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Constitutional Law - Evidence - Substantive Use of Witness' Prior Inconsistent Statement Does Not Violate the Confrontation Clause of the Sixth Amendment of the United States Constitution

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CONSTITUTIONAL LAW—EVIDENCE—Substantive Use of Witness' Prior Inconsistent Statement Does Not Violate the Confrontation Clause of the Sixth Amendment of the United States Constitiution.

In January, 1967, Melvin Porter was arrested for selling marijuana. While in custody he named John Green as his source of supply. At Green's preliminary hearing, Porter, with some variations from his earlier story, again named John Green as his source of supply. Porter testified under oath and was cross-examined by Green's counsel, the same counsel who represented Green at his subsequent trial. At Green's trial, Porter changed his testimony, stating that he could not remember who had supplied the marijuana since he had been on LSD at the time of the sale. During Porter's direct examination, the prosecution introduced both Porter's prior inconsistent testimony from the preliminary hearing, and a statement by a police officer that Porter had named Green as his supplier while in custody. These statements were admitted as substantive evidence under Section 1235 of the California Evidence Code.[1] The District Court of Appeals reversed,[2] holding that the substantive use of Porter's prior statements denied Green his constitutional right of confrontation.[3] The California Supreme Court affirmed[4] the reversal, holding Section 1235 unconstitutional as violative of the Confrontation Clause of the Sixth Amendment since it allowed the substantive use of prior inconsistent statements.

The United States Supreme Court in *California v. Green*[5] vacated the decision of the California court, stating that the orthodox hearsay rule limiting the use of prior inconsistent statements to impeachment purposes is not incorporated in the Sixth Amendment Confrontation Clause. The Court held that the defendant's constitutional right to be confronted with the witnesses against him is not violated by the substan-

1. "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Cal. Evid. Code § 1235 (West 1966) Sec. 770 provides that "extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: (a) the witness was so examined while testifying as to give him an opportunity to explain or to deny the statement." Cal. Evid. Code § 770 (West 1966).

2. 71 Cal. Rptr. 100 (1968).

3. In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." United States Constitution, Amendment VI.

4. People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

5. 399 U.S. 149 (1970).

tive use of prior inconsistent statements, where the witness is present at trial, subject to cross-examination, and there is opportunity to test him as to the basis of his former statement.[6] Furthermore, the Court stated that Porter's preliminary hearing testimony would be constitutionally admissible even if there were no opportunity for confrontation at the trial since those statements had been given "under circumstances closely approximating those that surround the typical trial."[7]

Due to the fact that Porter's statement while in custody was not then subject to cross-examination, the Court remanded the case for consideration of the question whether Porter's later inability to remember precluded effective cross-examination at trial.[8]

The decision in *Green* establishes that the proscriptions of the hearsay rule with its myriad exceptions are not equivalent to the prohibitions of the confrontation clause. Although the court found that there would be some "overlap" between the hearsay rule and the Confrontation Clause, its decision lends support to states' attempts to reform, and experiment with, their evidentiary requirements. Further, the Court's decision that statement's given "under circumstances closely approximating those that surround the typical trial" are admissible, absent an opportunity for confrontation at a subsequent trial, makes the preliminary hearing a more critical stage in the criminal process.

The classic enunciation of the orthodox hearsay rule is found in *State v. Saporen*.[9] In that case, Nathan Saporen was convicted of the crime of carnal knowledge and abuse of a female under the age of eighteen. At the trial, the prosecution had fixed the date of the offense as November 2, 1937, and the place of occurrence at a boarding house. One of the witnesses for the state testified that he had seen the prosecuting witness at that boarding house in late October. Claiming surprise, the state introduced prior inconsistent statements of the witness which not only placed the prosecuting witness at the boarding house on November 2, but the defendant as well.

On appeal to the Supreme Court of Minnesota, that court held that the previous inconsistent statements of the witness could not be utilized as substantive evidence.[10] The court reasoned that such evidence could

6. *Id.* at p. 164.
7. *Id.* at p. 165.
8. *Id.* at pp. 168-170.
9. 205 Minn. 358, 285 N.W. 898 (1939).
10. Most legal commentators have urged the adoption of the view that permits the substantive use of prior inconsistent statements because the hearsay dangers are nonexistent when the witness testifies at trial. See 3 *Wigmore*, Evidence § 1018 (3d ed. 1940), Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62

not be admitted for substantive purposes pursuant to the hearsay rule because they were out of court declarations given without oath and test of cross-examination.[11] The court focused on the importance of contemporaneous cross-examination to the fact-finding process.

> The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is, to maintain falsehood rather than truth.[12]

The California Supreme Court, in *People v. Johnson,*[13] interpreted the Confrontation Clause as requiring adherence to the rationale of *Saporen.* In *Johnson,* the court held that the admission of grand jury testimony violated the defendant's right of confrontation. The defendant had been convicted of the crime of incest. At trial, the defendant's wife and daughter denied that he ever had intercourse with the daughter. The prosecutor then introduced the grand jury testimony of both the mother and daughter in which they had testified that the defendant had engaged in intercourse with his daughter a number of times.

The grand jury testimony was admitted pursuant to Section 1235 of the California Evidence Code.[14] The justification for this statutory exception to the hearsay rule is that the declarant is present and testifying in court. The declarant can be cross-examined as to the prior statement and the factfinder has the opportunity to observe his demeanor as he is questioned about the prior inconsistent statement.[15] The California Supreme Court, however, did not agree that belated cross-examination effectively cured the lack of cross-examination at the time the statement was made:

> To assert that the dangers of hearsay are "largely non-existent" when the declarant can be cross-examined at some later date, or to urge that such a cross-examination puts the later trier of fact in

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Harv. L. Rev. 177 (1948), C. McCormick, Evidence § 39 (1954), Uniform Rule of Evidence 63 (1) (1953), Model Code of Evidence Rule 503(b) (1942), Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969), Gelhaar v. State, 41 Wis. 2d 230, 103 N.W.2d 609 (1969), DiCarlo v. United States, 6 F.2d 364 (2d Cir. 1925) (L. Hand, J.), *cert. denied,* 268 U.S. 706 (1925), United States v. Block, 88 F.2d 618 (2d Cir. 1937) (L. Hand, J.), *cert. denied,* 301 U.S. 690 (1937).

11. 285 N.W. at p. 901.
12. *Id.*
13. 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied,* 393 U.S. 1051 (1969).
14. *Supra* note 1.
15. 441 P.2d at p. 117.

> "as good a position" to judge the truth of the out-of-court statement as it is to judge contemporary trial testimony, is to disregard the critical importance of *timely* cross-examination.[16]

The court's analysis of the dynamics of the truthseeking process of a trial led it to conclude that a cross-examination which did not immediately follow the elicitation of the statement was a constitutionally inadequate method for testing the truthfulness of the statement.

In *People v. Green*,[17] the California Supreme Court expanded its holding in *Johnson* to prohibit the substantive use of preliminary hearing testimony which had been subject to immediate cross-examination. The court interpreted the Confrontation Clause as requiring not only that cross-examination immediately follow the direct testimony, but that the cross-examination should take place before the trier of fact who must pass on the credibility of the witness and the weight to be given his testimony. Once against the California Supreme Court examined the role of cross-examination in the truth seeking process. The court reasoned that the function of cross-examination was not limited to eliciting a contradiction of the witnesses's direct testimony, but rather to focusing the attention of the fact finder upon the demeanor of the witness as he relates his story and then responds to the probing questions of the opposing attorney.[18] The importance of demeanor in the determination of the weight to be given testimonial evidence renders the reading of the preliminary hearing transcript at the trial an inadequate substitute.[19]

Apart from the fact that the reading of a transcript does not allow the factfinder to directly observe the demeanor of the witness as he initially relates his story, there are important differences between the cross-examination of a witness at the preliminary hearing and at the trial. The purpose of the examination of a witness at a preliminary hearing is to establish probable cause to hold the defendant for trial. That limited purpose coupled with the fact that the preliminary hearing is at an early stage in the judicial process are factors which usually influence defense counsel not to conduct a searching and aggressive cross-examination at the preliminary hearing.

The court concluded that since, pursuant to the decision in *Johnson*, cross-examination at trial relating to a previously given statement is

16. *Id.*
17. 451 P.2d 422.
18. *Id.* at p. 427.
19. With only one exception the transcript of Porter's cross-examination at the preliminary hearing was not read to the court, 451 P.2d at p. 427 n. 5.

inadequate, and that since timely cross-examination before someone other than the ultimate trier of fact is inadequate, a combination of those two invalid approaches is likewise constitutionally inadequate.[20]

The decisions by the California Supreme Court in both *Johnson* and *Green* overruling the judgment of the California legislature as to what constituted reliable and relevant evidence, were influenced by what the court considered to be the disapproving import of a recent trend of the United States Supreme Court decisions.[21]

In *Pointer v. Texas*,[22] the Supreme Court of the United States held that the Sixth Amendment Confrontation Clause was applicable to the States through the Fourteenth Amendment. In that case the defendant was charged with robbery. At the preliminary hearing the victim of the robbery, one Phillips, testified to it in detail and identified the defendant as the one who perpetrated the crime. The defendant did not have the assistance of counsel, nor did he attempt to cross-examine Phillips. At trial, the prosecution, after showing that Phillips had moved and did not intend to return to the jurisdiction, offered the transcript of Phillips' testimony given at the preliminary hearing. The trial court admitted the transcript over the objection of the defendant that it denied him the right to confront the witnesses against him. The Supreme Court reversed, stating:

> Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips; its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment.[23]

However, the Court carefully differentiated its holding in *Pointer* from a situation where the statements offered into evidence were taken at a full-fledged hearing where the defendant was represented by counsel who had an adequate opportunity for cross-examination.[24] Although the Court did not delimit the scope of the constitutional right of confrontation, it did state that the decision in *Pointer* did not affect its previous recognition of the admissibility of dying declarations nor of testimony of a deceased witness who testified at a former trial.[25]

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20. *Id.* at 429.
21. 441 P.2d at p. 120, and 451 P.2d at p. 426.
22. 389 U.S. 400 (1965).
23. *Id.* at p. 407.
24. *Id.*
25. *Id.*

The Court, in *Douglas v. Alabama*,[26] again emphasized that one of the primary interests secured by the Confrontation Clause was the right of cross-examination. In that case Douglas and one Loyd were tried separately for assault with intent to murder. Loyd's trial was first and he was found guilty. The prosecution then called Loyd as a witness at Douglas' trial, but Loyd, relying on the privilege against self-incrimination, refused to answer any questions relating to the crime. The trial judge ruled that the privilege was not available to Loyd because of his conviction, but Loyd persisted in his refusal to answer any questions. The prosecution, after Loyd was declared a hostile witness, then read from a document later identified as Loyd's confession, with intermittent pauses to ask Loyd if he made those statements. Loyd continued to refuse to answer, but by this method the prosecution was able to get before the jury Loyd's previous confession which implicated Douglas.

The Supreme Court found that this procedure was a clear violation of Douglas' right to confront the witnesses against him. The Court stated that effective confrontation of Loyd was possible only if he admitted the statement was his. As matters stood, cross-examination of Loyd as to the truthfulness and circumstances of the statement was impossible since he refused to respond to any questions about it. Also, the Court held that cross-examination of the law enforcement officers who testified that Loyd made the confession was inadequate because corss-examination of the officers would only probe the question of whether Loyd ever actually made the confession. Thus, all effective avenues of cross-examination to test the veracity of the confession were denied the defendant. Although the prosecution's reading of the alleged statement was not technically testimony, the Court reasoned that the circumstances of its presentation and Loyd's refusal to answer would be treated by the jury as the equivalent of testimony that the statement had in fact been made by Loyd.

The Court was presented with a similar situation in *Bruton v. United States*.[27] In *Bruton*, the petitioner and one Evans were tried together on a charge of armed postal robbery. Evans' oral confession, which named the petitioner as his accomplice, was admitted into evidence against Evans. Since Evans did not take the stand and could not be questioned concerning the confession, the trial judge instructed the jury that although the confession was competent evidence against Evans, it

26. 389 U.S. 415 (1965).
27. 391 U.S. 123 (1968).

was inadmissible as hearsay against the petitioner. The Supreme Court reversed Bruton's conviction, holding that:

> [B]ecause of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.[28]

The decisions in *Bruton, Douglas* and *Pointer* reiterated that an opportunity for cross-examination was included in the protection afforded by the Confrontation Clause, but nothing in these decisions gave support to the view that the elicitation of the statement and the cross-examination must necessarily occur at trial. *Bruton, Douglas* and *Pointer* each concerned a situation where the statements were completely untested by cross-examination. For the purposes of these decisions it was not necessary for the Court to examine the relationship between the traditional hearsay rule and the Confrontation Clause.

However, in *Barber v. Page*,[29] the Supreme Court gave some indication as to the scope of the Confrontation Clause. In Barber, the petitioner and one Woods were jointly charged with armed robbery. At their preliminary hearing both the petitioner and Woods were represented by the same counsel, a Mr. Parks. During the hearing Woods decided to waive his privilege against self-incrimination, whereupon Parks withdrew as his attorney. Woods then gave testimony that incriminated petitioner, but Parks refrained from cross-examining Woods. When petitioner was brought to trial in Oklahoma, Woods was then imprisoned at the federal penitentiary in Texarkana, Texas. The prosecution then introduced the transcript of Woods' testimony from the preliminary hearing on the ground that Woods was then unavailable because he was not within the jurisdiction. Petitioner's objection was overruled, the transcript was read to the jury and, subsequently, the petitioner was found guilty.

The Supreme Court recognized the traditional exception to the confrontation requirement where the witness is unavailable and has testified at previous judicial proceedings against the same defendant who then had an opportunity for cross-examination.[30] Although the Court

28. *Id.* at p. 126.
29. 390 U.S. 719 (1968).
30. *Id.* at p. 722. *See* Mattox v. United States, 156 U.S. 237 (1895). In *Mattox* the witness died before the second trial. His testimony from the first trial was then admitted at the subsequent trial.

assumed, for the purpose of its decision, that the petitioner had waived his right of cross-examination at the preliminary hearing, it did not agree that Woods was unavailable under the terms of the exception to the confrontation requirement. Although the process of state courts is of no force outside of the jurisdiction, the Court noted that there are procedures by which federal prisoners are permitted to testify in state courts.[31] The Court stated that although permitting federal prisoners to testify in state courts requires an exercise of discretion by federal authorities, the state is not relieved of the obligation to make the request. Thus, the Court held that a witness was not unavailable under the terms of the confrontation requirement unless the prosecutorial authorities made a good faith effort to obtain his presence at trial. However, the Court then went on to discuss the substitution of cross-examination at trial by cross-examination at a preliminary hearing:

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not as we have pointed out, such a case.[32]

This language from the decision in *Barber* lent some support to the California Supreme Court's interpretation of the Confrontation Clause in *Johnson* and *Green*, but the decision of the United States Supreme Court in *California v. Green* rejected the view that cross-examination must take place at the same time as the direct testimony is given, before the same trier of fact as must pass on the credibility of the witness and the weight of his testimony.

The Court, in *California v. Green*, began by establishing that the Confrontation Clause did not incorporate the traditional hearsay rule and its exceptions. The Court stated that it could not be automatically assumed that evidence admitted in violation of the traditional hearsay rule necessarily violated the confrontation requirements. In the

31. *Id.* at p. 723. The federal courts have the power to issue writs of habeas corpus *ad testificandum* for prospective witnesses in federal custody upon the request of state prosecutorial authorities, 28 U.S.C. 2241(c)(5). Also the United States Bureau of Prisons permits federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus *ad testificandum* issued out of state courts. 390 U.S. at p. 724.
32. *Id.* at p. 725-726.

Court's view, the motivation for the promulgation of the Confrontation Clause "was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions."[33] In this manner the defendant was denied a face to face encounter with his accuser befor the trier of fact. The core of the protection afforded by the Confrontation Clause was the literal right to confront the witness at the trial. Historically, the Court found no reason to hold that admitting a declarant's inconsistent out-of-court statements, when he is present and testifying at the trial and subject to effective cross-examination, was constitutionally inadequate.

An analysis of the purposes of the confrontation requirement provided an additional basis for the Court's decision. First, the Confrontation Clause requires that the witness testify under oath, causing the witness to reflect on the seriousness of the occasion and the possibility that a lie will be punished as perjury. Although at the time the out-of-court statement is made it is not subject to the oath's protection, the presence of the declarant at trial causes the statement to regain that protection in that the declarant must now affirm, deny, or qualify the earlier statement while presently under oath.[34] Second, the Confrontation Clause forces the witness to undergo the process of cross-examination in order to test his testimony. The out-of-court statement is not tested by cross-examination, but the Court found that so long as effective cross-examination is available at trial, the earlier omission is not of crucial significance. The main reason for this conclusion by the Court is that at the time the prior inconsistent statements are introduced, the witness is already telling a different story and, thus, one of the main goals of a cross-examination has already been accomplished.[35] Finally, the Confrontation Clause allows the trier of fact to examine the demeanor of the witness as he makes his statements in order that the trier of fact can assess the credibility of the witness and the weight to be given his testimony. The Court admitted that in the case of prior inconsistent statements the jury would be in a better position to evaluate the truth of the statement if it could observe a cross-examination of the declarant as he initially gives the statement. However, when prior inconsistent statements are introduced, the witness must take a position as to the truth or validity of that statement. The jury then has an opportunity to observe the witness' demeanor as he reacts to the questions

33. 399 U.S. at p. 156.
34. *Id.* at pp. 158-159.
35. *Id.* at p. 159.

about the earlier statement. The Court held that, for the purposes of the Confrontation Clause, subsequent cross-examination of an out-of-court statement still gives the jury a satisfactory basis for evaluating the truth of the statement.[36]

The Court exmphasized that none of its earlier decisions dealt with the situation where out-of-court statements of a witness were admitted when he was present and testifying at trial. Indeed, the decisions of the Court finding that the Confrontation Clause had been violated dealt with situations where the statements were admitted in the absence of the declarant, and thus without *any* opportunity to cross-examine him at trial.[37]

The Supreme Court also held that Porter's preliminary hearing testimony was constitutionally admissible even absent an effective opportunity for confrontation at trial because the circumstances under which the statement was given approximated those of a trial. The Court noted that it already had recognized the constitutionality of the prior testimony exception to the hearsay rule,[38] and it refused to find that the preliminary hearing afforded Green differed substantially enough from a trial to preclude the applicability of the prior testimony exception. At Green's preliminary hearing, Porter testified under oath, Green's counsel had an opportunity to conduct a cross-examination that was not significantly limited as to scope, and the proceedings were conducted before a judicial tribunal which provided a record of the hearing.[39] This holding in *Green* was inconsistent with the implication of the Court's reasoning in *Barber* that the more limited purpose of a preliminary hearing rendered a cross-examination of the witness only at the hearing constitutionally inadequate. The decision in *Green* limits the opinion in *Barber* to the strict holding that the State had not made a good faith effort to secure the witness for trial.[40] The Court concluded that since

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36. *Id.* at pp. 160-161.

37. *Id.* at p. 161. The Court even found support in *Bruton* for the substantive use of prior inconsistent statements: "Indeed, Bruton's refusal to regard limiting instructions as capable of curing the error, suggests that there is little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used only for impeachment purposes, and permitting them to be used for substantive purposes as well." 399 U.S. at p. 164.

38. *Id.* at p. 165.

39. Similarly Mr. Justice Harlan, in a concurring opinion in *Green*, agreed that:

> [T]he Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial. 399 U.S. at p. 174.

Thus, Justice Harlan concluded that in *Green* the State produced its witness and made him available for trial confrontation. With that done, the Sixth Amendment requirements were satisfied.

40. 399 U.S. at p. 167.

the testimony would be admissible were the declarant actually unavailable, it was inconsistent to exclude the testimony when the declarant was present and testifying at the trial. When the State actually produced the witness at the trial, it was immaterial, in the Court's opinion, whether that witness then claimed a loss of memory or simply refused to answer; the State could constitutionally rely on his prior testimony.[41]

The decision of the United States Supreme Court in *Green* raises the possibility that defendants in criminal trials will be convicted largely on the basis of out-of-court statements. Green, for example, was convicted mainly on the basis of Porter's statements of this type, and the Supreme Court pointed out that on remand the California Supreme Court might choose to set aside the conviction on the ground that the evidence was insufficient to sustain conviction.[44] Thus, it appears likely that the interpretation of the Confrontation Clause in *Green* will lead to due process problems in future cases where the rules of evidence reflect the lenient attitude of the Supreme Court.

The Court's opinion in *Green* also creates a danger that preliminary hearings will become more critically important and will tend to develop into full-scale trials. The purpose of the preliminary hearing is the limited one of establishing reasonable credibility in the charges against the defendant. Under these circumstances, it is not likely that defense counsel would be willing to completely expose their case in view of the greater likelihood that at this stage they would not succeed in exonerating the defendant. Also, at this beginning phase of the proceedings against the defendant counsel may often lack adequate time for preparation and investigation in order to conduct a thorough cross-examination. However, given the risk that the preliminary hearing testimony of a witness might be used at trial, cautious counsel will be compelled to seek delays in order to investigate and prepare for a thorough cross-examination. The end result for a defendant could well be that the already prolonged time to trial will only be further extended.

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41. *Id.* at p. 170.