Missouri Law Review

Volume 48
Issue 3 *Summer 1983*

Article 9

Summer 1983

Standard of Reliability for Declarations against Penal Interest in Missouri, The

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THE STANDARD OF RELIABILITY FOR DECLARATIONS AGAINST PENAL INTEREST IN MISSOURI

State v. Turner[1]

While declarations against pecuniary and proprietary interests have traditionally been regarded as exceptions to the hearsay rule,[2] courts have considered declarations against penal interest less trustworthy and have generally refused to admit them.[3] The traditional justification is that recognition of the penal interest exception would encourage a criminal defendant to induce a third party to give a false confession.[4]

The United States Supreme Court first decided not to admit declarations against penal interest in *Donnelly v. United States*.[5] The propriety of excluding such evidence has since been complicated by the Court's decision in *Chambers v. Mississippi*.[6] In *Chambers*, the Court held the defendant's right to a fair trial required that a declaration against penal interest be admitted if sufficiently trustworthy.[7] Since *Chambers*, the lower courts have struggled

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1. 623 S.W.2d 4 (Mo. en banc 1981).

2. *See generally* 5 J. WIGMORE, EVIDENCE §§ 1458-1460 (Chadbourn rev. 1974).

3. The first case to consider declarations against penal interest less trustworthy was Sussex Peerage, 11 Cl. & F. 85, 8 Eng. Rep. 1039 (1844). *See also* C. MCCORMICK, EVIDENCE § 278 (2d ed. 1972).

4. 623 S.W.2d at 9 n.6. This rationale has been subject to extensive criticism by commentators and courts. *See, e.g.*, Donnelly v. United States, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting) ("no other statement is so much against interest as a confession of murder"); Scolari v. United States, 406 F.2d 563, 564 (9th Cir.) (testimony must be excluded due to *Donnelly*'s badly reasoned authority), *cert. denied*, 395 U.S. 981 (1969); United States v. Annunziato, 293 F.2d 373, 378 (2d Cir.) (excluding statements against penal interest is an indefensible limitation to the hearsay exception for statements against interest), *cert. denied*, 368 U.S. 919 (1961); 5 J. WIGMORE, *supra* note 2, § 1477, at 358; Tague, *Rule 804(b)(3)*, 69 GEO. L.J. 851, 983 n.680 (1981).

5. 228 U.S. 243 (1913).

6. 410 U.S. 284 (1973).

7. *Id.* at 310. The Supreme Court held that exclusion of a third party's confession to the murder the defendant was charged with denied the defendant his right to a fair trial. Chambers was charged with murder in Mississippi. McDonald had confessed to the murder but later denied it. The defense called McDonald as a witness when the state would not do so. The defense was not allowed to cross-examine McDonald due to Mississippi's "voucher rule," which prevents a party from impeaching its own witness. Chambers then tried to introduce the testimony

to determine the level of reliability a statement must have before it invokes the defendant's constitutional right to demand its admission. The Missouri Supreme Court first addressed this question in *State v. Turner*[8] and held that declarations must meet the same level of reliability as was present in *Chambers*.[9] By interpreting *Chambers* as establishing a mechanical standard of reliability, the Missouri Supreme Court failed to sufficiently address important constitutional issues.

In *Turner*, Turner and Mitchell robbed a liquor store. Two men were killed during the robbery, and Turner and Mitchell were each charged with two counts of capital murder. At his trial, Turner admitted he was at the scene of the robbery but claimed that Mitchell was responsible for the murders. Turner attempted to call Michael Cooper as a witness to testify about admissions made by Mitchell.[10] Cooper intended to testify that the day following the murders, Mitchell, unaware of Cooper's presence, said to Turner, "I wasted those two punk-ass motherf----s."[11] Cooper alleged that Mitchell then saw him and asked if he "knowed who wasted those two dudes." Cooper also planned to testify that Mitchell made two further admissions to him. The trial judge excluded Cooper's testimony as hearsay,[12] and Turner was convicted.[13]

On appeal to the Missouri Supreme Court, the defendant claimed that the trial court had erred in excluding Cooper's testimony[14] because exclusion of the declaration against penal interest was unconstitutional under *Chambers*. The Missouri Supreme Court held that *Chambers* did not require admission of the testimony.[15] The court's analysis was limited to comparing the circumstances surrounding the declarations in *Turner* with those factors in *Chambers* that led the Supreme Court to find the declarations

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of three witnesses to whom McDonald had confessed. The trial court excluded the testimony as hearsay and Chambers was convicted. Chambers v. State, 252 So. 2d 217, 220 (Miss. 1971), *rev'd*, 410 U.S. 284 (1973). The Supreme Court held that the voucher rule in combination with the exclusion of the witnesses' testimony was a clear denial of the defendant's due process rights. 410 U.S. at 302.

8. 623 S.W.2d 4 (Mo. en banc 1981).

9. *Id.* at 9.

10. Cooper had testified on behalf of the state at Mitchell's trial. *Id.* at 10. Mitchell's capital murder convictions were affirmed in State v. Mitchell, 611 S.W.2d 223 (Mo. en banc 1981).

11. 623 S.W.2d at 8.

12. *Id.*

13. *Id.* at 4.

14. *Id.* at 6. The defendant's other allegations of error included (1) insufficiency of evidence, (2) violation of the cruel and unusual punishment provisions of the United States and Missouri Constitutions, and (3) erroneous refusal to permit defense counsel to withdraw. *Id.* None of these allegations were sustained. *Id.* at 13.

15. *Id.* at 10.

reliable.[16] The *Chambers* Court had listed the circumstances which assured reliability in that case: (1) the declaration was spontaneous and made to a close acquaintance shortly after the murder occurred; (2) it was corroborated by other substantial, reliable evidence; (3) the declarant was aware that each statement was unquestionably against his interest; and (4) the declarant was available for cross-examination by the state.[17] In addition to these circumstances, the Missouri Supreme Court also interpreted *Chambers* to require that the declarant's complicity exonerate the accused.[18]

The Missouri Supreme Court found that two of the *Chambers* factors were not met: there was not the same degree of corroborating evidence and the declarations would not clearly exonerate Turner.[19] Although the court held that a declaration against penal interest must be admitted where substantial indicia of reliability appear and the declarant's statement exonerates the accused, it stated that the dangers of admitting extrajudicial confessions "militate[d] against extending the rule of *Chambers* beyond the facts presented there."[20] Since the level of reliability present in *Chambers* was not met, the court concluded that the declarations were properly excluded.[21]

Prior to *Turner*, Missouri courts consistently held that declarations against penal interest were inadmissible in criminal proceedings,[22] but this

16. *Id.* at 9.

17. 410 U.S. at 300-01.

18. 623 S.W.2d at 9. Although the *Turner* court required the statement to fully exonerate the accused and relied on *Chambers* as the source of this requirement, the *Chambers* Court did not specify this as one of the factors considered in reaching its decision. *See* 410 U.S. at 300-01. Other courts that have adopted the *Chambers* factors as the definitive test in determining the trustworthiness of a statement have not indicated that exoneration is required. *See, e.g.*, United States v. Oropeza, 564 F.2d 316, 325 (9th Cir. 1977); State v. Guillete, 547 F.2d 743, 754 (2d Cir. 1976), *cert. denied*, 434 U.S. 839 (1977); United States v. Wingate, 520 F.2d 309, 316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); People v. Foster, 66 Ill. App. 3d 292, 294-95, 383 N.E.2d 788, 789 (1978).

19. 623 S.W.2d at 9. The *Turner* court also noted that the declarant was unavailable, whereas in *Chambers* the declarant was available. While this weighed against the defendant in determining whether the declaration should be admitted, it is doubtful that the *Chambers* Court intended availability to be a factor. *Turner* was interpreted by a subsequent Missouri decision as not requiring availability. State v. Carroll, 629 S.W.2d 483, 485 (Mo. App., W.D. 1981). In United States v. Goodlow, 500 F.2d 954 (8th Cir. 1974), the court of appeals applied the *Chambers* test and found the declaration against penal interest admissible although the declarant was unavailable. The court stated that the general rule allowing admission of statements against penal interest recognizes as a prerequisite the unavailability of the declarant. *Id.* at 958 n.5.

20. 623 S.W.2d at 9.

21. *Id.* at 10.

22. *Id.* at 8. Missouri has not adopted Federal Rule of Evidence 804(b)(3). The rule is set forth in note 35 *infra*.

exclusion has never been clearly justified by Missouri courts. Early Missouri cases dealing with the subject stated simply that declarations admitting criminal acts were hearsay and therefore inadmissible.[23] Subsequently, in *Sutter v. Easterly*,[24] a civil case, the Missouri Supreme Court recognized the declaration against penal interest as an exception to the hearsay rule.[25] Nevertheless, after *Sutter*, in *State v. Brown*,[26] the supreme court held that statements against penal interest offered by the defendant were excludable.[27] Although the defendant relied on *Sutter*, the court stated a number of bases for inadmissibility and noted that the general rule in criminal cases excludes statements admitting criminal acts.[28] Although Missouri courts finally recognized such admissions as declarations against interest, they continued to exclude them in criminal cases, based only on Missouri precedent.[29]

In *Turner*, the court realized it could no longer exclude such statements merely because they were hearsay.[30] Under *Chambers*, even hearsay statements are admissible if their exclusion would violate the defendant's right to a fair trial. *Turner*'s interpretation of *Chambers* was that the right to a fair trial was violated only if the declaration excluded had the same degree of reliability as the evidence in *Chambers*.[31] In *Chambers*, however, the Court stated that the testimony before it "bore persuasive assurances of trustworthiness and thus was *well within* the basic rationale of the exception for declarations against interest."[32] In addition, the Court claimed that it was not

23. *See* State v. Williams, 309 Mo. 155, 177, 274 S.W. 427, 433 (1925) (third party's admissions hearsay and inadmissible); State v. Hack, 118 Mo. 92, 99, 23 S.W. 1089, 1091 (1893) (evidence was mere hearsay and clearly inadmissible); State v. Duncan, 116 Mo. 288, 311, 22 S.W. 699, 705 (1893) (evidence "wholly inadmissible . . . [as] the merest hearsay"); State v. Evans, 55 Mo. 460, 461 (1874) (evidence was mere hearsay and under no circumstances admissible).

24. 354 Mo. 282, 189 S.W.2d 284 (1945).

25. *Id.* at 295-94, 189 S.W.2d at 289-90.

26. 404 S.W.2d 179 (Mo. 1966).

27. *Id.* at 185.

28. *Id.* The court stated that *Easterly* required unavailability, while the declarant in *Brown* was available. The court also found that the declaration was merely cumulative.

29. *See, e.g.*, State v. Grant, 560 S.W.2d 39, 42 (Mo. App., St. L. 1977). The *Grant* court discussed the criticism of the traditional rule of excluding declarations against penal interest but noted that Missouri courts still excluded them in criminal cases. The court avoided the issue by concluding that even if it were to extend the exception to criminal cases, the offered declaration would be inadmissible due to an insufficient foundation. *Id.* at 42-43. *See also* State v. Invisivices, 604 S.W.2d 773, 780 (Mo. App., E.D. 1980) (Missouri courts still refuse to recognize declarations against penal interest as hearsay exception in criminal cases).

30. 623 S.W.2d at 8-9.

31. *Id.* at 9.

32. 410 U.S. at 302 (emphasis added).

establishing new principles of constitutional law.[33] These statements imply that the constitutional analysis used to determine whether evidence must be admitted does not depend upon the specific factors set forth in *Chambers*. By adopting the standard of reliability in *Chambers* to determine admissibility, *Turner* failed to address the possibility that the right to a fair trial may demand admission of less reliable declarations.[34]

Courts throughout the United States have struggled with the constitutional limitation imposed on their rules of evidence by *Chambers*. Since the federal courts must apply Federal Rule of Evidence 804(b)(3), their decisions on the reliability required are not helpful. Rule 804(b)(3) requires that declarations against penal interest be admitted where corroborating circumstances clearly indicate trustworthiness,[35] but the degree of corroboration required is unclear.[36] Thus, some courts use the *Chambers* factors as a guide to determine whether statements are sufficiently trustworthy,[37] while others do not require the level of reliability found in *Chambers* for admissibility under Rule 804(b)(3).[38] A number of states also have adopted Rule 804(b)(3), which complicates their courts' interpretation of *Chambers*.[39]

States that traditionally have applied rules of evidence similarly to Missouri interpret *Chambers* differently.[40] In *People v. Tate*,[41] the Illinois

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33. *Id.*

34. *See* Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U.L. REV. 148 (1976).

35. "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3).

36. *See* Lowery v. Maryland, 401 F. Supp. 604, 607 (D. Md. 1975) ("Except to indicate that simple corroboration is not enough, no clues are given as to what constitutes corroborating circumstances.").

37. In United States v. Guillette, 547 F.2d 743 (2d Cir. 1976), the court stated: "To guide our review we turn to the Supreme Court's decision in *Chambers*, which sets forth four general considerations relevant to an investigation of third party confessions." *Id.* at 754. *See also* United States v. MacDonald, 688 F.2d 224, 232 (4th Cir. 1982) (*Chambers* ruling is in large measure codified in Rule 804(b)(3)).

38. In United States v. Thomas, 571 F.2d 285 (5th Cir. 1978), the court held a statement admissible where the statement was spontaneous, a United States magistrate was a witness, the declarant had no motive to falsify, and it was against his interest to make the statement. The court did not mention the *Chambers* factors in its analysis. *Id.* at 290. *Accord* United States v. Goodlow, 500 F.2d 954, 958 (8th Cir. 1974) (implying that *Chambers* only requires corroborating circumstances which give "aura of trustworthiness" to statement); *cf.* United States v. Barrett, 539 F.2d 244, 253 (1st Cir. 1976) (district court should "be mindful of the possible relationship between *Chambers* and 804(b)(3)").

39. A thorough examination of Rule 804(b)(3) is beyond the scope of this Note. For a list of states that have adopted some form of Rule 804(b)(3), see 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804-114, -264 (1981 & Supp. 1982).

40. A number of state courts have held declarations against penal interest admissible as a common law exception to the hearsay rule and so do not have to

Supreme Court held that an out-of-court confession by a defense witness was not admissible. The court "adopted the language of *Chambers*" and recognized that *Chambers* required admissibility in certain circumstances.[42] Nonetheless, the court reasoned that *Chambers* only requires admission of statements having the same type of corroboration found in *Chambers*.[43] The court found that although the declarant in *Tate* was at trial and could be cross-examined, other indicia of reliability were not present.[44] This is similar to the narrow interpretation of *Chambers* given by the Missouri Supreme Court.

Strict application was reemphasized by the Illinois Appellate Court in *People v. Petrovic*.[45] After examining the four *Chambers* factors, the court stated that "Illinois courts have excluded statements as hearsay where any one or more of these factors has been absent."[46] Thus Illinois courts have applied *Chambers* even more rigidly than the Missouri Supreme Court. This analysis calls into question the constitutionality of requiring the same degree of reliability as in *Chambers* before admitting the declaration.[47]

By contrast, the Pennsylvania Superior Court in *Commonwealth v. Hackett*[48] interpreted *Chambers* to require an analysis of the facts of the case to determine whether due process was violated.[49] Although earlier Pennsylvania courts had held that declarations against penal interest were inadmissible,[50] the *Hackett* court realized it was compelled to update the law in light of *Chambers*.[51] However, the Pennsylvania court established its own

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decide whether the constitution requires such statements to be admitted. *See, e.g.*, People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); State v. Leong, 51 Hawaii 581, 465 P.2d 560 (1970); People v. Edwards, 396 Mich. 551, 242 N.W.2d 739 (1976); People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923).

41. 87 Ill. 2d 134, 429 N.E.2d 470 (1981).

42. *Id.* at 144, 429 N.E.2d at 475.

43. *Id.* at 145, 429 N.E.2d at 476.

44. *Id.*

45. 102 Ill. App. 3d 282, 430 N.E.2d 6 (1982).

46. *Id.* at 290, 430 N.E.2d at 12.

47. The Connecticut Supreme Court follows an analysis similar to that of Illinois. *See* State v. Gold, 180 Conn. 619, 431 A.2d 501, *cert. denied*, 449 U.S. 920 (1980); State v. De Freitas, 179 Conn. 431, 426 A.2d 799 (1980); Note, *Third Party Declarations Against Penal Interest*, 14 CONN. L. REV. 173 (1981).

48. 225 Pa. Super. 22, 307 A.2d 334 (1973). The defendant in *Hackett* was charged with drug addiction, but he asserted that he had been involuntarily drugged. The trial court refused to admit the testimony of a witness who claimed the declarant admitted he drugged the defendant's soda. The defendant claimed a denial of due process based on *Chambers*. *Id.* at 23-28, 307 A.2d at 335-37.

49. *Id.* at 29-30, 307 A.2d at 338.

50. Commonwealth v. Somershoe, 217 Pa. Super. 156, 269 A.2d 149 (1970); Commonwealth v. Honigman, 216 Pa. Super. 303, 264 A.2d 424 (1970).

51. 225 Pa. Super. at 27, 307 A.2d at 337.

level for mandatory admission.[52] The court found that the declaration under consideration met the standard of reliability it had established; thus its exclusion denied the defendant a fair opportunity to defend himself.[53] The court noted that "[t]he protection of innocent defendants must override any technical adherence to a policy that excludes evidence on the grounds of hearsay."[54]

The Pennsylvania court interpreted *Chambers* as forbidding exclusion of declarations against penal interest without analyzing the facts of the individual case to determine whether the defendant is deprived of a fair trial. Without determining whether the court's factual analysis in *Hackett* led to a constitutional result,[55] it is clear the court did at least succeed in addressing the constitutionality of excluding the defendant's evidence.

In *State v. Higginbotham*,[56] the Minnesota Supreme Court addressed the issue perhaps even more successfully. Rather than establishing a set of reliability factors, the Minnesota court stated that "the declaration against penal interest must be proven trustworthy by independent corroborating evidence that bespeaks reliability."[57] Although the declaration in *Higginbotham* was excluded, the court analyzed the facts of the case to reach this decision rather than inquiring whether the level of reliability in *Chambers* had been met.

The Minnesota court also pointed out that the *Chambers* Court had acknowledged that hearsay could be excluded if there was a basis for doubting its trustworthiness.[58] In *Higginbotham*, the declarant gave his confession at 2:30 a.m., then broke down, and claimed he was on LSD when he gave the confession. Eyewitness evidence also discredited the trustworthiness of the confession, and the declarant was "like a brother" to the defendant. The court concluded that evidence was "demonstrably incredible hearsay," and that to admit it would constitute a "fraud on the public."[59] By interpreting *Chambers* as it did, the court was able to reach the constitutional issue and determine at what point the defendant's right to a fair trial requires a hearsay statement to be admitted in his favor.

Since the factors established in *Chambers* were not presented by the Supreme Court as the standard required for admissibility, lower courts

52. *Id.* at 29-30, 307 A.2d at 338. In order for the statement to be admissible, *Hackett* appears to require that it exculpate the defendant, be written or made orally to reliable persons of authority or those having adverse interests to the declarant, and be made before trial or during the trial itself.

53. *Id.*

54. *Id.*

55. The required standard for admissibility appears to be even more stringent than *Chambers* and would therefore be unconstitutional.

56. 298 Minn. 1, 212 N.W.2d 881 (1973).

57. *Id.* at 5, 212 N.W.2d at 883.

58. *Id.*

59. *Id.* at 6, 212 N.W.2d at 883.

must decide when the Constitution requires that evidence be admitted. There are two constitutional limits on the degree of reliability a court can require: the defendant's right to a fair trial and the defendant's right to introduce material evidence in his favor to the jury.[60] Since the traditional role of the jury is to weigh relevant evidence, "the trial judge's role should be limited to a threshold determination of the probability of trustworthiness."[61] It has been asserted that a declaration against penal interest is sufficiently trustworthy if (1) the declarant recognizes the potential of jeopardizing his liberty, (2) the statement is against penal interest when made, (3) the declarant would reasonably perceive the disserving quality of the statement, (4) the part of the statement that exculpates the defendant is related to the part of the statement that is against the declarant's interest, (5) there is no probable motive to falsify, and (6) the declarant acted reasonably when he gave the statement.[62] State courts that admit declarations against penal interest under the common law exception for declarations against interest are recognizing that these factors are inherent in declarations against penal interest, making them as reliable as declarations against a material interest.[63] These courts do not require any additional foundation of reliability.[64]

In *Turner*, the Missouri Supreme Court required a pre-admissibility foundation of total exoneration and sufficient corroboration to achieve absolute reliability. This foundation requirement appears to usurp the jury's function.

A defendant's guilt must be established beyond a reasonable doubt.[65] When the defendant attempts to introduce a declarant's admission of guilt, however, that declarant's guilt should not have to be established beyond a reasonable doubt. Some courts appear to require corroboration in order to establish the declarant's guilt; yet even without corroboration the declaration in *Turner* would have raised a reasonable suspicion that the declarant, not the defendant, had committed the crime.[66] Since a defendant need only create a reasonable doubt in the jurors' minds to justify acquittal, a declaration which could exculpate the defendant should be admitted when it is reasonably possible that the declarant committed the crime.[67] By re-

60. The distinction between the compulsory process and due process clauses is made in Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 150 (1974).

61. *See* Note, *supra* note 34, at 155.

62. *Id. See also* Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 52-53 (1944); Note, *supra* note 47, at 184.

63. *See* cases cited note 40 *supra*.

64. *See, e.g.*, People v. Edwards, 396 Mich. 551, 565, 242 N.W.2d 739, 745 (1976) ("We are of the opinion that the circumstances surrounding the making or reporting of a third-party statement . . . go to the weight to be given the testimony, not its admissibility.").

65. *In re* Winship, 397 U.S. 358, 364 (1970).

66. *See* Note, *supra* note 34, at 175.

67. *See id.* at 176.

quiring that degree of corroboration found in *Chambers*, the *Turner* court excluded evidence that could have raised this reasonable doubt.

The *Turner* court assumed that confessions without a high degree of corroboration are inherently unreliable and that the only way to avoid misleading the jury is to exclude them. This assumption conflicts with the jury's role; a defendant has the right to introduce material evidence in his favor "unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to ensure the integrity of the trial is to exclude the evidence altogether."[68] Where the jury has a rational basis for evaluating the truth, its role is improperly restricted by requirements of additional corroboration.[69]

The second constitutional limitation the *Turner* court failed to address is the defendant's right to a fair trial. This constitutional right was considered in *Hackett* and *Higginbotham*, where the courts analyzed the facts to decide whether the evidence was so reliable that due process required its admission. In *Turner*, however, the court merely stated that due process requires "fundamental fairness essential to the very concept of justice" and summarily held that due process had not been violated.[70]

In certain circumstances, rules of evidence must yield to the defendant's right to present evidence. In *Washington v. Texas*,[71] Fuller and Washington were charged with murder. Fuller had been convicted, and Washington sought to introduce Fuller's testimony at his trial. Fuller planned to testify that he was responsible for the murder. The trial court excluded the testimony based on two Texas statutes prohibiting co-conspirators from testifying for each other.[72] Washington was convicted, the Texas Court of Criminal Appeals affirmed,[73] the United States Supreme Court reversed and held that the defendant had the right to call Fuller as a witness.[74] The Court held that the fourteenth amendment due process clause[75] incorporated the sixth amendment compulsory process clause,[76] therefore

68. Westen, *supra* note 60, at 159.

69. *See, e.g.*, People v. Edwards, 396 Mich. 551, 565, 242 N.W.2d 739, 745 (1976) (corroboration relevant to weight of testimony, not admissibility); Hines v. Commonwealth, 136 Va. 728, 747, 117 S.W. 843, 848 (1923) ("even a bare confession ought to go to the jury for what they may consider it worth"); *cf.* United States v. Satterfield, 572 F.2d 687, 691 (9th Cir.) (judge's determination of admission based on witness's credibility may interfere with the jury's role), *cert. denied*, 439 U.S. 840 (1978).

70. 623 S.W.2d at 10.

71. 388 U.S. 14 (1967).

72. *Id.* at 18. *See* TEX. PENAL CODE ANN. § 82 (Vernon 1925) (repealed 1965); TEX. CODE CRIM. PROC. ANN. § 711 (Vernon 1925) (repealed 1965).

73. Washington v. State, 400 S.W.2d 756, 759 (Tex. Crim. App. 1966), *rev'd*, 388 U.S. 14 (1967).

74. 388 U.S. at 17-19.

75. U.S. CONST. amend. XIV, § 1 (no state shall "deprive any person of life, liberty, or property, without due process of law").

76. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall

the sixth amendment was applicable to the states.[77] The compulsory process clause encompasses the right to offer testimony of witnesses and to compel their attendance. The Court stated that since a defendant has a constitutional right to present a defense, legislatures and courts cannot arbitrarily exclude whole categories of defense witnesses from testifying on the presumption that they are unworthy of belief.[78] *Chambers* followed *Washington* and indicated that lower courts must analyze the facts in each case to determine whether the right to a fair trial requires evidence to be admitted.[79]

Six years later, the Court repeated this analysis in *Green v. Georgia*.[80] In *Green*, the defendant, charged with murder, attempted to admit the testimony of a witness during the sentencing stage of the trial. The witness alleged that a co-defendant had admitted committing the murder.[81] Like the witness in *Turner*, this witness's testimony had aided the state in convicting the co-defendant.[82] The Georgia Supreme Court upheld exclusion of the testimony, distinguishing *Chambers* on the basis that the testimony in *Green* was to be admitted during the sentencing stage, not the guilt stage. In addition, the court held that the evidence in *Green* would not have totally exonerated the defendant.[83]

On appeal, the United States Supreme Court reversed,[84] implicitly rejecting the distinctions made by the lower court.[85] Apparently, the stage of admission and the absence of total exoneration were immaterial. The factors indicating reliability were examined in connection with the defendant's right to a fair trial; the Court determined that testimony sufficiently reliable to convict the co-defendant was reliable enough to be admitted on Green's behalf.[86]

These Supreme Court cases indicate the direction the Missouri Supreme Court should have taken in *Turner*. In *Washington*, the Court held

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enjoy the right to . . . have compulsory process for obtaining witnesses in his favor . . . .").

77. 388 U.S. at 18-19.

78. *Id.* at 23.

79. 410 U.S. at 300-02.

80. 422 U.S. 95 (1979) (per curiam).

81. *Id.* at 96.

82. *See Turner*, 623 S.W.2d at 10.

83. Green v. State, 242 Ga. 261, 271-72, 249 S.E.2d 1, 8-9 (1978), *rev'd*, 442 U.S. 95 (1979).

84. 442 U.S. at 97.

85. The dissent in *Turner* noted that by reversing the Georgia Supreme Court, the United States Supreme Court had demonstrated that it was not essential that the statement be introduced at a particular stage of the proceedings or that it totally exonerate the defendant in order to be admissible. 623 S.W.2d at 17 (Bardgett, J., dissenting).

86. 442 U.S. at 97.

that exclusion of evidence based on a presumption of untrustworthiness violated the defendant's right to present a defense.[87] Yet in *Turner*, the Missouri Supreme Court excluded evidence based on the presumption that unless it met the *Chambers* factors it was unreliable.[88] The court should have followed *Chambers* and analyzed whether, in light of the specific facts and circumstances, the defendant's right to compulsory process required the admission of the evidence.

As Judge Bardgett pointed out in his dissenting opinion in *Turner*, if the court's analysis had focused on specific facts, it would have been influenced by the *Green* decision.[89] He argued that *Green* was not distinguishable from *Turner* on the ground that the testimony in *Turner* was to be admitted at sentencing rather than at trial or that the testimony would not have totally exonerated the defendant.[90] These are the specific distinctions the Court rejected in *Green*.

The dissent also contended that the circumstances indicated that the declarations bore the assurances of reliability found in *Green* and *Chambers*. More specifically, the dissent asserted that the "evidence Turner wanted to introduce was the most powerful evidence used by the state to convict the declarant."[91] *Green* held that testimony admissible on behalf of the state in an earlier criminal prosecution was sufficiently reliable to be admitted on behalf of the defendant.[92] As the *Turner* dissent emphasized, the state relied almost totally on the declaration to prove the declarant's guilt; one could hardly find a more convincing expression of reliability.[93] If the Missouri Supreme Court had analyzed the facts, *Green* indicates that the court should have admitted the testimony to insure the defendant his right to a fair trial.

The *Turner* court failed to analyze the constitutional implications of excluding declarations against penal interest less reliable than those in *Chambers*. *Turner* also ignored the inference in *Chambers* that courts may be constitutionally required to admit less trustworthy statements. The court should have used the *Hackett* and *Higginbotham* approach and determined whether the statement was so unreliable that exclusion did not violate the defendant's right to a fair trial. Although this analysis might place untrustworthy evidence in the jury's hands, this is consistent with the jury's role as factfinder. Instead, Missouri courts are left with a decision which failed to extend the constitutional analysis beyond the factors in *Chambers*. The constitutional principles which the United States Supreme Court left to lower

87. 388 U.S. at 23.
88. 623 S.W.2d at 13.
89. *Id.* at 17 (Bardgett, J., dissenting).
90. *Id.*
91. *Id.*
92. 442 U.S. at 97.
93. 623 S.W.2d at 17 (Bardgett, J., dissenting).

courts to refine have been further delegated by the Missouri Supreme Court to the lower courts of Missouri.

KAY WILLENBRINK VAN PELT