross-examination of the officers to whom the alleged statement was made could not, according to the Court, substitute for confrontation. "[T]heir evidence tended to show only that [the accomplice] made the confession, cross-examination of them . . . could not substitute for cross-examination of [the accomplice] to test the truth of the statement itself."⁶⁷

Similarly, in *Bruton v. United States*,⁶⁸ the Supreme Court held that a defendant was denied his right to confrontation when the court, in a joint trial, admitted a co-defendant's confession which had not been subjected to cross-examination.⁶⁹ In that case, a witness testified that the co-defendant-declarant orally divulged his own as well as the defendant's participation in the crime. The witness' testimony, being admitted against the co-defendant only, was not

confrontation. In *Douglas*, the testimony was read in open court before the jury and could have had its harmful effect without being entered as hearsay. The suggestion in *Douglas*, then, is that the Court will look behind the hearsay-non-hearsay distinction and will require confrontation in either case if prejudice will result to the defendant. . . . When the jury is not able to make the necessary distinction between hearsay and non-hearsay purposes, the defendant is certainly prejudiced. Therefore, operation of the standard in this area should require a direct consideration of potential prejudice to the defendant, in addition to the basic elements of reliability and need in evaluating hearsay exceptions." *Id.* at 377-78 (footnotes omitted) (emphasis omitted). Other commentators have also urged that an extra-judicial statement, though offered non-assertively, should not be automatically admitted unless its admission is considered in the light of the risk of undue prejudice to the defendant. Comment, *Hearsay, The Confrontation Guarantee and Related Problems*, 30 *La. L. Rev.* 651, 660 (1970); Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 *La. L. Rev.* 611, 617 (1954).

65. 380 U.S. at 419 (citations omitted). Cf. *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 557-58 (1956); *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959). The *Douglas* Court also noted that, although the prosecution's reading of the purported confession was not hearsay, "Loyd could not be cross-examined on a statement imputed to but not admitted by him." 380 U.S. at 419. See *Namet v. United States*, 373 U.S. 179, 187 (1963) where the court stated: "[The] inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." See also *Fletcher v. United States*, 332 F.2d 724 (D.C. Cir. 1964).

66. 380 U.S. at 420.

67. *Id.*

68. 391 U.S. 123 (1968). See Note, *Trial By Jury In Criminal Cases*, 69 *Colum. L. Rev.* 419, 449-60 (1969); Note, *The Admission of a Codefendant's Confession After Bruton v. United States: The Questions and a Proposal For Their Resolution*, 1970 *Duke L.J.* 329; *The Supreme Court*, 1967 Term, 82 *Harv. L. Rev.* 63, 231-38 (1968); Comment, *Bruton v. United States: A Belated Look At The Warren Court Concept Of Criminal Justice*, 44 *St. John's L. Rev.* 54 (1969).

69. 391 U.S. at 137.

technically hearsay as to the defendant.⁷⁰ Again, as in *Douglas*, the introduction of the confession created a situation which was highly prejudicial to the defendant. Thus, the jury would believe "not just . . . portions [incriminating the co-defendant] but those implicating [the defendant] as well."⁷¹ Since the co-defendant refused to take the stand and could not be cross-examined as to his statements, the trial court gave limiting instructions to the jury to the effect that the confession was admissible against the co-defendant but not against the defendant. The court of appeals, relying on *Delli Paoli v. United States*,⁷² affirmed the defendant's conviction on the ground that the limiting instructions were sufficient to enable a jury to ignore the uncross-examined confession implicating the defendant.⁷³ However, the Supreme Court rejected this reasoning and held that the defendant was denied his right of confrontation.⁷⁴ The Court emphasized the jury's inability to "segregate evidence into separate intellectual boxes."⁷⁵

70. An out-of-court statement is hearsay when it is introduced against a defendant for its truth. See note 61 supra and accompanying text. In *Bruton*, the alleged confession was introduced only against the co-defendant. 391 U.S. at 123-24. It was not used for its truth against *Bruton*. Therefore, it was not technically hearsay.

71. 391 U.S. at 127.

72. 352 U.S. 232 (1957). *Delli Paoli* was a modification of *Blumenthal v. United States*, 332 U.S. 539 (1947), where the Court held that instructions to the jury left "no room for doubt that the admissions were adequately excluded . . ." *Id.* at 551-52. In *Delli Paoli*, however, the Court required that the circumstances of each case be examined to determine if the jury could reasonably comply with the instructions. 352 U.S. at 239. *Delli Paoli* assumed that if a jury could comply then there would be no denial of confrontation in a criminal case *Id.* at 242-43. Prior to the *Bruton* decision, this assumption was criticized by a number of courts and commentators. See *United States ex rel. Floyd v. Wilkins*, 367 F.2d 990 (2d Cir. 1966); *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966); *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964); *Barton v. United States*, 263 F.2d 894 (5th Cir. 1959); *People v. Aranda*, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965); *State v. Young*, 46 N.J. 152, 215 A.2d 352 (1965); *People v. Vitagliano*, 15 N.Y.2d 360, 206 N.E.2d 864, 258 N.Y.S.2d 839 (1965); Note, *Joint And Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 *Yale L.J.* 553, 554-55 (1965).

73. *Evans v. United States*, 375 F.2d 355 (8th Cir. 1967), *rev'd sub nom. Bruton v. United States*, 391 U.S. 123 (1968).

74. 391 U.S. at 126.

75. *Id.* at 131. See *Nash v. United States*, 54 F.2d 1006 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932), wherein Judge Learned Hand stated that the use of limiting instructions is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else [sic]." *Id.* at 1007. Accord, *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (concurring opinion); *People v. Barbaro*, 395 Ill. 264, 69 N.E.2d 692 (1946); *State v. Rosen*, 151 Ohio 339, 86 N.E.2d 24 (1949). For recent studies on the jury's inability to ignore incriminating evidence regardless of instructions see Broeder, *The University of Chicago Jury Project*, 38 *Neb. L. Rev.* 744 (1959); Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 *Minn. L. Rev.* 264 (1966). The Broeder project was undertaken among a group of thirty juries. A tape of a hypothetical injury action was played to three groups of ten juries. The tape played to all three groups, however, differed as to a statement made by the plaintiff. The tape played to the first group contained a statement read, without objection by the defendant's attorney, that the defendant had no liability insurance. The average

Such instructions were not, according to the Court, "an adequate substitute for [the defendant's] constitutional right of cross-examination."⁷⁶

Thus, in *Douglas* and *Bruton*, the Supreme Court illustrated the potential dangers to a defendant when a court does not distinguish between a hearsay and a non-hearsay situation. Although the evidence was not introduced against the defendant for its truth, its effect was so prejudicial that the defendant was denied his right to confrontation. In such cases, the Court noted the primary importance of the availability of the declarant for cross-examination. Unless he is available for effective cross-examination and confrontation, the out-of-court testimony will not be admitted at trial.

V. THE POST-BRUTON ERA

As a result of these decisions many commentators⁷⁷ were of the opinion that the rights secured by the confrontation clause were so basic and fundamental that traditional hearsay exceptions were violative of a defendant's constitutional right to a fair trial. The dying declaration exception, thus, was considered a violation of the confrontation clause on the basis of "the inability of the defendant to cross-examine the 'real' witness . . ." ⁷⁸ Another commentator⁷⁹ concluded that if evidence

recovery given by this group was \$33,000. The second tape contained the same statement, but this time the defendant's attorney did object. The average recovery given by the second group was \$37,000. The third tape contained the statement that the defendant did have liability insurance. Here an instruction was made by the judge to ignore it. The average recovery rewarded by the last group was \$46,000. Broeder, *supra*, at 754.

76. 391 U.S. at 137. See *Roberts v. Russell*, 392 U.S. 293 (1968), which applied *Bruton* retroactively since the evidence admitted in violation of the *Bruton* rule "went to the basis of [a] fair hearing and trial . . ." *Id.* at 294.

77. Larkin 85-86; Comment, *The Admissibility of Dying Declarations*, 38 *Fordham L. Rev.* 509, 523 (1970); Comment, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 *Iowa L. Rev.* 360, 364 (1968) ("The constitutional concept of confrontation has grown and developed into a concept with its own definitive meanings and applications. In many instances the elements of the hearsay rule have not kept pace with the development of the confrontation clause, and their continued use may be depriving criminal defendants of their constitutional right of confrontation. If a new standard of confrontation is evolving, the hearsay rule must be re-examined in light of that standard. Simply because some particular circumstances might justify an exception to the hearsay rule does not necessarily insure that the new confrontation requirements have been met despite the fact that the circumstances might have satisfied the old requirements."); Comment, *Bruton v. United States: A Belated Look at the Warren Court Concept of Criminal Justice*, 44 *St. John's L. Rev.* 54, 66 (1969); see *The Supreme Court, 1967 Term*, 82 *Harv. L. Rev.* 63, 237 (1968) where the authors stated: "[I]f the declarant is not available to testify, an exception to the hearsay rule which would permit introduction of his testimony despite his absence would seem to violate the confrontation clause." For cases illustrating that the confrontation right might be broader than the hearsay rule see *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Parker v. Gladden*, 385 U.S. 363 (1966).

78. Comment, *The Admissibility of Dying Declarations*, 38 *Fordham L. Rev.* 509, 523 (1970). See note 27 *supra* and accompanying text.

79. Larkin 85-86.

depends for its probative value upon the testimonial credibility of some person, that person must present the evidence in person. Exceptions to this rule may be recognized when, *and only when*, the ideal of fairness as served by the full satisfaction of all aspects of physical confrontation is outweighed by the necessity to *avoid a complete failure* of justice. . . . Probably falling before this muster . . . may be such old familiar friends as declarations against interest, [and] writings containing past recollection recorded⁸⁰

This type of thinking was adopted in several lower court cases⁸¹ decided subsequent to *Bruton*. Two such cases were *People v. Johnson*⁸² and *Evans v. Dutton*.⁸³ In *Johnson*, the Supreme Court of California held that an expanded hearsay exception allowing prior inconsistent statements as substantive evidence⁸⁴ was a violation of the confrontation clause.⁸⁵ In reaching this decision, the court stressed the Supreme Court's "belief in the importance of ensuring that the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, *i.e.*, before the same trier who sits in judgment on the truth of the

80. *Id.* at 86 (emphasis added).

81. See *Evans v. Dutton*, 400 F.2d 826 (5th Cir. 1968), rev'd, 400 U.S. 74 (1970); *People v. Green*, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), rev'd sub. nom. *California v. Green*, 399 U.S. 149 (1970); *People v. Johnson*, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), cert. denied, 393 U.S. 1051 (1969); *Schepps v. State*, 432 S.W.2d 926 (Tex. Crim. App. 1968); cf. *United States v. Barbat*, 284 F. Supp. 409 (E.D.N.Y. 1968).

82. 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), cert. denied, 393 U.S. 1051 (1969).

83. 400 F.2d 826 (5th Cir. 1968), rev'd, 400 U.S. 74 (1970). See *Schepps v. State*, 432 S.W.2d 926 (Tex. Crim. App. 1968), wherein the defendant was convicted as a result of the confession of an accomplice who was tried separately. In holding that the admission was improper, the court stated that the confrontation right embodies "the requirements of real necessity and adequate guarantees of trustworthiness as essential to all exceptions to the rule, present or future, for otherwise legislative bodies and courts could abolish the right of confrontation by simply making unlimited exceptions to the hearsay rule." *Id.* at 941. Cf. *United States v. Barbat*, 284 F. Supp. 409 (E.D.N.Y. 1968), where the court indicated that, in a criminal case, extrajudicial statements should be closely scrutinized and reevaluated by the court. Such evidence, the court noted should be admitted only when there is no more satisfactory evidence and the availability of the declarant for cross-examination affords the defendant adequate protection. *Id.* at 412.

84. Cal. Evid. Code § 1235 (West 1966). For text of the statute see note 94 *infra*. See also *People v. Green*, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), rev'd sub. nom. *California v. Green*, 399 U.S. 149 (1970). In *Johnson*, the testimony of a witness before a grand jury was admitted at trial as substantive evidence. At trial, the witness denied the truthfulness of the testimony. The prosecution was then permitted to introduce the prior inconsistent statement. 68 Cal. 2d at 648-51, 441 P.2d at 113-15, 68 Cal. Rptr. at 601-02.

85. 68 Cal. 2d at 660, 441 P.2d at 120, 68 Cal. Rptr. at 609; see *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945), where the Supreme Court held that an extrajudicial statement, while permissible for impeachment purposes, "certainly would not be admissible in any criminal cases as substantive evidence. . . . So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded." (citations and footnotes omitted).

witness' direct testimony as it is spoken from the stand."⁸⁶ In *Evans v. Dutton*,⁸⁷ the Fifth Circuit Court of Appeals struck down a statutory exception admitting co-conspirator's statements made in the concealment stage of the conspiracy.⁸⁸ Emphasizing that "hearsay exceptions in criminal cases must be continually scrutinized and reevaluated"⁸⁹ in light of the confrontation clause, the court held that the hearsay exception was unconstitutional since "[a] criminal defendant cannot . . . be convicted upon the testimony of . . . witnesses whose credibility is unknown and unknowable by the trier of fact."⁹⁰

The effect of *Pointer*, *Douglas*, *Bruton*, and the other "watershed" cases is obvious. The lower courts, stirred by the apparent thrust of these decisions, began to strike down various exceptions to the hearsay rule as violations of the confrontation clause on a case by case basis. The Supreme Court, the prime mover in this trend, had left little in the way of guidance and the primary question—whether or not all hearsay exceptions were beyond the pale of constitutionality—still awaited a definitive answer.⁹¹ The Court responded with a trilogy of cases⁹² which indicated that the exceptions to the hearsay rule retained considerable vitality and that the confrontation clause was not as broad in sweep as *Pointer* and its companions seemed to indicate.

VI. RECENT CASES

A. *California v. Green*

In *California v. Green*,⁹³ the Supreme Court was confronted with the issue of whether a state could expand a hearsay exception to allow prior inconsistent statements as substantive evidence.⁹⁴ The traditional rule was that such state-

86. 68 Cal. 2d at 660, 441 P.2d at 120, 68 Cal. Rptr. at 608.

87. 400 F.2d 826 (5th Cir. 1968), rev'd, 400 U.S. 74 (1970).

88. Id. at 831-32. For the facts of this case see notes 106-10 infra and accompanying text.

89. 400 F.2d at 830. The court, relying on *Barber v. Page*, 390 U.S. 719 (1968), and *Pointer v. Texas*, 380 U.S. 400 (1965), noted that "if an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation." 400 F.2d at 830. Since the hearsay exception involved went beyond the traditional co-conspirator exception and no cogent reasons were involved, the admission of the extrajudicial statement was "repugnant to the sixth amendment." Id. at 831. The traditional co-conspirator exception to the hearsay rule allows admission of out-of-court statements made only in furtherance of the conspiracy and not in the concealment stage. *Fiswick v. United States*, 329 U.S. 211, 216-17 (1946); see Proposed Fed. R. Evid. 801(d)(2)(v), 51 F.R.D. 315, 413 (1971). See also cases cited note 111 infra.

90. 400 F.2d at 830.

91. See The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 236 (1968).

92. *Nelson v. O'Neil*, 402 U.S. 622 (1971); *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 491 (1970).

93. 399 U.S. 149 (1970).

94. Id. at 155. The statutory hearsay exception involved was Cal. Evid. Code § 1235 (West 1966), which states: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Id. § 770 states: "Unless the interests of justice

ments could only be used to impeach a witness' credibility.⁹⁵ However, California made a statutory change to reflect the minority view.⁹⁶ In *Green*, the declarant was, at the time the operative events transpired, under the influence of an hallucinogenic drug. He was able, however, shortly thereafter, to make a statement incriminating the defendant. At trial, the declarant took the stand, but was unable to recall anything about the events at issue. The prosecution, after the declarant had admitted making the statement, was successful in introducing it under the California version of the prior inconsistent statement exception to the hearsay rule.

On appeal,⁹⁷ the Supreme Court of California held that the hearsay exception at issue was a violation of the defendant's confrontation right since it did not require legal necessity as a basis for admission.⁹⁸ The court stated: "This exception . . . adds the factor of necessity to the constitutional aspect of confrontation—which factor may, in appropriate cases, outweigh the lack of contemporary cross-examination. Of course, no such 'necessity' exists where the witness is present to testify at trial . . ."⁹⁹ In reversing, the Supreme Court of the United

otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action."

95. 399 U.S. at 154; see *Ellis v. United States*, 138 F.2d 612, 616-21 (8th Cir. 1943); *United States v. Biener*, 52 F. Supp. 54 (E.D. Pa. 1943). In *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939), the court stated: "The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot." *Id.* at 362, 285 N.W. at 901. For criticism of the orthodox view see *United States v. De Sisto*, 329 F.2d 929, 933-34 (2d Cir.), cert. denied, 377 U.S. 979 (1964); *United States v. Rainwater*, 283 F.2d 386 (8th Cir. 1960); *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 935 (2d Cir.), cert. denied, 353 U.S. 984 (1957); *United States ex rel. Ng Koo Wong v. Corsi*, 65 F.2d 564, 565 (2d Cir. 1933); *Di Carlo v. United States*, 6 F.2d 364, 368 (2d Cir.), cert. denied, 268 U.S. 706 (1925); *McCormick* § 39; 3A *Wigmore* § 1018, at 996 n.2 (3d rev. ed. Chadbourne 1970); *Morgan* 192-96. A recent Second Circuit case explaining the minority position is *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971), wherein a witness refused to testify and the prosecution was permitted to introduce his prior testimony as substantive evidence. The court reversed, indicating that a witness' prior inconsistent testimony can be used as substantive evidence only if the witness is available at trial for "meaningful cross-examination." *Id.* at 115. See Rule 801 of the proposed Federal Rules of Evidence which defines prior statements by a witness as non-hearsay when he "testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony" 51 F.R.D. at 413.

96. 399 U.S. at 154. For the text of the statute see note 94 supra.

97. *People v. Green*, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), rev'd sub nom. *California v. Green*, 399 U.S. 149 (1970).

98. *Id.* at 664-66, 451 P.2d at 428-29, 75 Cal. Rptr. at 788-89.

99. *Id.* at 664, 451 P.2d at 428, 75 Cal. Rptr. at 788. Relying on *Barber v. Page*, 390 U.S. 719 (1968), and *People v. Johnson*, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), cert. denied, 393 U.S. 1051 (1969), the California court noted that "cross-examination at trial on prior testimony, together with cross-examination at the time of the statement before

States specifically stated that although the hearsay rule and the right of confrontation protect similar values, they are not co-extensive. "[T]he Confrontation Clause is [not] a codification of the rules of hearsay and their exceptions as they existed historically at common law. . . . [M]erely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."¹⁰⁰ Reviewing its previous confrontation cases, the Court held that the confrontation clause is not violated when a declarant is present at trial and subject to cross-examination.¹⁰¹ "As a constitutional matter," according to the Court, "it is untenable to construe the Confrontation Clause to permit the use of prior testimony . . . where the declarant never appears, but to bar that testimony where the declarant is present at the trial"¹⁰²

The implications of *Green* are clear. There are areas where the right of confrontation and the hearsay rule do not overlap. It is only where the declarant is unavailable that they cover the same ground.¹⁰³ The confrontation clause only requires that a witness appear before the jury to testify as to the circumstances of his earlier statements.¹⁰⁴ In cases like *Douglas v. Alabama*,¹⁰⁵ the hearsay and

a different trier of fact, is not a valid substitute for constitutionally adequate confrontation." 70 Cal. 2d at 665, 451 P.2d at 429, 75 Cal. Rptr. at 789.

100. 399 U.S. at 155-56.

101. *Id.* at 158. Mr. Justice White, writing for the majority, noted that the right of confrontation: "(1) insures 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 the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (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.

"It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections. But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections." *Id.* (footnote omitted).

102. *Id.* at 166. "As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through the live testimony of the witness Whether [the witness] then testified in a manner consistent or inconsistent with his preliminary hearing testimony . . . nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case" *Id.* at 167-68. See *The Supreme Court*, 1969 Term, 84 Harv. L. Rev. 32, 112 (1970); 59 Calif. L. Rev. 580, 590-92 (1971); 39 Geo. Wash. L. Rev. 415, 426-27 (1970); 1970 Utah L. Rev. 668, 672-78.

103. In *Green*, the Court stated that the confrontation clause does not come into play when the declarant is present at trial. Rather, it only involves "situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial." 399 U.S. at 161. See *Bruton v. United States*, 391 U.S. 123 (1968); *Barber v. Page*, 390 U.S. 719 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965). Thus, even if the hearsay rule would require the exclusion of extrajudicial statements of a declarant who is present at trial, the confrontation clause would not require their exclusion.

104. See *United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971); *United States v. Weber*, 437 F.2d 327, 336 (3d Cir. 1970), cert. denied, 402 U.S. 932 (1971).

105. 380 U.S. 415 (1965); see notes 60-67 *supra* and accompanying text.

confrontation problems did overlap since the witness, though present at trial, in claiming his right against self-incrimination, was not available for cross-examination. However, as long as a declarant is available to testify as to circumstances of his statement, then states may treat the statement as they wish in developing effective evidentiary rules.

B. *Dutton v. Evans*

A further indication of the Supreme Court's willingness to allow the states to experiment with their rules of evidence is *Dutton v. Evans*.¹⁰⁶ In *Dutton*, the defendant and an accomplice were indicted for murder. The day following their arraignment, the accomplice, while in jail, was asked by a fellow prisoner how he had fared. The accomplice allegedly answered: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."¹⁰⁷ During defendant's trial, this statement was introduced into evidence through the testimony of the prisoner, under a Georgia statutory exception to the hearsay rule.¹⁰⁸ The defendant, unable to cross-examine the accomplice, who had been tried separately and had not been called as a witness, was convicted and sentenced to death.¹⁰⁹

The issue presented to the Court was whether a state's hearsay exception was constitutionally invalid since it did not conform to the federal rules of evidence.¹¹⁰ Under the federal rules, a co-conspirator's statement is admissible against a fellow conspirator when made in furtherance of the conspiracy but not in the concealment phase as in the Georgia exception under consideration in *Dutton*.¹¹¹ Relying on the assertion in *Green* that the confrontation clause and the hearsay rule are not co-extensive, Mr. Justice Stewart, writing for the plurality,¹¹² held

106. 400 U.S. 74 (1970).

107. *Id.* at 77.

108. Ga. Code Ann. § 38-306 (1954). "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." *Id.*

109. The Georgia supreme court affirmed in *Evans v. State*, 222 Ga. 392, 150 S.E.2d 240 (1966), and the Supreme Court denied the defendant's petition for a writ of certiorari, *Evans v. Georgia*, 385 U.S. 953 (1966). Having exhausted his state remedies, the defendant sought a writ of habeas corpus in the federal district court alleging that he had been denied his sixth amendment right of confrontation. The district court denied the writ, but the Court of Appeals for the Fifth Circuit reversed in *Evans v. Dutton*, 400 F.2d 826 (5th Cir. 1968), *rev'd*, 400 U.S. 74 (1970). See notes 87-90 *supra* and accompanying text.

110. 400 U.S. at 80.

111. See *Grunewald v. United States*, 353 U.S. 391 (1957); *Lutwak v. United States*, 344 U.S. 604 (1953); *Krulewitch v. United States*, 336 U.S. 440 (1949); *Fiswick v. United States*, 329 U.S. 211 (1946); *Levie*, Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule, 52 Mich. L. Rev. 1159 (1954). The rationale generally given for the admission of such statements is that a co-conspirator is an agent of the defendant and, thus, the defendant is liable for his declarations. See *Levie*, *supra*, at 1163-64; *Morgan*, The Rationale of Vicarious Admissions, 42 Harv. L. Rev. 461 (1929).

112. Chief Justice Burger and Justices White and Blackmun joined in the plurality opinion. Justice Blackmun also wrote a concurring opinion in which Chief Justice Burger joined. Justice Harlan, who concurred only in the result, wrote a separate concurring opinion. Justice Marshall wrote the dissenting opinion in which Justices Black, Douglas and Brennan joined.

that the Supreme Court "never indicated that the limited contours of the hearsay exception in federal conspiracy trials are required by the Sixth Amendment's Confrontation Clause."¹¹³ He further noted that since "the limits of [the federal] exception have simply been defined by the Court in the exercise of its rule-making power in the area of the federal law of evidence,"¹¹⁴ a state hearsay exception that did not conform to it could not be said to violate the Constitution.¹¹⁵

As an alternative holding, the *Dutton* Court indicated that the admission of the extrajudicial statement was proper in view of its "indicia of reliability."¹¹⁶ According to Justice Stewart, there was no denial of confrontation on the issue of whether the jury might improperly infer that the accomplice-declarant identified the defendant as the murderer when he blamed him for their predicament since: 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, [the accomplice's] personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by [a third accomplice's] testimony and by [the accomplice's] prior conviction. . . . Third, the possibility that [the accomplice's] statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which [the accomplice] made the statement

113. 400 U.S. at 82.

114. *Id.* (footnote omitted). See 18 U.S.C. § 3771 (1970). Fed. R. Crim. P. 26 provides: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See generally *Hawkins v. United States*, 358 U.S. 74 (1958).

115. In upholding this exception, the Court noted that none of the policy reasons compelling a different result in federal trials was present in this case. 400 U.S. at 82-83. In federal trials, the limits of the co-conspirator hearsay exception is an outgrowth of the Supreme Court's "disfavor" of "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Id.* at 82, citing *Grunewald v. United States*, 353 U.S. 391, 404 (1957). However, in *Dutton*, the Court denied that this policy was factorial because the defendant was not prosecuted for conspiracy but for murder. 400 U.S. at 83. But see *Levie*, *supra* note 111, at 1173, indicating that the disfavor of such statements is a result of their untrustworthy nature. A co-conspirator's statement "may be based on spite, fear, pique, malice, a desire to stand well with the prosecutor, or many other motives not leading to truth." *Id.* Obviously, whether a defendant is charged with murder or the conspiracy to commit murder, these dangers are still inherent.

116. 400 U.S. at 89. In admitting the extrajudicial statement, the plurality distinguished the Court's prior confrontation cases on a factual basis. It contended that the admission of the statement was not as crucial as that in *Douglas v. Alabama* since in that case it was part of a coerced confession. *Id.* at 87. Also, the statement was not made during a joint trial as in *Bruton v. United States* nor was it in transcript form as in *Pointer v. Texas* or *Barber v. Page*. *Id.* Justice Marshall, in his dissenting opinion, noted that the plurality opinion was based on a complete lack of authority. He criticized its attempt to distinguish the Court's prior confrontation cases. *Id.* at 104-05. The plurality's emphasis on such facts as the accomplice's statement not being made at a joint trial or in written form—"though . . . [differentiating] some of the cases—[is] surely irrelevant. Other cases have presented each of these factors, and no reason is offered why the right to confrontation could be so limited." *Id.* at 105 (footnote omitted).

were such as to give reason to suppose that [the accomplice] did not misrepresent [the defendant's] involvement in the crime. These circumstances go beyond a showing that [the accomplice] had no apparent reason to lie to [the witness]. His statement was spontaneous, and it was against his penal interest to make it.¹¹⁷

The Court concluded that the presence of such indicia made it "wholly unreal" that cross-examination of the alleged accomplice "could conceivably have shown the jury that the statement, though made, might have been unreliable . . ." ¹¹⁸

The indirection of the plurality's opinion was criticized by Mr. Justice Harlan. In his concurring opinion, he underlined the plurality's failure to explain the standard used to determine the constitutionality of the hearsay exception.¹¹⁹ Not viewing the issue as one of confrontation, he asserted that the confrontation clause was inadequate to weigh "the numerous factors [which must be considered] in passing on the appropriateness of rules of evidence."¹²⁰ Urging that the right of confrontation provides merely a procedural guarantee of cross-examination, he quoted Wigmore, who had written:

The Constitution does not prescribe what kinds of testimonial statements . . . shall

117. *Id.* at 88-89. The third accomplice had been granted immunity in return for his testifying against the defendant. For a discussion of the admissibility of his testimony see *id.* at 108 (Marshall, J., dissenting).

118. *Id.* at 89. The plurality admitted the accomplice's statement under these indicia without determining if it was, in fact, reliable. As the first indicium, the plurality stressed that the statement was not an "express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight." *Id.* at 88. This reasoning hardly insures that the jury would not infer that the defendant was identified as the murderer. Preserving the Right to Confrontation 754-56. See Comment, Federal Confrontation: A Not Very Clear Say on Hearsay, 13 U.C.L.A.L. Rev. 366 (1966), where it is stated: "When the jury is not able to make the necessary distinction between hearsay and non-hearsay purposes, the defendant is certainly prejudiced. Therefore, operation of the standard in this area should require a direct consideration of potential prejudice to the defendant, in addition to the basic elements of reliability and need in evaluating hearsay exceptions." *Id.* at 378 (footnote omitted). As the fourth indicium, the Court underlined the statement's spontaneity. But see Stewart, Perception, Memory & Hearsay: A Criticism Of Present Law and The Proposed Federal Rules of Evidence, 1970 Utah L. Rev. 1, 28, for a discussion of a spontaneous hearsay exception as "[t]he most unreliable type of evidence admitted under hearsay exception . . ." Even putting aside this criticism, the statement, made twenty four hours after the arraignment in response to a question, was hardly spontaneous. See generally 6 Wigmore § 1747; Morgan, Res Gestae, 12 Wash. L. Rev. & St. B.J. 91 (1937); Slough, Spontaneous Statements and State of Mind, 46 Iowa L. Rev. 224, 240-48 (1961). For a criticism of the second indicium see *Dutton v. Evans*, 400 U.S. 74, 108 (Marshall, J., dissenting).

119. 400 U.S. at 96.

120. *Id.* Justice Harlan also noted that: "The conversion of a clause intended to regulate trial procedure into a threat to much of the existing law of evidence and to future developments in that field is not an unnatural shift, for the paradigmatic evil the Confrontation Clause was aimed at—trial by affidavit—can be viewed almost equally well as a gross violation of the rule against hearsay and as the giving of evidence by the affiant out of the presence of the accused and not subject to cross-examination by him. But however natural the shift may be, once made it carries the seeds of great mischief for enlightened development in the law of evidence." *Id.* at 94-95 (footnote omitted).

be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—*i.e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially.¹²¹

In adopting this view, Justice Harlan repudiated the view he had espoused in *Green*¹²² where he contended that the confrontation clause requires the production of any available witness whose statements are used against a defendant. However, he now felt that such a requirement would hinder the development of the law of evidence¹²³ in that it would require the production of a declarant “where production would be unduly inconvenient [to the sovereign] and of small utility to a defendant.”¹²⁴ In its place, Justice Harlan proposed a due process standard to determine the admissibility of statements under a hearsay exception. Under such a test, a testimony offered as a hearsay exception would be excluded when that result is deemed essential to a fair trial.¹²⁵

C. *Nelson v. O'Neil*

The last case in the trilogy, *Nelson v. O'Neil*,¹²⁶ further illustrates that the right to confrontation is not as broad as the language of the “watershed” cases seemed to indicate. It now seems that the confrontation clause requires only that an available declarant testify as to whether or not he, in fact, made the statement and not necessarily to its truth or falsity. In *Nelson*, the defendant and co-defendant were arrested for robbery. At their joint trial, a policeman testified that the co-defendant had made an unsworn confession implicating both himself and the defendant. The co-defendant was called to the stand and, under cross-examination, denied that he had made the confession. In admitting the testimony against the co-defendant, the trial court gave limiting instructions to the jury to disregard

121. *Id.* at 94, quoting 5 Wigmore § 1397.

122. 399 U.S. at 186 (Harlan, J., concurring).

123. 400 U.S. at 95-96 (Harlan, J., concurring). “If the hearsay exception involved in a given case is such as to commend itself to reasonable men, production of the declarant is likely to be difficult, unavailing, or pointless.” *Id.* at 96.

124. *Id.* at 96. Some examples of evidentiary rules that would otherwise fall if the confrontation clause required the production of all declarants are hearsay exceptions involving official statements, business records and scholarly treatises. See *Gilstrap v. United States*, 389 F.2d 6 (5th Cir.), cert. denied, 391 U.S. 913 (1968); *Kay v. United States*, 255 F.2d 476 (4th Cir.), cert. denied, 358 U.S. 825 (1958); 28 U.S.C. §§ 1732-33 (1970); Uniform Rules of Evidence 63(15), 30.

125. Justice Harlan went on to analyze the Court's prior confrontation cases against this due process standard. As a matter of due process, he contended that the use of prior recorded testimony in *Pointer*, *Barber* and *Green* would, “[i]n the absence of countervailing circumstances . . . be an affront to the core meaning of the Confrontation Clause. The question in each case, therefore, was whether there had been adequate ‘confrontation’ to satisfy the requirement of the clause.” *Id.* at 97. Also, *Douglas v. Alabama* could be viewed in the light of due process as one of prosecutorial misconduct and *Bruton v. United States* as prohibiting the introduction of an accomplice's confession unless adopted by him. *Id.* at 98.

126. 402 U.S. 622 (1971).

it as to the defendant since it was hearsay as to him.¹²⁷ The district court, relying on *Bruton v. United States*, granted defendant's writ of habeas corpus because he did not have an adequate opportunity to cross-examine his co-defendant as to the truth of the confession.¹²⁸ The court of appeals affirmed the granting of the writ on substantially the same grounds.¹²⁹ However, the Supreme Court reversed the court of appeals, holding that the confrontation clause does not require that a declarant adopt a statement for there to be full and effective cross-examination.¹³⁰ The Court distinguished *Bruton* on the grounds that there "the witness . . . was . . . totally unavailable at trial for any kind of cross-examination."¹³¹ Since the co-defendant was not unavailable for cross-examination, there was no denial of confrontation.

VII. CONCLUSION

A close analysis of the Court's confrontation decisions reveals three distinct groups of cases. The first category, which includes *Pointer* and *Barber*, contemplates a presumptively valid (confrontation-wise) exception to the hearsay rule. In these cases, the offer of proof under the exception is violative of confrontation because it does not comply with the elements of the exception.¹³² The second group of cases, including *Bruton*, *Green*, *O'Neil* and probably *Douglas*, which may be termed pure confrontation decisions, turn essentially on the issue

127. *Id.* at 624.

128. *Id.* at 625.

129. *O'Neil v. Nelson*, 422 F.2d 319 (9th Cir. 1970), rev'd, 402 U.S. 622 (1971). In affirming, the court of appeals relied upon *Douglas v. Alabama* to the extent that *Douglas* stated that a defendant is afforded "effective confrontation . . . only if [the witness] affirmed the statement as his." *Id.* at 321, citing *Douglas v. Alabama*, 380 U.S. 415, 420 (1965).

130. 402 U.S. at 629-30. The Court noted that although there was dictum in *Douglas v. Alabama*, 380 U.S. 415, 419 (1965), and *Bruton v. United States*, 391 U.S. 123, 127 (1968), to the effect that a witness had to affirm his statement, neither of the two cases involved that issue. 402 U.S. at 627-28.

131. 402 U.S. at 628 (emphasis added). In reaching its decision, the Court indicated that the situation in *Nelson* was inverted from that in *California v. Green*. See notes 93-102 and accompanying text. In *Green*, although the witness admitted making the statement, he was unable to testify as to the surrounding circumstances. In *Nelson*, however, "the witness . . . denied ever making an out-of-court statement but testified at length, and favorably to the defendant, concerning the underlying facts." 402 U.S. at 628.

132. Compare *Pointer v. Texas*, 380 U.S. 400 (1965), with *Barber v. Page*, 390 U.S. 719 (1968). In *Pointer*, the confrontation (cross-examination) was a necessary element of the exception. See note 43 *supra*. The admission of the statement was therefore a denial of confrontation because it violated the hearsay rule. 380 U.S. at 407; see text accompanying notes 44-47 *supra*. In *Barber*, the same prior testimony exception was at issue. But there, the availability requirement of the rule was the focus of the Court's attention. The Court found that the declarant, although incarcerated in another state, was indeed available and that, therefore, the admission of the statement did not fulfill the requirements of the exception. 390 U.S. at 724-25. The rather obvious implication is that, had the *Pointer* declarant been cross-examined at the preliminary hearing, and the convict in *Barber* truly unavailable, there would have been no violation of the hearsay rule and hence, no violation of confrontation. See *Barber v. Page*, 390 U.S. 719, 725-26 (1968); *Pointer v. Texas*, 380 U.S. 400, 407 (1965).

of availability. In these cases, irrespective of the nature of the proof set forth, there will be no confrontation problem if the declarant of the extrajudicial statement is indeed available for cross-examination.¹³³ The mere availability of the witness being crucial, it does not matter that he is under some partial disability¹³⁴ or refuses to affirm or disaffirm the content of the statement.¹³⁵ The third group of cases, where the hearsay rule and the confrontation clause are said not to overlap,¹³⁶ includes *Dutton* and its inevitable progeny.¹³⁷ These cases employ a two-tiered analysis, the first rationalizing the exception itself on more or less constitutional grounds¹³⁸ and the second examining the evidence to be introduced under the exception for its inherent reliability.¹³⁹ *Dutton* suggests that the admission of evidence under a long recognized exception to the hearsay rule, under circumstances which indicate its reliability, is an adequate substitute for the actual production of an extrajudicial declarant for cross-examination.¹⁴⁰ Viewed as such, *Dutton* would seem to violate the confrontation standard delineated in *Bruton* and *Green* since the prosecution did not produce the declarant even though he was available for cross-examination.¹⁴¹

The seeming ambiguity of the *Green*, *Dutton* and *O'Neil* decisions is a result of the Court's groping for guidelines to determine the constitutionality of such a situation. Although the *Dutton* Court, upheld the validity of a hearsay exception, it failed to explain the constitutional standard used.¹⁴² In lieu thereof, almost as an after-thought, the Court attempted to shore up the validity of its decision by illustrating the reliability of the statement.¹⁴³ However, relying on a statement's indicia of reliability for its admission will result in the Court's grappling with factual situations on a case by case basis.¹⁴⁴ It will require a close scrutiny of the record to determine, first, whether the statement was reliable and, second,

133. Compare *California v. Green*, 399 U.S. 149, 158, 161 (1970), and *Nelson v. O'Neil*, 402 U.S. 622, 628 (1971), with *Bruton v. United States*, 391 U.S. 123, 127-28 (1968), and *Douglas v. Alabama*, 380 U.S. 415, 419 (1965).

134. *California v. Green*, 399 U.S. 149, 152 (1970).

135. *Nelson v. O'Neil*, 402 U.S. 622, 628 (1971).

136. See *California v. Green*, 399 U.S. 149, 155, 161 (1970).

137. For an example of a state court applying the indicia of reliability as a four pronged test to determine the admissibility of an extrajudicial statement see *State v. Lunn*, 82 N.M. 526, 484 P.2d 368 (1971). See also *The Supreme Court*, 1970 Term, 85 Harv. L. Rev. 3, 188-99 (1971).

138. *Dutton v. Evans*, 400 U.S. 74, 80-83 (1970).

139. *Id.* at 88-89.

140. *Id.*

141. See notes 116-17 *supra* and accompanying text. But it should be noted that unavailability is not an element of one Georgia conspiracy exception. See Ga. Code Ann. § 38-305 (1954), quoted in note 108 *supra*.

142. 400 U.S. at 96 (Harlan, J., concurring); *The Supreme Court*, 1970 Term, *supra* note 137, at 191.

143. 400 U.S. at 88-89.

144. See Comment, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1437 (1966); note 117 *supra* and accompanying text.

if not, whether its admission was harmless beyond a reasonable doubt.¹⁴⁵ If a due process standard is employed, the Court could avoid such ad hoc determinations—questions of reliability and availability being irrelevant. Rather, the constitutionality of a particular hearsay exception would depend on whether it was fundamentally unfair.¹⁴⁶ Such a standard would enable the development of evidentiary rules to eliminate the requirement of necessity or unavailability where production of the declarant “would be unduly inconvenient and of small utility to a defendant.”¹⁴⁷

Although a due process standard has been criticized as vague,¹⁴⁸ the Court has been able, in other areas, to determine when the government has exceeded the bounds of fairness.¹⁴⁹ There would seem to be no reason why the Supreme Court could not exercise the same vigilance here.

145. See *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967). In *Chapman*, the Court held “that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Id.* at 24.

The Court will be faced with situations similar to that encountered by Mr. Justice Blackmun in his concurring opinion in *Dutton v. Evans*, 400 U.S. 74, 90-93 (1970), where he reviewed not only the testimony of nineteen witnesses but also the setting in which the statement was made. His examination took him to such minute details as the measurements of an opening in the door through which the declarant allegedly spoke. *Id.* at 90-91.

146. See *Palko v. Connecticut*, 302 U.S. 319 (1937), overruled on other grounds, *Benton v. Maryland*, 395 U.S. 784 (1969), where Mr. Justice Cardozo defined due process as “the very essence of a scheme of ordered liberty.” *Id.* at 325. It is a “‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” *Id.* (citations omitted).

147. *Dutton v. Evans*, 400 U.S. 74, 96 (1970).

148. *Duncan v. Louisiana*, 391 U.S. 145, 168 (1968) (Black, J., concurring).

149. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Palko v. Connecticut*, 302 U.S. 319 (1937), overruled on other grounds, *Benton v. Maryland*, 395 U.S. 784 (1969). For a discussion of the due process standard see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *Yale L.J.* 319 (1957).