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Hearsay And Confrontation: Can The Criminal Defendant'S Rights Be Preserved Under A Bifurcated Standard?

HEARSAY AND CONFRONTATION: CAN THE CRIMINAL DEFENDANT'S RIGHTS BE PRESERVED UNDER A BIFURCATED STANDARD?

Both the confrontation clause of the sixth amendment[1] and the common law rule against hearsay evidence[2] restrict the admission of out-of-court statements in criminal proceedings. The confrontation clause guarantees the criminal defendant the right to face witnesses against him, while the hearsay rule prevents the admission into evidence of out-of-court statements made by persons not testifying at trial.[3] Although both standards appear to require the attendance and testimony of witnesses at trial, they are not co-extensive.[4] Certain

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[1]U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the Witnesses against him . . . ."

[2]Professor McCormick defines hearsay as: *"[T]estimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."* MCCORMICK, LAW OF EVIDENCE § 246, at 584 (2d ed. 1972) [hereinafter cited as MCCORMICK] (emphasis in original) (footnote omitted).

[3]The common law hearsay rule precludes the admission into evidence of out-of-court statements. The premise behind this rule is that such evidence has not been tested by cross-examination, nor has it been given under oath nor in the presence of the trier of fact. The belief is that these three elements safeguard the jury from being misled by unreliable information. Cross-examination is the most important element since the jury may choose between competing sides and the reliability of the evidence presented is assumed, because it is subject to the test of the opponent's challenges. The oath solemnizes the testimony by threatening supernatural punishment and, more immediately, perjury charges against those giving false testimony. Finally, it is believed that twelve tried and true laymen can determine the veracity of the witness' testimony by observing his demeanor. 1 GREENLEAF, LAW OF EVIDENCE § 124 (15th ed. 1892) [hereinafter cited as GREENLEAF].

The following is an example of a hearsay statement. Hypothetically W is a testifying witness, D is an out-of-court declarant, and A is the accused:

> W: "D told me he and A were passing counterfeit Federal Reserve Notes."

See generally MCCORMICK § 245, 5 J. WIGMORE, LAW OF EVIDENCE §§ 1361-65 (3d ed. 1940) [hereinafter cited as WIGMORE]; Morgan, *Hearsay Dangers and Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948), [hereinafter cited as Morgan, *Hearsay Dangers*]. *See also*, note 69 *infra*.

[4]*Cf.* California v. Green, 399 U.S. 149 (1970). Mr. Justice White speaking for the majority stated:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.

judicially created exceptions to the hearsay rule allow admission of evidence ordinarily excluded as hearsay, because the circumstances under which such evidence was obtained assure its reliability.[5] In some situations evidence falling within such an exception, although not barred by the hearsay rule, will infringe upon the defendant's rights under the confrontation clause.[6] Conversely, the hearsay rule may be violated while the confrontation clause is satisfied.[7] The dual standard thus created by the confrontation clause and the hearsay rule has been difficult to implement and has at times been misapplied.[8] The dynamic nature of the hearsay rule has exacerbated this

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Id. at 155.

Contra, Snyder v. Massachusetts, 291 U.S. 97 (1934) (right of confrontation is subject to exceptions of hearsay rule, which are not static); Salinger v. United States, 272 U.S. 542 (1926) (purpose of sixth amendment was to preserve common law right of confrontation, not to broaden or distrub it); 5 WIGMORE § 1362 (confrontation clause merely requires testimony taken infra-judicially under the hearsay rule to be subject to cross-examination).

[5]The hearsay rule is a principle of evidence designed to insure the reliability of material admitted into evidence at trial. The rule was not designed to frustrate the admission of evidence. A pure application of the rule, however, would many times preclude introduction of valuable evidence. Hence the common law developed a body of exceptions which allowed introduction of the evidence even though the declarant was neither present at trial, nor subject to oath or cross-examination. The exceptions, such as dying declarations and official documents, encompassed statements which were thought to have been given under conditions sufficiently attesting to their reliability, thus rendering the safeguards of oath and cross-examination superfluous. *See* authorities cited in notes 68-70 *infra* and accompanying text.

[6]*See, e.g.,* Bruton v. United States, 391 U.S. 123 (1968). In that case the confession of a co-defendant which similarly inculpated the defendant was admitted into evidence through the testimony of a third party. The statement was admissible under the co-conspirator exception to the hearsay rule, but the admission of the confession was held to have violated the defendant's right to confrontation because the co-defendant was not produced on the stand for cross-examination.

[7]*See, e.g.,* United States v. Pacelli, 470 F.2d 67 (2d Cir. 1972), *cert. denied,* 410 U.S. 983 (1973). A government witness who aided in the capture of the defendants initialled a typed statement implicating the defendants. At trial the witness denied making the statement or knowing the defendants, but the typed statement was admitted into evidence. The Second Circuit conceded that there was no applicable hearsay rule exception, but found the admission of the statement harmless error. No sixth amendment violations existed since the witness was present and available for cross-examination. *Id.* at 69-70.

Case examples of violations of the hearsay rule but not the confrontation clause are sparse since courts ordinarily reach constitutional issues only if the case is not disposed of on other grounds. *See, e.g.,* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Since a violation of the hearsay rule generally would be dispositive of the case, the court will not delve into the sixth amendment question. *See also,* Comment, *The Supreme Court 1967 Term,* 82 HARV. L. REV. 63, 236-38 (1968).

[8]Dutton v. Evans, 400 U.S. 74, 95 (1971) (Harlan, J., concurring).

problem. The recent judicial trend favoring the admissibility of out-of-court statements by witnesses unavailable or unable to testify threatens to encroach upon the criminal defendant's constitutional right to confront witnesses against him.[9] A recent decision of the Fourth Circuit Court of Appeals resolved this conflict to the detriment of the defendant's constitutional right.

In *United States v. Payne,*[10] the Fourth Circuit dealt with a problem focusing on the conflicting admissibility requirements of the confrontation clause and the hearsay rule. The petitioners, Roland, Hubert and Clifford Payne, were convicted of conspiracy for obtaining, possessing and passing counterfeit Federal Reserve Notes in violation of federal law.[11] Four other codefendants, including the petitioners' brothers Chester and Burrell, pleaded guilty to the same charges. In an interview prior to pleading guilty Burrell gave a statement to Secret Service Agent Donald in which he not only confessed his own guilt, but also implicated the petitioners.[12] Due to Burrell's claims of dizziness and lack of memory, the interview was terminated before he signed the statement. At Burrell's arraignment Agent Donald testified regarding the confession he received from Burrell, although that statement was not admitted into evidence, and Donald made no reference to its implication of the petitioners.

At the petitioners' trial Burrell was called as a government witness, but when questioned he claimed no recollection of pleading guilty, of any scheme to counterfeit notes, or of talking with Secret Service agents.[13] The government used the statement made to Agent Donald in a fruitless attempt to revive Burrell's memory. Agent Donald then took the stand and testified as to the substance of Burrell's

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[9]Dutton v. Evans, 400 U.S. 74 (1971). Mr. Justice Marshall dissented, commenting:

> 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.

Id. at 110.

[10]492 F.2d 449 (4th Cir. 1974).

[11]18 U.S.C. §§ 472, 473 (1970).

[12]Portions of Burrell's statement implicating the petitioners stated: "I got about 35 counterfeit $10 bills from Hubert. At this time Hubert did not ask for any money for these bills nor did I give him any . . . ," and "I would like to add that I believe my brothers Hubert, Roland, Clifford and Chester also had some counterfeits." The statement ended with the inscription: "Statement is incomplete and unsigned as subject complains of lapses of memory and dizzy spells." Petitioner's Brief for Certiorari at 55-56, Payne v. United States, ___ U.S. ___ (1974).

[13]492 F.2d at 450.

statement.[14] Subsequently the statement itself was admitted into evidence over the objection of the defense counsel.[15] Upon their conviction the petitioners appealed to the Fourth Circuit on two grounds: first, that the admissions of the statement and Agent Donald's testimony were violations of the hearsay rule since Burrell did not make his statement in court and the statement fell under no traditional hearsay exception; and second, that the admission was unconstitutional since Burrell, the accuser, did not make his statement in court and the petitioners were denied any effective opportunity to confront him on account of his memory loss.

The Fourth Circuit divided on whether the lower court properly allowed Burrell's extra-judicial statement to be admitted into evidence. The majority held that the statement had been sufficiently tested for reliability and should not have been barred by a "mechanical application" of the hearsay rule simply because the witness' memory failed at trial.[16] The court further determined that Burrell's presence as a witness at trial satisfied the sixth amendment confrontation requirement.[17] In his dissent, Judge Widener disagreed on both the hearsay and confrontation issues. He asserted not only that the statement failed to qualify under any traditional hearsay rule exception, but also that its reliability was not demonstrated by the facts.[18] He urged that the right to confrontation could not be satisfied by the mere physical presence of the witness at trial.

The disagreement between the majority and dissent in *Payne* reflects an ongoing debate concerning the development of the hearsay rule. The majority embraced the "progressive school approach," which favors the admission of sufficiently probative evidence even in the absence of a traditional hearsay exception.[19] The dissent, on the

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[14]This statement was hearsay, see note 3 *supra.*

[15]492 F.2d at 450.

[16]*Id.* at 451-52.

[17]*Id.* at 454.

[18]*Id.* at 457.

[19]*See, e.g.,* Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961). In an opinion by Judge Wisdom the Fifth Circuit upheld the admissibility of a fifty-one year old newspaper article even though its admission fell under no traditional hearsay exception. Judge Wisdom urged that the article was sufficiently reliable and that strict application of the hearsay rule would totally preclude admission of the evidence contained in the statement. *Id.* at 392.

Caution, however, should be taken in applying the rationale of this case to criminal cases, in which a higher standard of reliability may be required. *See also* United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964) (Friendly, J.); Di Carlo v. United States, 6 F.2d 364 (2d Cir.), *cert. denied,* 268 U.S. 706 (1925) (Hand, J.); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); Gelhaar v. State, 41

other hand, illustrated "traditional school," the which excludes all hearsay evidence not falling within an inveterate exception.[20] The difference in the two opinions regarding the sixth amendment right to confrontation is more fundamental: whether the confrontation clause merely requires that the prosecution produce the *corpus* of the witness against the accused, or whether, as the dissent asserted, it demands practical considerations to insure the accused the right to meaningful confrontation of witnesses against him. The significance of the Fourth Circuit's decision in *Payne* lies in its exemplification of a trend in the hearsay-confrontation area of the law of evidence.

The Evidentiary or Hearsay Problem

The Fourth Circuit initially indicated that Burrell's statement was within the recorded past recollection exception to the hearsay rule.[21] Shifting its focus to the prior inconsistent statement exception, which allows a previous statement inconsistent with the testimony of the witness to be admitted to impeach his credibility,[22] the court noted that the minority view on the scope of this exception would support the admission of Burrell's statement as substantive evidence as well as for impeachment purposes.[23] Judge Winter, writing for the court, indicated that it was unnecessary to choose either the majority "impeachment only" view, or the minority "substantive use" view, stating that the reliability of a prior inconsistent statement given at a former trial or before a grand jury had been sufficiently tested by oath and potential cross-examination to allow admission of the matter contained therein.[24] Recognizing that Burrell's statement was nei-

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Wis. 2d 230, 163 N.W.2d 609, *cert. denied,* 399 U.S. 929 (1969); Weinstein, *Probative Force of Hearsay,* 46 IOWA L. REV. 331 (1961) [hereinafter cited as Weinstein, *Probative Force*].

[20]*See, e.g.,* Krulewitch v. United States, 336 U.S. 440 (1949); Taylor v. Baltimore & O.R.R., 344 F.2d 281 (2d Cir.), *cert. denied,* 382 U.S. 831 (1965); Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967); State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939); Seidelson, *Hearsay Exceptions and the Sixth Amendment,* 40 GEO. WASH. L. REV. 76 (1971).

[21]492 F.2d at 451. The majority cited California v. Green, 399 U.S. 149 (1970), in support of its contention. The Fourth Circuit either misnamed the rule of which it spoke or miscited its authority. *Green* involved a prior inconsistent statement, not a recorded past recollection. The court's discussion indicates it was referring to the prior inconsistent statement exception and not the recorded past recollection exception. For an explanation of the recorded past recollection exception see note 31 *infra.*

[22]*See* notes 79-84 and accompanying text *infra.*

[23]*See* note 33 *infra.*

[24]492 F.2d at 452. The court cited United States v. Mingoia, 424.F.2d 710, 713 (2d Cir. 1970) (government allowed to impeach witness with prior inconsistent statements

ther made under oath nor subject to cross-examination, Judge Winter cited Burrell's silence during his arraignment, at which Agent Donald testified concerning the general contents of the prior statement, as amounting to a "tacit admission that the interview took place, that he remembered it and that he acknowledged the correctness of Mr. Donald's testimony . . . ."[25] In conclusion Judge Winter noted that the cumulative effect of all the facts, especially Burrell's arraignment, so attested to the reliability of the statement that it should not be barred by the hearsay rule.[26]

The Fourth Circuit relied on two Second Circuit cases, *United States v. Mingoia*[27] and *United States v. Insana,*[28] to support its conclusion that an inconsistent statement may, under proper circumstances, be admissible as substantive evidence.[29] While these cases support the latter rationale, they do not propose the flexible hearsay standard necessary to justify the court's logic in *Payne. Mingoia* involved the impeachment of a witness with his inconsistent testimony before a grand jury. The defendant objected that since the jury was incapable of not using the impeachment evidence substantively, it should not have been admitted. The Second Circuit held the impeachment proper and, in dicta, noted that the statement by the witness before the grand jury could have been admitted as substantive evidence.[30] Similarly, in *Insana* a witness who had earlier testi-

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and grand jury testimony); and United States v. Insana, 423 F.2d 1165 (2d Cir.), *cert. denied,* 400 U.S. 841 (1970) (government witness became recalcitrant at trial because of desire not to hurt anyone, court allowed witness' grand jury testimony as substantive evidence).

[25]492 F.2d at 452.

[26]*Id.*

[27]424 F.2d 710 (2d Cir. 1970).

[28]423 F.2d 1165 (2d Cir.), *cert. denied,* 400 U.S. 841 (1970). District Judge Bartels, sitting by designation, wrote the Second Circuit opinion.

[29]The Fourth Circuit also cited California v. Green, 399 U.S. 149, 155 (1970). In *Green* the Supreme Court was confronted with an attempt by the California legislature to alter the state's hearsay rule to allow the admission of prior inconsistent statements as substantive evidence at trial. CAL. EVID. CODE § 1235 (West 1966). The Court did not rule on the hearsay issue, indicating that state courts or legislatures have the discretionary power to amend their own rules of evidence, but decided only the confrontation issue. Mr. Justice White in the majority opinion stated:

> Our task in this case is not to decide which of these positions, purely as a matter of the law of evidence, is the sounder. The issue before us is the considerably narrower one of 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 . . . .

399 U.S. at 155.

[30]424 F.2d at 713. The Court commented:

fied before a grand jury feigned memory loss at trial. The court of appeals held that the trial judge had discretion in the admission of prior grand jury testimony when the witness was present at trial and his failure to testify was attributable not to memory failure, but to a desire not to "hurt anyone."[31]

In *Payne* the Fourth Circuit confused the hearsay exception it initially cited, recorded past recollection,[32] and then rejected the prior inconsistent statement view[33] which could have logically supported

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> Although Paulsen's statements to the F.B.I. would not be admissible as affirmative evidence of guilt under *De Sisto* [329 F.2d 929], those statements contained the same material as his grand jury testimony. There was no error in admitting the challenged testimony and, at least as to the prior grand jury testimony, the trial judge's instruction [limiting the evidence to impeachment] was more favorable to Mingoia than he was entitled to get.

Id.

[31]The hearsay portion of *Insana* was also dictum, since the appellant challenged the admission of the evidence only on constitutional grounds. 423 F.2d at 1170.

[32]Recorded past recollection actually is a generic term involving two subprinciples. First, present recollection revived is a theory under which a witness may refresh his memory by reading from a record made by him when the event was fresh in his mind. He then testifies from his refreshed memory. *Cf.* Jewett v. United States, 15 F.2d 955 (9th Cir. 1926).

Recorded past recollection also may allow a record made by the witness when the event was fresh in his memory to be read into evidence when the witness is unable to revive his memory. *See, e.g.,* United States v. Riccardi, 174 F.2d 883 (3d Cir. 1949).

To insure the accuracy of the recorded past recollection certain requirements must be met. First, the witness must be able to identify making the memorandum—which Burrell could not. Next, the witness must adequately recall making the record at or near the time of the event—which Burrell did not. Finally, the witness must testify to the accuracy of the memorandum—which Burrell could not. Jordan v. People, 151 Colo. 133, 376 P.2d 699, 702, *cert. denied,* 373 U.S. 944 (1963). *See also* United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966); Mathis v. Stricklind, 201 Kan. 655, 443 P.2d 673 (1968); State v. Legg, 59 W. Va. 315, 53 S.E. 545 (1906); PROP. FED. R. EVID. 803(5); MCCORMICK §§ 299-303; 3 WIGMORE, LAW OF EVIDENCE § 747 (Chadbourn rev. ed. 1970) [hereinafter cited as WIGMORE, (Chadbourn)].

[33]The general principle behind the exclusion of prior inconsistent statements is that such statements are subject to neither oath nor cross-examination and are not made in the presence of the trier of fact. The exception generally limits the admission of such statements to impeach the credibility of the witness, and to cancel out the harm which the witness' in court testimony has caused the proponent's case. *See, e.g.,* California v. Green, 399 U.S. 149 (1970); United States v. Pacelli, 470 F.2d 67 (2d Cir. 1972), *cert. denied,* 410 U.S. 983 (1973); Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965), *cert. denied,* 384 U.S. 921 (1966); United States v. Kahaner, 317 F.2d 459 (2d Cir.), *cert. denied,* 375 U.S. 836 (1963); Young v. United States, 97 F.2d 200 (5th Cir. 1938); People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968); Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967); State v. Saporen, 205 Minn.

its holding. Further, the two Second Circuit cases Judge Winter cited fail to support the exception upon which he attempted to rely. He asserted that the reliability of testimony given before a grand jury was assured because it was rendered under oath and potentially subject to cross-examination.[34] These are not the same assurances named by the Second Circuit in *Insana* and *Mingoia,* but are rather the assurances of reliability found in the prior testimony exception to the hearsay rule.[35]

The Second Circuit indicated that the oath administered at the grand jury proceeding, coupled with the witness' presence for cross-examination at trial, sufficiently insured the reliability of the prior inconsistent statement to warrant its submission to the jury for consideration.[36] The Second Circuit's holdings in *Insana* and *Mingoia* do not support the Fourth Circuit's supposition that total memory failure renders prior statements inconsistent, let alone the court's implied assumption that statements neither conceded nor denied at a guilty plea arraignment contain the same attributes of reliability as prior testimony.

The Fourth Circuit analyzed Burrell's statement to Agent Donald and the subsequent arraignment as a branch of the prior testimony exception to the hearsay rule.[37] Unlike the prior inconsistent state-

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358, 285 N.W. 898 (1939); MCCORMICK § 251; 3A WIGMORE, (Chadbourn) § 1018; BEAVER & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality,* 3 IND. LEG. F. 309 (1970).

A number of courts have allowed the admission of prior inconsistent statements not only for impeachment purposes and the cancellation of harm, but also for the statements' substantive value. The qualification placed on this exception is that the declarant must presently be in court and subject to cross-examination. By this means courts and commentators adopting the minority view feel the out-of-court statement regains much of its lost assurances of reliability. *See, e.g.,* United States v. Williamson, 350 F.2d 585 (5th Cir. 1971), *cert. denied,* 405 U.S. 1026 (1972); United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964); People v. Williams, 9 Cal. 3d 24, 506 P.2d 998, 106 Cal. Rptr. 622 (1973); Vance v. State, 190 Tenn. 521, 230 S.W.2d 987, *cert. denied,* 339 U.S. 988 (1950); PROP. FED. R. EVID. 801(d)(1)(A); CAL. EVID. CODE § 1235 (West 1966) (Comment, Law Revision Comm'n); MCCORMICK § 251; Weinstein, *Probative Force* at 331.

[34]492 F.2d 451-52.

[35]*See* note 37 *infra.*

[36]424 F.2d at 713; 423 F.2d at 1169.

[37]Former testimony is evidence which may be introduced under the hearsay rule even though the declarant may not be present at trial. The guarantors of reliability are the oath and cross-examination under which the testimony was initially given. Since the present defendant is not able to challenge the statements directly, it is required that the previous defendant have had a similar interest and motive in cross-examination. *See* Young v. United States, 406 F.2d 960 (D.C. Cir. 1968) (testimony

ment and recorded past recollection exceptions, which rely on the availability of the witness for cross-examination at trial,[38] the basis for assuming the reliability of prior testimony is that the witness was subject to oath, cross-examination, and perjury charges for false statements at the former proceeding.[39] These are the same factors which insure the reliability of statements made in the presence of the trial court.[40] A prerequisite to the use of former testimony is the unavailability of the declarant to testify at the present trial,[41] or if joined with the prior inconsistent statement exception, an inconsistency between the former testimony and the present testimony.[42]

Neither Second Circuit case cited in *Payne* dealt with the pure

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before grand jury does not satisfy former testimony exception because of lack of cross-examination); Holman v. Washington, 364 F.2d 618 (5th Cir. 1966) (enumerating the requirements for admission of prior testimony); United States v. Graham, 102 F.2d 436 (2d Cir.), *cert. denied*, 307 U.S. 643 (1939) (admission of former testimony for substantive purposes held proper); Gaines v. Thomas, 241 S.C. 412, 128 S.E.2d 692 (1962) (deceased witness' testimony at former trial admissible when parties had like interests); MCCORMICK § 256; 5 WIGMORE § 1388; Donnelly, *The Hearsay Rule and Its Exceptions*, 40 MINN. L. REV. 455 (1956); Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U.L. REV. 651 (1963).

Judge Winter neither admitted using a former testimony rationale, nor is it apparent that he realized he was doing so. However, the importance he attached to Burrell's arraignment, Agent Donald's testimony at the arraignment, and Burrell's failure to controvert the evidence when given the opportunity, evidences concern with the same considerations relevant in determining the admissibility of former testimony. Judge Winter admitted that the two most important criteria were missing: "technically it [Burrell's statement] had not been sworn to, or he cross-examined." 492 F.2d at 452.

[38]*See* note 36 *supra*.

[39]In United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964), Judge Friendly stated:

> Testimony at a former trial has already been once subjected "to the test of Cross-Examination" on which our law places primary reliance for the ascertainment of truth. 5 Wigmore, Evidence § 1362 (3d ed. 1940). Both such testimony and evidence before a grand jury have had the sanction of what Wigmore calls the "prophylactic rules" relating to the oath and to perjury, influencing "the witness subjectively against conscious falsification, the one by reminding of ultimate punishment by a supernatural power, the other by reminding of speedy punishment by a temporal power." 6 Wigmore, Evidence §§ 1813, 1831 (3d ed. 1940).

329 F.2d at 934.

[40]*See* Morgan, *Hearsay Dangers* at 183-85.

[41]*See, e.g.*, Mattox v. United States, 156 U.S. 237 (1895) (witness died prior to second trial).

[42]*See, e.g.*, United States v. Graham, 102 F.2d 436 (2d Cir.), *cert. denied*, 307 U.S. 643 (1939) (prosecutor allowed to use witness' former testimony when witness denied truth of that testimony). *See also* United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970).

former testimony exception. The exception proposed in *Insana* was a hybrid, assimilating characteristics of the former testimony and the prior inconsistent statement exceptions with the defendant's present opportunity for cross-examination. *Insana* suggests that under proper circumstances a feigned loss of memory can be considered inconsistent,[43] so that testimony given at a former proceeding may be admitted as substantive evidence as well as to impeach the witness' credibility.[44] Yet the facts in that case were substantially different from those in *Payne*. The witness in *Insana* had made inculpatory statements regarding the defendant to the grand jury, but at trial had a change of heart and admittedly feigned memory loss to avoid incriminating the defendant.[45]

The Second Circuit did not assert that all instances of memory loss would render prior statements inconsistent, nor did it state that all grand jury testimony was admissible as substantive evidence. Rather, the Second Circuit left to the trial judge discretion to admit or exclude prior statements given under oath when the witness obviously feigns memory loss at trial.[46] The court recognized that total memory failure would bar admission of the prior statement under the traditional prior inconsistent statement theory.[47] The grand jury proceeding was important because the statement given at the proceeding was made under oath, thus fulfilling the first requisite of reliability.[48] The presence of the witness for cross-examination at trial and before the jury were the second and third elements of reliability in *Insana*.[49] Hence the statement given at the grand jury proceeding possessed the assurances of reliability required by traditional doctrine: an oath given at the grand jury stage, cross-examination at trial, and presence

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[43]423 F.2d at 1170.

[44]*Id.* at 1169.

[45]*Id.* at 1168. Judge Bartels commented: "Shurman took the stand and was at all times available for cross-examination. We are far from convinced that such cross-examination would have been fruitless in view of his obvious desire to help Insana." *Id.*

[46]*Id.* at 1170. The Second Circuit emphasized:

> Where . . . a recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to so testify is not a lack of memory but a desire "not to hurt anyone," then *the court has discretionary latitude* in the search for truth, to admit a prior sworn statement which the witness does not in fact deny he made.

Id. (emphasis added).

[47]*Id.* at 1169.

[48]*Id.*

[49]*Id. See also* PROP. FED. R. EVID. 801(d)(1)(A) (Advisory Committee Note).

of the witness before the trier of fact at trial.[50]

The admission of Burrell's statement in *Payne* does not fall under the "*Insana* exception." Unlike the witness in *Insana,* Burrell gave no testimony, either at his arraignment or at trial.[51] In addition, the trial court concluded that Burrell's memory loss was real,[52] obviously not feigned as was the witness' in *Insana.* Most importantly, neither at his arraignment nor at trial was Burrell under oath or subject to cross-examination with regard to the content of his statement.[53]

Similarly, Burrell's arraignment failed to meet the former testimony assurances of reliability which are based not only on the oath, but also upon cross-examination at the former proceedings by someone representing interests similar to those of the defendant.[54] The former proceeding, Burrell's guilty plea arraignment, only involved Burrell's plea, not the inculpation of the petitioners. He was interested in pleading guilty, not in challenging incriminating evidence, hardly the type of situation which guarantees vigorous cross-examination.[55] Further, Burrell was subject to neither oath nor cross-examination, nor was his statement entered into evidence where its authenticity and accuracy could be challenged.[56] The thrust of the majority opinion was that although the reliability of Burrell's statement was guaranteed neither by a traditional hearsay exception, nor by the Second Circuit's "*Insana* exception," the peculiar facts of the case indicated sufficient reliability to bar a "mechanical application of the rule against hearsay evidence."[57]

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[50]*See* note 76 and accompanying text *infra.*

[51]492 F.2d at 452.

[52]*Id.* at 456.

[53]Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). The Court recognized:

> Cross-examination pre-supposes a witness who affirms a thing being examined by a lawyer who would have him deny it, or a witness who denies a thing being examined by a lawyer who would have him affirm it. Cross-examination is in its essence an adversary proceeding. The extent to which the cross-examiner is able to shake the witness, or induce him to equivocate is the very measure of the cross-examiner's success.
>
> If he [the witness] refuses to adopt his prior statement as true, there can be no adversary cross-examination upon it . . . .

150 N.W.2d at 156.

[54]*See* note 37 *supra.*

[55]*See, e.g.,* United States v. Tateo, 214 F. Supp. 560, 565 (S.D.N.Y. 1963); D. NEWMAN, CONVICTION, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 8 (1966).

[56]492 F.2d at 452.

[57]The majority's most contorted rationalization was the attempt to find the assurances of oath and cross-examination, though technically lacking, at Burrell's arraign-

Contrary to the majority's "sufficient reliability" approach to the hearsay question, Judge Widener's dissent followed traditional analysis. Unable to place Burrell's statement under an existing hearsay exception, Judge Widener flatly rejected its admission. Recognizing that Burrell's failure to verify the statement precluded its admission

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ment. Judge Winter asserted that Burrell's "silence" during Agent Donald's sworn testimony was a "tacit admission" that the agent's testimony was accurate, and since the testimony Donald gave at the arraignment was consistent with Burrell's statement, thus the statement, including the portions implicating the petitioners, must likewise be accurate. 492 F.2d at 452. The concept of *qui tacet consentire videtur,* he who is silent appears to consent, is well established in the law of evidence, but equally well established is the condition that silence is an admission only when no other explanation for silence exists. *Cf.* Northern Ry. v. Page, 274 U.S. 65 (1927); Kelly v. United States, 236 F.2d 746 (D.C. Cir. 1956); 2 JONES ON EVIDENCE § 13:49 (6th ed. 1972); 4 WIGMORE (Chadbourn) § 1071.

Presumably Judge Winter was not attempting to analogize Burrell's arraignment to a trial. Yet the assurances of trustworthiness he extracted from the arraignment are the same guarantors relied on under the former testimony exception. The oath, though technically absent, could be found implicitly in Agent Donald's testimony since the testimony was given under oath and was consistent with the statement. The cross-examination test, the Fourth Circuit reasoned, was satisfied by Burrell's opportunity to challenge Donald's testimony. Although the court admitted that both oath and cross-examination were missing, it indicated that the requirements were met constructively at the arraignment.

Judge Winter's constructive oath and cross-examination are subject to criticism. Primarily, although Burrell had the opportunity to challenge Agent Donald's testimony, the agent was reciting only what Burrell had told him. Thus, only the accuracy of Donald's transcription was tested. Burrell, who made the statement, was never subjected to cross-examination on the facts contained in the statement. Next, the nature of the proceeding—a guilty plea arraignment—cast doubt upon the existence of any adversary process which would insure reliability of the statement. Finally, the absence of any reference to statements inculpating the defendant, the fact that Burrell did not testify at his arraignment, and the lack of any meaningful cross-examination at the present trial certainly cast doubts upon any resemblance to the criteria of former testimony. *Cf.* United States v. Nuccio, 373 F.2d 168, 173 (2d Cir.), *cert. denied,* 387 U.S. 906 (1967) (former testimony was introduced to impeach a witness, but Judge Friendly held that where the prior testimony was given at a different trial with different issues, the evidence should be excluded for substantive purposes).

This reasoning also creates a potential constitutional objection as Judge Widener noted. 492 F.2d at 452. In Bruton v. United States, 391 U.S. 123 (1968), the court held that the co-defendants could not be tried together when the confession of one might inculpate others. The trial of the petitioners and Burrell was severed before Burrell pleaded guilty. By introducing Agent Donald's testimony and Burrell's statement, which were tantamount to oral and written evidence of Burrell's confession including implication of the petitioners, the Fourth Circuit violated the *Bruton* doctrine. It would be anomalous to allow the admission of confessions when co-defendants are tried separately, but not when they are tried together.

under the recorded past recollection exception,[58] and that a guilty plea arraignment was not an acknowledged guarantor of the reliability of a confession, he explained that the statement did not fall under any recognized exception.[59] Judge Widener rejected the majority's finding of sufficient reliability, reasoning that Burrell was never subject to oath or cross-examination on the statement, and further, that the portions of the statement implicating the brothers were never brought into issue at Burrell's arraignment. Additionally he noted the established rule that the confession of one accomplice may not be used against another.[60]

The dissent also indicated that the admission of the statement violated the doctrine of *Bruton v. United States*,[61] which prohibits admission of the confession of a codefendant at a joint trial when the confession also implicates another defendant, and that the statement did not fall within the purview of the traditional co-conspirator exception to the hearsay rule.[62] That exception allows statements made by co-conspirators in furtherance of the conspiracy to be admitted as substantive evidence, but in *Payne* the conspiracy ended before Burrell made his statement to Agent Donald.[63] The fact that it was unsigned and incomplete, and that Burrell was allegedly suffering from dizziness and lapses of memory made the statement itself "suspect on its face."[64] In conclusion, Judge Widener rejected the statement as inherently unreliable.

In analyzing *Payne* as a step in the evolution of the hearsay rule, recognition of what the Fourth Circuit attempted to do, as well as the end result of its decision, is important. Unlike Judge Widener's dissent, which followed the conventional approach by attempting to pigeonhole the facts under a recognized exception, the majority endeavored to avoid the traditional dogma and fashion a more flexible approach to the delineation of hearsay rule exceptions.[65] In so doing,

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[58]*See* note 32 *supra*.

[59]492 F.2d at 456.

[60]*See, e.g.*, Phillips v. Commonwealth, 202 Va. 207, 116 S.E.2d 282 (1960) (admission of sodomy by one defendant not admissible against another); Tong's Case, Kelying 18, 84 Eng. Rep. 1061, 1062 (K.B. 1663).

[61]391 U.S. 123 (1968).

[62]In *Bruton* the court objected to the admission on sixth amendment confrontation grounds, not hearsay rules. *Id.*

[63]*See, e.g.*, United States v. Nixon, ___ U.S. ___, 94 S.Ct. 3090 (1974); Lutwak v. United States, 344 U.S. 604 (1953); Krulewitch v. United States, 336 U.S. 440 (1949).

[64]492 F.2d at 457.

[65]*Cf.* Weinstein, *Probative Force.*

it tacitly approved a doctrine of judicial discretion[66] which could, however, lead to arbitrary results. Although Judge Winter refrained from expressly embracing a novel approach to the hearsay rule, his opinion represents a trend away from rigid adherence to the traditional hearsay exceptions. The apparent reasoning behind this trend is that the more evidence that is presented to the jury, the more accurate its judgment will be. Since the traditional exceptions often preclude the admission of evidence they are replaced by a decision of the trial judge, who has the discretion to admit evidence when he determines that the potential unreliability is outweighed by the probative value of the evidence.[67] The problem emanating from the Fourth Circuit's handling of *Payne* is the court's failure to temper its relaxation of the hearsay rule with any objective standard of trustworthiness beyond "sufficient reliability." Ultimately such a standard may effectively replace reliability of evidence with convenience in the admission of evidence, which would be contrary to the purpose of the hearsay rule.

The hearsay rule is a child of the jury system.[68] It developed out of fear that the jury would be misled by out-of-court statements and ex parte affidavits by persons who were neither challenged by cross-examination, nor subject to oath. The ultimate goal of the rule is to prohibit the submission of unreliable evidence to the trier of fact.[69]

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[66]*See, e.g.*, United States v. Insana, 423 F.2d 1165, 1170 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970); United States v. Nuccio, 373 F.2d 168, 173 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967) (Friendly, J.); United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964) (Friendly, J.); United States v. Block, 88 F.2d 618 (2d Cir.), *cert. denied*, 301 U.S. 690 (1937) (Hand, J.); Di Carlo v. United States, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925) (Hand, J.).

[67]Weinstein, *Probative Force* at 331. Professor Weinstein defines probative force as "power to convince a dispassionate trier of fact that a material proposition . . . is probably true or false." *Id.* He suggests individual treatment of hearsay evidence by trial judges on a case by case basis rather than by application of the traditional exceptions. Although he asserts that the class exceptions may be "mechanically" applied by trial judges and lend stability to the law of evidence, they fail to account for individual attributes of reliability or unreliability. When the probative force of the evidence is high, yet no applicable class exception exists, Professor Weinstein's theory allows the trial judge discretion to admit the evidence to the jury. *See generally* Weinstein, *Probative Force.*

[68]Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 391 n.1 (5th Cir. 1961); MODEL CODE OF EVIDENCE 218-21 (1942).

[69]During the Middle Ages no rule similar to the hearsay rule existed. At the early stages of the jury system jurors handed down their opinions from their own personal knowledge, which must have included some hearsay. During the sixteenth century, as the process of witnesses giving oral testimony in court developed, the hearsay rule evolved as part of the general question of sufficiency of proof. Gradually hearsay became recognized as inferior to direct testimony. Hearsay became admissible only as

The oath, presence of the witness before the trier of fact and, most importantly, cross-examination, are believed to insure reliability.[70]

The exceptions which developed were consistent with the purpose of the rule because the circumstances under which they arose[71] attested to the trustworthiness of the evidence, and strict adherence to the hearsay rule would have deprived the jury of valuable evidence.[72] As the number of exceptions grew they became tightly structured. In Pavlovian fashion any evidence falling under a recognized exception was admitted, regardless of its reliability, while sufficiently reliable evidence not falling under a traditional exception was excluded.[73] As courts have become conscious of the anomalies inherent in such a rigid application, a trend has developed favoring admission of hearsay evidence in the absence of a traditional exception when the facts of the case indicate commensurate reliability.[74]

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corrobative evidence, and finally, "in the second decade after the Restoration . . . the modern rule that hearsay is wholly inadmissible [came] to be generally recognized." 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 217 (1926). Soon after its development the necessity for exceptions to the rule arose. The general theory behind the rule was that cross-examination was the best test of the accuracy of evidence. The exceptions developed where the accuracy of the evidence was sufficiently developed so as to make cross-examination a "work of supererogation." *See* 3 BLACKSTONE, LAWS OF ENGLAND, 368-376 & n.11 (15th ed. 1809); 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 211-19 (1926); 1 GREENLEAF § 124; MCCORMICK § 244; 5 WIGMORE §§ 1364, 1420.

[70]*See* Morgan, *Hearsay Dangers* at 185-86.

[71]*See, e.g.*, Shepard v. United States, 290 U.S. 96 (1933) (dying declaration); United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966) (records of past recollection); State v. Carr, 67 S.D. 481, 294 N.W. 174 (1940) (testimony from former hearing); *In re* Estate of Simms, 442 S.W.2d 426 (Tex. Civ. App. 1969) (declaration against interest); Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681 (1941) (testimony at former trial); Business Records Act, 28 U.S.C. § 1732 *et seq.* (1970); Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712 (1927).

[72]*See, e.g.*, PROP. FED. R. EVID. 801, 803 (Advisory Committee's Notes); MCCORMICK §§ 254, 262, 282, 299, 306; 5 WIGMORE §§ 1363, 1420; Morgan, *Hearsay Dangers* at 179; Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 89 (1971).

[73]*See generally* McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573 (1947); Morgan, *Hearsay Dangers;* Weinstein, *Probative Force.*

[74]*See* Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961); Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609 (1969), *cert. denied*, 399 U.S. 929 (1970); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969). *See also* United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970); United States v. Insana, 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970); United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); Di Carlo v. United States, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494, *cert. dismissed*, 404 U.S. 801 (1971).

The Fourth Circuit's decision in *Payne* reflects an attempt to adhere to the principles of this trend. Finding the statement sufficiently reliable even in the absence of oath, cross-examination, or any traditional attribute of reliability, the majority rejected "mechanical application" of the hearsay rule.[75] However, the weakness in Judge Winter's opinion is the failure to establish any formula to justify his conclusion of "sufficient reliability." Indeed, the court indicated that it utilized the *Insana* exception to the prior inconsistent statement majority rule,[76] yet proceeded to determine trustworthiness in a fashion strangely analogous to the former testimony exception.[77] Neither of these exceptions are supported by the facts in the case. The Fourth Circuit seems to have conferred upon the trial judge limitless discretion to admit evidence when he feels that the cumulative impact of the circumstances attests to its reliability.

In pursuing the contemporary trend toward judicial discretion the Fourth Circuit apparently ignored the recognized distinction between the admission of a prior inconsistent statement for impeachment purposes and its admission for substantive use. Traditional doctrine would have allowed introduction of Burrell's statement to impeach his credibility[78] if his memory loss were shown to be inconsistent with his prior testimony.[79] However, the judge would have been required to instruct the jury that it might use the evidence only to analyze the veracity of the witness and not as proof of the matter contained in the statement.[80] Within the framework of this conventional rationale

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[75]492 F.2d at 451-52.

[76]*Id.*

[77]*See* note 37 *supra.*

[78]*See, e.g.*, United States v. Pacelli, 470 F.2d 67 (2d Cir. 1972), *cert. denied,* 410 U.S. 983 (1973); Bushaw v. United States, 353 F.2d 477 (9th Cir. 1965), *cert. denied,* 384 U.S. 921 (1966); United States v. Kahaner, 317 F.2d 459 (2d Cir.), *cert. denied,* 375 U.S. 836 (1963); Young v. United States, 97 F.2d 200 (5th Cir. 1938); Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). *Cf.* State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).

[79]*Compare* People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 1002, 92 Cal. Rptr. 499, *cert. dismissed,* 404 U.S. 801 (1971) (inconsistency in effect rather than express terms is the test for admitting the prior statement) *with* People v. Sam, 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 804 (1969) (failure of memory is not an inconsistency). *See also* United States v. Insana, 423 F.2d 1165 (2d Cir.), *cert. denied,* 400 U.S. 841 (1970) (genuine memory loss is not inconsistent); Taylor v. Baltimore & O.R.R., 344 F.2d 281 (2d Cir.), *cert. denied,* 382 U.S. 831 (1965) (loss of memory insufficient to constitute inconsistency); 3A WIGMORE (Chadbourn) § 1043 (unwilling witness may take refuge in memory loss, must use prior statement to impeach).

[80]*See, e.g.*, United States v. Cunningham, 446 F.2d 194 (2d Cir.), *cert. denied,* 404 U.S. 950 (1971) (judge's statements to jury limiting its use of prior statement of witness to impeachment of his credibility validated admission); Young v. United States, 97

the error in *Payne* arose from the failure of the trial judge to instruct the jury to limit its use of the statement to impeachment, not from introducing the statement itself into evidence. A finding of harmless error by the Fourth Circuit would have thus upheld the convictions with regard to the hearsay objections.[81] The obstacles which prevented a showing of inconsistency and harmless error would have been no more difficult to overcome than those encountered by the Fourth Circuit in admitting the statement as substantive evidence.[82] However, the distinction between the use of evidence for impeachment purposes and its admission as affirmative proof has not gone without opposition. The admission of a prior statement to impeach the credibility of a witness, while expecting the jury not to use it substantively, has been criticized as requiring an exercise of "mental gymnastics of which jurors are happily incapable."[83]

The doctrine of judicial discretion, implicit in the court's opinion, has been suggested and utilized by other courts.[84] However, use of judicial discretion in the admission of hearsay evidence in the past has required some objective elements of reliability in addition to subjective judicial evaluation.[85] Even in those progressive decisions which have admitted statements not falling under any traditional hearsay exception, requirements of necessity and trustworthiness

F.2d 200 (5th Cir. 1938) (use of prior inconsistent statement of witness limited to negative the adverse effects of his testimony).

[81]*See* United States v. Pacelli, 470 F.2d 67 (2d Cir. 1972), *cert. denied,* 410 U.S. 983 (1973) (pre-trial statement of government witness admitted when witness repudiated truth of statement, failure of trial judge to give instruction limiting jury's use of statement to impeachment of the witness held to be harmless error).

[82]Although the trial court found that Burrell's memory failure was genuine, 492 F.2d at 456, his brother Chester testified that he was unaware that Burrell suffered any memory problems. Further, Burrell's statement was only a portion of the prosecution's case. The testimony of other witnesses contributed to the evidence against the petitioners. *See* note 88 *infra.*

[83]United States v. De Sisto, 329 F.2d 929, 933 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964) (Friendly, J.). *See also* Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609, 613 (1969), *cert. denied,* 399 U.S. 929 (1970).

[84]*See, e.g.,* United States v. De Sisto, 329 F.2d 929, 934-35 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964); Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir.), *cert. denied,* 268 U.S. 706 (1925) (latitude to be allowed in cross-examination of recalcitrant witness is wholly within discretion of trial judge); Weinstein, *Probative Force* at 338-41.

[85]United States v. Mingoia, 424 F.2d 710, 712 (2d Cir. 1970) (prior statement given under oath); United States v. Insana, 423 F.2d 1165 (2d Cir.), *cert. denied,* 400 U.S. 841 (1970); United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964) (identification had been made under oath); Di Carlo v. United States, 6 F.2d 364 (2d Cir.), *cert. denied,* 268 U.S. 706 (1925) (identification made before witness had motive to fabricate, and in presence of defendant who acquiesced).

have been met.[86] Neither requirement was satisfied in the *Payne* decision, nor was any standard suggested other than implicit confidence in the ability of the trial judge to perceive reliability. The value of Burrell's statement as substantive evidence was slight. It contained only minor references to the petitioners[87] and the prosecution introduced other more substantial evidence inculpating the defendants.[88] The majority asserted that the statement was credible,[89] yet it was never subject to any objective guarantee of reliability. Extending the *Payne* rationale to its logical conclusion leaves nothing of the hearsay rule,[90] it eliminates oath, cross-examination, presence of the witness before the trier of fact, and any measure of trustworthiness. The trend away from rigid adherence to the hearsay rule seeks to make it more flexible, not to eliminate it as a meaningful rule of evidence.[91] Thus, not only did the *Payne* majority fail to articulate the rationale under which it presumably attempted to justify admission of the statement, but in addition, the progressive test itself was not satisfied.

The Constitutional or Right to Confrontation Issue

The situation in *Payne* created by Burrell's statement, his loss of memory and his subsequent inability to testify presented not only a hearsay problem but a constitutional issue as well. The sixth amendment guarantees the criminal defendant the right to confront wit-

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[86]*See, e.g.*, Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961). Judge Wisdom noted two prerequisites necessary to admit a hearsay statement in the absence of a traditional exception: necessity and trustworthiness. *See also* Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 89 n.114 (1971) (necessity and trustworthiness are the standard rationale in the dying declaration exception).

[87]*See* note 12 *supra*.

[88]Brief for Appellee at 4, Payne v. United States, 492 F.2d 449 (4th Cir. 1974).

[89]492 F.2d at 452.

[90]The Fourth Circuit's rejection of the hearsay rule in *Payne* parallels its holding in United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974). In another opinion by Judge Winter, the Fourth Circuit in *Woods* upheld the admission of prior similar incidents, contrary to the traditional American rule, to prove the *corpus delicti* of murder. As in *Payne* the decision strained logic. Unlike *Payne* the evidence met the demands of necessity and reliability. *See* Comment, *The Admissibility of Prior-Crimes Evidence in Prosecutions for Child Abuse*, 31 WASH. & LEE L. REV. 207 (1974). *See also* Note, *Evidence*, 43 U. CIN. L. REV. 437 (1974); Note, *Evidence*, 52 TEX. L. REV. 585 (1974).

[91]Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEG. F. 309 (1970). The author suggests a policy reason against elimination of the hearsay rule: "[T]he unrestricted use of police-station statements would 'increase both the temptation and opportunity for the . . . manufacture of evidence' . . . . defendants would similarly entrap or coerce substantive exculpatory proof." *Id.* at 315, *quoting*, State v. Saporen, 205 Minn. 358, 361-62, 285 N.W. 898, 901 (1939).

nesses against him.[92] Like the hearsay rule, the confrontation clause necessitates the presence of the prosecution's witnesses at trial.[93] The phraseology of the clause appears to admit no exception, but courts have not always applied the language strictly.[94] Indeed, some authorities have even attempted to graft the traditional hearsay exceptions onto the confrontation clause.[95] The Fourth Circuit in *Payne* held that the mere physical presence of a witness against the accused satisfied the confrontation clause.[96] The majority perceived the sixth amendment as basically a procedural requirement, while the dissent emphasized the substantive guarantee to the criminal defendant.

The portion of Judge Winter's opinion addressing the constitutional problem in *Payne* relied upon the Supreme Court's rationale in *California v. Green.*[98] That case involved a legislative amendment to California's hearsay rule permitting the admission for substantive purposes of prior inconsistent statements of witnesses present at trial.[99] The defendant in *Green* was convicted of narcotics violations due largely to the statement of a witness who testified at a preliminary hearing and had earlier given a statement to police.[100] At trial the witness became evasive and claimed loss of memory, although he confirmed making the statement and his belief in its accuracy. Subsequently, under the authority of the new statute, the prosecution entered the prior statement and preliminary hearing testimony into evidence.[101]

Upon conviction, the defendant appealed to the California Supreme Court,[102] which held that the admission of the prior statement and testimony violated the sixth amendment, and the state then appealed to the United States Supreme Court, which found no confrontation clause violation[103] since the declarant was subject to full

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[92]*See* note 1 *supra.*

[93]5 WIGMORE § 1397.

[94]*See, e.g.*, Dutton v. Evans, 400 U.S. 74, 96 (1970) (Harlan, J., concurring); California v. Green, 399 U.S. 149 (1970); Mattox v. United States, 156 U.S. 237 (1895); Matthews v. United States, 217 F.2d 409 (1954). *Contra,* Bridges v. Wixon, 326 U.S. 135 (1945).

[95]Snyder v. Massachusetts, 291 U.S. 97 (1934); Salinger v. United States, 272 U.S. 542 (1926).

[96]492 F.2d at 453-54.

[97]*Id.* at 462-65.

[98]399 U.S. 149 (1970).

[99]CAL. EVID. CODE § 1235 (West 1966).

[100]399 U.S. at 151.

[101]*Id.* at 151-52.

[102]People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), *rev'd,* 399 U.S. 149 (1970).

[103]Although *Green* was a state case involving state laws the Supreme Court in

and effective cross-examination at trial.[104] The Court noted that the witness' testimony at the preliminary hearing was given under oath and subject to cross-examination by the defendant, who was aided by counsel. The preliminary hearing testimony satisfied the confrontation clause requirements independently of the defendant's opportunity to confront the witness at trial.[105]

The situation in *Payne* differed from that in *Green.* Most importantly, Burrell's statement was neither given under oath nor subject to cross-examination. Also of significance was the fact that Burrell never admitted making the statement, nor did he attest to its accuracy, which the witness in *Green* did at trial.[106] Never were the petitioners able to question Burrell on the substance of his statement; yet the defendant in *Green* not only challenged the witness on his statement, but was able to make the witness retreat from his accusation.[107] Judge Winter recognized the dissimilarity of the two cases, but indicated that the difference was only in degree and that application of the *Green* rationale to the facts in *Payne* was proper.[108]

Mr. Justice White in *Green* noted that the purpose of the confrontation clause is three-fold: first, to insure that the witness will be subjected to cross-examination; second, to assure that statements will be given under oath; and third, to guarantee that the jury will have an opportunity to observe the witness' demeanor.[109] The out-of-

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Pointer v. Texas, 380 U.S. 400 (1965), held that the sixth amendment applied to the states by virtue of the fourteenth amendment's due process clause. Chief Justice Burger's concurring opinion in *Green* intimates that this application may not be absolute. 399 U.S. at 171. *See also* Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting) (discussing the hazard of applying Bill of Rights to states via the fourteenth amendment).

[104]399 U.S. at 158.

[105]*Id.* at 165. The court commented regarding the admission of the witness' statement to police:

> Porter's preliminary hearing testimony is not barred by the Sixth Amendment despite his apparent lapse of memory, the reception into evidence of the Porter statement to Officer Wade may pose a harmless-error question which is more appropriately resolved by the California courts . . . .

Id. at 170.

[106]*Id.* at 152.

[107]*Id.* at 151-52.

[108]492 F.2d at 453.

[109]399 U.S. at 158. Mr. Justice White commented:

> 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

court statement in *Green* regained these protections when the witness was present and testified in court. Thus the crucial inquiry Justice White made was whether "subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[110]

The Fourth Circuit did not answer this question in terms of a "satisfactory basis for evaluating," but rather indicated that Burrell's availability for cross-examination about contemporaneous events and his memory failure would provide the jury with a "substantial basis" to determine the truthfulness of the prior statement.[111] Judge Winter de-emphasized the lack of oath and the absence of any effective cross-examination by noting that the jury's decision was still made on what it saw and heard in court.[112] Such reasoning seems to ignore the confrontation clause guarantee. Unlike the hearsay rule, which is designed to aid the jury in its evaluation of the evidence by requiring evidence to be presented in court, the confrontation clause is a positive guarantee to the criminal defendant of the right to challenge his accusers.[113] The Fourth Circuit's reasoning would support convictions based on unsworn, unchallengeable evidence, the admission of which would also violate the hearsay rule, as long as the jury received the evidence at trial.[114]

The three elements of confrontation posited by Justice White in *Green*[115] were not satisfied in *Payne*. The majority admitted that

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> 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.

Id. (footnote omitted).

[110]*Id.* at 161.

[111]492 F.2d at 454.

[112]*Id.* Judge Winter quoted from Judge Learned Hand's opinion in Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). The witness had identified the defendant before the grand jury, but at trial he became recalcitrant and refused to testify. Judge Hand's statements were directed toward the evidentiary admissibility of the prior identification, not the constitutional admissibility.

[113]*See, e.g.*, Douglas v. Alabama, 380 U.S. 415, 419-20 (1965).

[114]*See* United States v. Block, 88 F.2d 618 (2d Cir.), *cert. denied*, 301 U.S. 690 (1937) (Judge Hand reversed a conviction based on the statements of a witness given the prosecutor, but denied at trial).

[115]Mr. Justice White's three purposes of confrontation—oath, cross-examination, and the jury's observance of demeanor— are the same elements Professor McCormick cites as central to the hearsay rule. Although Justice White posits the same three elements, confrontation and hearsay are not co-extensive, and this comingling of elements is indicative of the confusion in definition of terms. *See* McCormick § 245.

there was effectively no cross-examination[116] and that the statement was never admitted or denied under oath.[117] Moreover, the jury concluded from their observance of Burrell's demeanor that his memory loss was real.[118] Thus, although the prosecution produced Burrell physically, he was effectively unchallengeable on his prior statement and the petitioners were left with only the bare opportunity of confrontation.

Judge Widener's dissent on the confrontation issue in *Payne* centered on the ancestry of the confrontation clause in an attempt to demonstrate the substantive right as well as the mere physical presence requirement.[119] As a preface to his dissent Judge Widener cautioned against undue reliance on *Green.* He pointed out that the sixth amendment may not be as strictly applied to the states as it is in federal prosecutions.[120] In searching for the substantive purpose of the confrontation clause he traced its history through the constitutional debates and ultimatley to the trial of Sir Walter Raleigh.[121] Judge Widener contended that the confrontation clause regulated trial procedure by requiring the witness to testify against the defendant openly and in view of the jury.[122] Although noting that both the hear-

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[116]492 F.2d at 454. Judge Winter noted: "It is true that by reason of Burrell's claim of complete failure of recollection, the scope of effective cross-examination excluded inquiry with regard to the substantive evidence of guilt on the part of Burrell's brothers." *Id.*

[117]*Id.*

[118]*Id.* at 456.

[119]*Id.* at 458-65.

[120]492 F.2d at 457.

Following the adoption of the fourteenth amendment, cases did not immediately apply the Bill of Rights to the individual states. This included the right to confrontation. West v. Louisiana, 194 U.S. 258 (1904). *See generally* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*? 2 STAN. L. REV. 5 (1949). Later, however, the Court applied the confrontation clause to the states through the fourteenth amendment's due process clause. Pointer v. Texas, 380 U.S. 400 (1965). As Judge Widener noted, Chief Justice Burger's concurring opinion in *Green* points out the importance of allowing state innovation, thus inferring that the states may not be held strictly to the confrontation clause. *See also* Apodaca v. Oregon, 406 U.S. 404, 371-72 (1972) (Powell, J., concurring, stressed the importance of flexibility in application of sixth amendment to States to allow States experimentation with non-unanimous jury verdicts).

[121]Raleigh was convicted of treason on the basis of an ex parte affidavit by Lord Cobham, who was in prison in the same building. Despite Raleigh's pleas to confront him, Lord Cobham was never produced at trial. *See,* WIGMORE § 1364; C. BOWEN, THE LION AND THE THRONE 202-04 (1956).

[122]492 F.2d at 458. *See also* Mattox v. United States, 156 U.S. 237 (1895), where the Court stated:

> The primary object of the constitutional provision in question was to

say rule and confrontation clause originated from the same abuse, trial by ex parte affidavit, he stressed that the right to confrontation is broader than the procedural requirement of the hearsay rule.[123] The confrontation clause was added to the Constitution to prevent the abuses that were possible even under the common law hearsay rule.[124] Judge Widener expressed the fear that by merely addressing the question of the sufficiency of the defendants' opportunity to cross-examine Burrell, the majority tacitly accepted Professor Wigmore's notion equating the confrontation clause with the rules of evidence.[125]

Judge Widener suggested that three principal elements have developed which guarantee the criminal defendant substantive confrontation of his accusers. The first element to evolve was that requiring the witness to testify in court, enabling the jury to observe his demeanor as he confronted the defendant with his accusations. Next came the right to cross-examination, allowing the defendant to challenge the accusations against him, and forcing the witness to answer for inconsistencies and weaknesses in his statement. Finally, the right of the defendant to have counsel for the purpose of cross-examining the witness evolved.[126] Under these criteria, Burrell's failure to state

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> 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.

156 U.S. at 242-43.

[123]492 F.2d at 458. The abuse that necessitated both the hearsay rule and confrontation clause appears to have been the use of ex parte affidavits by the prosecution against the defendant. The trial of Raleigh was perhaps the most publicized of the abuses. *See* note 121 *supra.* The incorporation of the right to confrontation into the Constitution reaffirmed the defendant's right and protected it from the infringement that occurred under common law exceptions to the hearsay rule. *See, e.g.,* California v. Green, 399 U.S. 149, 156 (1970); Mattox v. United States, 156 U.S. 237, 242 (1895); F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104-05 (1951) [hereinafter cited as HELLER]; 5 WIGMORE § 1364; Morgan, *Hearsay Dangers* at 179-83; Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials,* 113 U. PA. L. REV. 741, 746-47 (1965).

[124]492 F.2d at 459.

[125]Professor Wigmore surmised that the Constitution prescribed only the type of procedure to be followed at trial—cross-examination; not the type of statements to be taken infra-judicially, which were determined by the law of evidence. 5 WIGMORE § 1397.

[126]492 F.2d at 464. *See* Pointer v. Texas, 380 U.S. 400 (1965). In that case the prosecution attempted to introduce the transcript of a preliminary hearing in which a

his accusations on the stand in the presence of the defendants and jury violated the confrontation clause. Inquiry into the effectiveness of the petitioners' cross-examination opportunity, the question which Justice White thought primary in *Green,* was therefore academic.[127]

Although Judge Widener indicated that cross-examination was the second element in the chronological development of the right to confrontation, this element is not only the single most important guarantee,[128] but also constitutes the ultimate difference between the dissent and the majority in *Payne.* Moreover, cross-examination is the common thread between the hearsay rule and the confrontation clause.[129] Judge Winter found no denial of cross-examination since the witness was produced and the petitioners were provided with an opportunity to ask questions, thereby satisfying in his opinion both the hearsay rule and the confrontation clause.[130] Judge Widener, on the other hand, emphasized that the failure of Burrell to reiterate his accusatory statements at trial constituted a violation of the right of confrontation, since the statement could not be challenged in a truly adversary cross-examination.[131]

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witness who was unavailable for trial gave testimony against the defendant. The defendant was present at the hearing and was given an opportunity to cross-examine the witness, however, the Court noted that the defendant's lack of counsel at that time denied him adequate cross-examination and hence violated his confrontation right.

[127]Essentially Judge Widener agreed with the Harlan-Wigmore theory that the hearsay rule is a rule of evidence, while the confrontation clause is a rule of procedure—cross-examining procedure. 492 F.2d at 464; *see* Dutton v. Evans, 400 U.S. 74, 93 (1970) (Harlan, J., concurring); 5 WIGMORE § 1397. However, a prerequisite to the cross-examining procedure is the requirement that the accusing witness be present in court. 492 F.2d at 464.

[128]Mr. Justice White stated: "Viewed historically . . . there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." 399 U.S. at 158.

[129]Cross-examination is an important element in both the hearsay rule and the confrontation clause and has on occasion been equated with one or both. However, the purpose served by the cross-examination under the two requirements is not the same, nor are the confrontation clause and hearsay rule co-extensive. Cross-examination under the hearsay rule is a method of insuring the accuracy of the evidence. *See* Morgan, *Hearsay Dangers* at 185. In the confrontation clause it is the primary element in the defendant's right to challenge the accusations against him. *See* Douglas v. Alabama, 380 U.S. 415 (1965). Failure to distinguish the different purposes served by cross-examination under the two rules is a major source of confusion and generally leads to an equating of hearsay and confrontation, or equating cross-examination with one or both. *See, e.g.,* Dutton v. Evans, 400 U.S. 74, 94-95 (1970). Mr. Justice Harlan, concurring, stated that the confrontation clause only requires evidence taken at trial to be taken under a cross-examining procedure. The law of evidence, not the confrontation clause, governs what type of statements may be taken infra-judicially.

[130]492 F.2d at 454.

[131]*Id.* at 463-64.

The nature of cross-examination and its relationship to the defendant's right to confrontation have troubled courts and confounded commentators.[132] Unlike the hearsay rule requirement of cross-examination, which safeguards the reliability of the evidence and is dispensable if the trustworthiness of the evidence can be demonstrated by other means,[133] the cross-examination requirement of the confrontation clause is a substantive right guaranteeing the criminal defendant the opportunity to challenge his accusers in an adversary process.[134] A simple denial of cross-examination has been held to violate the confrontation clause,[135] yet an earlier opportunity to cross-examine the witness has been considered sufficient to satisfy the sixth amendment requirement in the absence of the witness' physical presence at trial.[136] Mr. Justice White indicated in *Green* that no confrontation problem would arise in the admission of an out-of-court statement if the witness was subject to "full and effective" cross-examination at the time of the trial.[137]

Unlike the witness in *Green,* who, although suffering impaired memory, took the stand and admitted that he made the statement and believed in its accuracy,[138] Burrell's total memory loss prevented any affirmation of the authorship of his statement, or acknowledgement of the statement's veracity. *Payne* presented a situation more

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[132]*Compare* Barber v. Page, 390 U.S. 719, 725 (1968) (confrontation is a trial right including both opportunity to cross-examine and an occasion for jury to weigh demeanor of the witness) *with* California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) (confrontation requires only production of witness for cross-examination by defendant) *and* Brookhart v. Janis, 384 U.S. 1 (1966) (denial of cross-examination is denial of right of confrontation). *See also* 5 WIGMORE §§ 1395, 1397.

[133]*See* notes 5, 67-69 *supra* and accompanying text.

[134]*See, e.g.*, Douglas v. Alabama, 380 U.S. 415, 418-20 (1965); Pointer v. Texas, 380 U.S. 400, 403 (1965); Motes v. United States, 178 U.S. 458, 474 (1900); Mattox v. United States, 156 U.S. 237 (1895).

[135]*See* Brookhart v. Janis, 384 U.S. 1 (1966).

[136]*See, e.g.*, California v. Green, 399 U.S. 149 (1970) (preliminary hearing cross-examination held to satisfy confrontation); Douglas v. Alabama, 380 U.S. 415 (1965) (right to confront is basically cross-examination, and opportunity to cross-examine could suffice in absence of physical presence); United States v. Fiore, 443 F.2d 112 (2d Cir. 1971); 467 F.2d 86 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973) (refusal of government witness to take oath, to testify at trial and to succumb to cross-examination by defense did not render grand jury testimony admissible since defendant had no opportunity to cross-examine).

[137]399 U.S. at 159. The Court commented: "[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial." *Id.*

[138]399 U.S. at 152.

analogous to that in *Douglas v. Alabama,*[139] in which a co-defendant made a statement incriminating the defendant. Upon being called to the stand the co-defendant claimed privilege against self-incrimination and refused to testify. The substance of his earlier statement was read to the jury under the guise of refreshing the witness' memory.[140] The Supreme Court held that the failure of the witness to confirm or deny the statement attributed to him precluded effective cross-examination, and thus deprived the defendant of the right to confrontation.[141]

Viewing cross-examination as fundamentally an adversary process,[142] its effectiveness is contingent upon the witness asserting his accusation at trial and in the presence of the accused.[143] The claim of privilege by the witness in *Douglas* denied the defendant the opportunity of challenging the statement. Similarly, Burrell's memory loss prevented his affirmation or denial of the statement's implications and precluded any possibility of the defense counsel discrediting the statement through cross-examination. Unlike the situations in which a witness discredits an out-of-court statement attributed to him by denying authorship of the statement or admitting authorship but denying the truth of the statement,[144] Burrell neither denied making

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[139]380 U.S. 415 (1965).

[140]*Id.* at 416-17.

[141]*Id.* at 419-20. The Court stated: "[P]etitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause . . . . [E]ffective confrontation of Loyd [the witness] was possible only if Loyd affirmed the statement as his." *Id.*

[142]Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). The court noted:

> Cross examination presupposes a witness who affirms a thing being examined by a lawyer who would have him deny it, or a witness who denies a thing being examined by a lawyer who would have him affirm it. Cross-examination is in its essence an adversary proceeding. The extent to which the cross-examiner is able to shake the witness, or induce him to equivocate is the very measure of the cross-examiner's success.

150 N.W.2d at 156.

[143]*But cf.* Mattox v. United States, 156 U.S. 237, 242-44 (1895) (technical adherence to the letter of the constitution would carry the right farther than the public good warrants, therefore, a copy of a deceased witness' testimony at a former trial where the defendant was able to cross-examine him does not violate the spirit of the clause).

[144]In California v. Green, 399 U.S. 149 (1970), Justice White posited that the defendant's task in cross-examination may actually be enhanced by a witness' prior inconsistent statement:

> The defendant's task in cross-examination is, of course, no longer identical to the task that he would have faced if the witness had not changed his story . . . . The difference, however, far from lessening, may actually enhance the defendant's ability to attack the prior state-

it nor refuted its accuracy. Further, *Payne* was not analogous to the situation in which a witness confirms authorship and the accuracy of the statement and is subject to cross-examination, since Burrell's inability to remember making the statement rendered him unavailable for adversary purposes. Burrell's memory loss effectively made the statement impregnable since "defense counsel cannot probe the story of a silent witness and attempt to expose facts that qualify or discredit it."[145]

The adversary nature of cross-examination under the confrontation clause guarantee gives substance to the criminal defendant's right under that clause and constitutes the essential difference between the clause's cross-examination requirement and the procedural cross-examination[146] aspect of the hearsay rule. Procedural cross-examination requires only that the defendant have an opportunity to cross-examine.[147] Its purpose is to insure the trustworthiness of evidence, but when cross-examination is impossible it may be waived if other circumstances attest to reliability.[148] Substantive confrontation, on the other hand, is the indispensable right of the criminal defendant to hear the accusations directly from the accuser and then to challenge those statements.[149] Judge Widener emphasized this in

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> ment. For the witness, favorable to the defendant, should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement . . . .

Id. at 160.

[145] *Id.* at 192 (Brennan, J., dissenting).

[146] *Compare* Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961) (cross-examination dispensable under hearsay rule when facts attest to reliability) *with* Greene v. McElroy, 360 U.S. 474, 496-97 (1959) (Supreme Court has zealously protected criminal defendants right of confrontation and cross-examination from erosion).

[147] *Cf.* State v. Logan, 344 Mo. 351, 126 S.W.2d 256 (1939); 5 WIGMORE § 1396.

[148] *See* Morgan, *Hearsay Dangers.* Professor Morgan contends:

> The theory of the system is that in the contest between the parties, each interested to demonstrate the strength of his own contentions and to expose the weakness of his opponents', the truth will emerge . . . .
>
> . . . Where, however, helpful data are available only through one who cannot be subjected to the conditions usually imposed on a witness, it becomes important to determine to what extent the reception of the data under conditions which do not satisfy the usual protective tests will serve to accomplish the objectives of the trial and yet not expose the trier to appreciable danger of being misled.

Id. at 185. *See also* note 19 *supra.*

[149] *See, e.g.*, Kirby v. United States, 174 U.S. 47 (1899). Mr. Justice Harlan stated:

> [A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront

his dissent. Mr. Justice White stressed the "face to face encounter" and the witness' open accusations in court as forming the "core of the values" furthered by the confrontation clause.[150] More than procedural cross-examination, the sixth amendment requirements guarantee the defendant a right that counterbalances those of his opponent—the aid of legal counsel at cross-examination.[151]

The majority in *Payne* ignored the adversary nature of confrontation, thereby providing the defendants with nothing more than the procedural opportunity to view their accuser. Judge Winter assumed that the sixth amendment only imposes an obligation on the prosecution to produce its witnesses, rather than creating a right guaranteed to the defendant. The majority purported to base its decision on Justice White's "full and effective" cross-examination criteria, but appeared to follow Justice Harlan's concurrence in *Green*, in which he stated that physical production of the witness at trial satisfied the confrontation clause.[152] Judge Winter responded to the White criteria with the Harlan answer: "Burrell was produced as a witness and he was available for cross-examination."[153] Moreover, the majority ignored the fact that Harlan favored a due process standard in dealing with the law of evidence, and under this standard would have remanded *Green* for a determination of whether the witness' memory failure so deprived the defendant of cross-examination as to violate due process.[154]

> 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. *See also* Young v. United States, 406 F.2d 960 (D.C. Cir. 1968).

[150]399 U.S. at 156-57.

[151]*See* HELLER at 104. *See also* Pointer v. Texas, 380 U.S. 400, 403-04 (1965). This case is discussed in note 126 *supra*.

[152]399 U.S. at 174.

[153]492 F.2d at 454.

[154]399 U.S. at 188-89.

Justice Harlan opposed the "incorporation" of the Bill of Rights into the due process clause of the fourteenth amendment generally, *see* Duncan v. Louisiana, 391 U.S. 145, 174-75 (1968) (Harlan, J., dissenting), and specifically the sixth amendment confrontation clause. California v. Green, 399 U.S. 149, 172 (1970). In *Green* he proposed that the constitutional standard to guide the states was merely a due process standard of fundamental fairness and not rigid application of the confrontation clause. This theory was further modified in Dutton v. Evans, 400 U.S. 74, 94-95 (1970) (Harlan, J., concurring).

As did *Green*, *Dutton* dealt with a state alteration of the hearsay rule, but, going beyond his *Green* opinion, Justice Harlan indicated his belief that the confrontation clause was an impractical instrument for dealing with evidence questions. He sug-

The Fourth Circuit's analysis of the sixth amendment as an obligation on the prosecution ignores the essential purpose of the confrontation clause, which is to guarantee the criminal defendant the right to challenge his accusers.[155] Courts have admitted prior statements of witnesses who were genuinely unavailable for trial when there was a preliminary or previous opportunity for cross-examination.[156] This is the type of situation in which courts have analyzed the sixth amendment as obligatory upon the prosecution. If the defendant has had an opportunity to cross-examine the declarant, if the government has attempted to procure his attendance and he is truly unavailable, then the confrontation clause is not violated by admission of the out-of-court statement.[157] This was the essence of *Douglas*.

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gested that the fifth and fourteen amendment due process clauses were better able to deal with the rules of evidence. 400 U.S. at 96-97.

Harlan indicated that historical understanding of the confrontation clause was of no value to its contemporary application. Essentially, he asserted that it mandates only the type of procedure that must be followed at trial, that being a cross-examination procedure. *See also* 5 Wigmore § 1365. Harlan did not believe that the confrontation clause demanded production of witnesses at trial. His contention was that such a rule would curtail the natural development of the law of evidence. 400 U.S. at 96. Harlan stated that the laws of evidence compelled the presence of the witnesses at trial, not the sixth amendment.

The due process standard, as Harlan saw it, was more flexible and able to adapt to continuing evolution in the law of evidence. Similarly, the due process standard would apply equally to the rules of evidence in both civil and criminal cases, something the confrontation clause did not accomplish since it applied only to criminal prosecutions. Finally, Harlan contended that a strict application of the confrontation clause would often preclude submission of evidence to the jury. 400 U.S. at 99.

This due process argument is subject to several major criticisms. Most basically it sacrifices the right of the defendant for the expediency of the admission of evidence. Second, similar to the trend in evidence, *see* note 19 *supra,* it gives the trial judge unbounded discretion in the admissibility of questionable evidence. Finally, Justice Harlan affixed common law hearsay exceptions to the due process clause, thus subjecting the defendant's constitutional rights to the whims of the rules of evidence.

[155]*See* HELLER at 104-06.

[156]*See, e.g.*, United States v. Green, 399 U.S. 149 (1970); Mattox v. United States, 156 U.S. 237 (1895). *See also* Motes v. United States, 178 U.S. 458 (1900) (preliminary hearing testimony, where defendants cross-examined witness, is not admissible when the witness' unavailability at trial is the fault of the government).

[157]*Compare* Mattox v. United States, 156 U.S. 237 (1895) (at the second trial of the defendant the prosecution was allowed to read into evidence the testimony from the first trial of a key prosecution witness who had since died; the defendant had cross-examined the witness at the first trial) *with* Barber v. Page, 390 U.S. 719 (1968) (the government attempted to introduce testimony from the preliminary hearing of a defendant now in jail; even though the defendant had had opportunity to cross-examine the witness, the failure by the prosecution to use diligence in procuring the witness' presence at trial precluded use of the testimony). *See also* Douglas v. Alabama, 380 U.S.

In producing the witness at trial the prosecution in *Douglas* had fulfilled its obligation to the fullest extent. Yet the defendant had never challenged the witness "face to face." Thus the confrontation clause was not satisfied even though the witness was physically present. Similarly, the production of Burrell in *Payne* satisfied the government's obligation, yet his memory loss deprived the petitioners of any adversary cross-examination, or any cross-examination with regard to the statement. The government's obligation to produce the witnesses against the accused is not, as envisioned by the Fourth Circuit in *Payne,* the sole requirement of the confrontation clause, but is merely a step necessary to insure the defendant's right to confrontation.

Conclusion

In *Payne* the Fourth Circuit recognized that the hearsay rule is not a dogmatic principle designed to frustrate the admission of evidence. In an attempt to join a trend toward making the rule more flexible, the court examined the cumulative nature of the circumstances attesting to the reliability of Burrell's out-of-court statement.[158] Noting the circumstances, especially Burrell's arraignment, the court indicated that the statement should not be barred by strict application of the hearsay rule.[159]

Although a trend toward more flexible application of the hearsay rule may be desirable, the Fourth Circuit failed to articulate any obective criteria to guide courts in the determination of reliability. By the nature of its decision judicial discretion will seemingly be the sole factor in the determination of trustworthiness. Such reliance upon the trial judge's subjective perception of the evidence leaves little or nothing of the traditional hearsay rule requirements of oath, cross-examination and presence of the witness before the trier of fact.[160] Earlier cases have dispensed with one or even two of these

415 (1965); Pointer v. Texas, 380 U.S. 400 (1965); Motes v. United States, 178 U.S. 458 (1900).

[158]*See, e.g.*, Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); United States v. Insana, 423 F.2d 1165 (2d Cir.), *cert. denied,* 400 U.S. 841 (1970); United States v. De Sisto, 329 F.2d 929 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964); Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609 (1969), *cert. denied,* 399 U.S. 929 (1970); CAL. EVID. CODE § 1235 (West 1966); PROP. FED. R. EVID. 801-06 (Advisory Committee Notes).

[159]492 F.2d at 454.

[160]*See* note 3 *supra.*

requirements,[161] but *Payne* eliminated all three without introducing any substitutes. The result of giving the trial judge such wide discretion may lead to confusion among barristers as to what evidence they should plan to present, confusion among trial judges as to what constitutes "sufficient reliability," and appellate court dockets crowded with applicants claiming improper admission or exclusion of evidence.[162]

The confrontation clause is not as flexible and prone to evolution as the laws of evidence, and infringement upon a defendant's right to cross-examination erodes one of the basic principles of our system of justice.[163] The decision in *Payne* indicated that the sixth amendment was satisfied by the mere physical production of the witness at trial. That finding is inconsistent with the intent of the confrontation clause, which is to guarantee the criminal defendant the substantive right to challenge, in an adversary proceeding, witnesses against him.[164]

Statements of a witness not present at trial were admitted in *Green*, however, the Fourth Circuit's reliance upon the Supreme Court's decision in that case was misplaced. In *Green* the defendant confronted the witness at the preliminary hearing, and the witness' memory loss at trial did not preclude his admitting authorship of the statement. Burrell's claimed memory loss was total, thus the defendants could not challenge him. The Supreme Court's decision in *Douglas* stressed that physical presence of a witness cannot satisfy the confrontation clause when the defendant is unable to cross-examine the witness.[165] The Fourth Circuit seemingly overlooked *Douglas* in its justification of the statement's admission into evidence.

Judge Widener's dissent in *Payne* adopts the preferable view. The confrontation clause requires not only the procedural opportunity to cross-examine, but requires as a minimum that the witness reiterate at trial his accusations against the defendant. The subsequent cross-

[161] *See, e.g.*, United States v. Williamson, 450 F.2d 585 (5th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972) (admission of technically inadmissible statement is cured by opportunity of defendant to cross-examine declarant); Di Carlo v. United States, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925) (identification made under oath is admissible at trial, even though witness could not affirm it). *Cf.* Virgin Islands v. Aquino, 378 F.2d 540, 547-48 (3d Cir. 1967) (presence of declarant before tribunal to judge demeanor is not essential).

[162] *See* Rucker, *The Twilight Zone of Hearsay*, 9 VAND. L. REV. 453, 485 (1956).

[163] *Cf.* Green v. McElroy, 360 U.S. 474, 496-97 (1959).

[164] *See, e.g.*, Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

[165] 380 U.S. at 419-20.

examination is then an adversary proceeding giving substance to the accused's confrontation right. This is consistent with the notion of confrontation set forth by the Supreme Court in *Douglas*. The constitutional right to confrontation must never be sacrificed to the convenience of admitting questionable evidence.

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