Annual Survey of Massachusetts Law

Volume 1978 Article 10

1-1-1978

Chapter 7: Evidence

Kenneth J. Malloy

CHAPTER 7

Evidence

KENNETH J. MALLOY*

§7.1. Hearsay Exceptions: Declarations Against Penal Interest. As a result of the Supreme Judicial Court's decision in *Commonwealth v. Carr*,[1] Massachusetts has joined the growing number of jurisdictions [2] which recognize as an exception to the hearsay rule declarations to a third party against the declarant's penal interest. Until *Carr*, the Court had allowed the statements against the declarant's pecuniary or proprietory interest,[3] but refused to admit statements against the declarant's penal interest.[4] While not expressly based on this, the Court's position regarding the inadmissibility of declarations against penal interest was in line with the House of Lords decision in the *Sussex Peerage Case*,[5] "which was read by contemporary writers as limiting the hearsay exception to statements tending to impair the declarant's pecuniary or proprietary interest." [6] McCormick states that the *Sussex Peerage Case* was responsible for creating the distinction in this country between declarations against pecuniary or proprietary interest (which are admissible) and declarations against penal interest (which are not admissible).[7]

In *Carr*, the defendant was convicted of selling a controlled substance, by virtue of participating in a sale to an undercover police officer.[8]

---

* KENNETH J. MALLOY is an Instructor of Law at Western New England College School of Law. Mr. Malloy wishes to thank Patrick Nally, a second year student, for his assistance.

§7.1. [1] 1977 Mass. Adv. Sh. 2312, 369 N.E.2d 970.

[2] *See Note, Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U.L. REV. 148, 148-49 n.5 (1976). *See also* C. MCCORMICK, Handbook of the Law of Evidence § 278 (2d ed. 1972 & Supp. 1978) [hereinafter cited as MCCORMICK].

[3] *See* Currier v. Gale, 80 Mass. (14 Gray) 504 (1860); Pool v. Bridges, 21 Mass. (4 Pick.) 377 (1826).

[4] *See* Commonwealth v. Densmore, 94 Mass. (12 Allen) 535 (1866); Commonwealth v. Chabbock, 1 Mass. 143 (1804). *See also* cases cited in *Carr*, 1977 Mass. Adv. Sh. at 2316 n.2, 369 N.E.2d at 972 n.2.

[5] 8 Eng. Rep. 1034 (1844).

[6] 1977 Mass. Adv. Sh. at 2316, 369 N.E.2d at 972.

[7] MCCORMICK, *supra* note 2, § 278 at 673 (2d ed. 1972).

[8] 1977 Mass. Adv. Sh. at 2312-13, 369 N.E.2d at 970-71.

The evidence at the trial showed that two men who identified themselves as "Frank" and "Otto" met with the officer on a sidewalk and sold him cocaine.[9] Frank told the officer that Otto would provide him with the drugs. Thereupon the officer paid one of them $450 for the cocaine, which was handed over by Otto.[10] The police later arrested Nelson Wood as the "Frank" and the defendant Carr as the "Otto" in the sale.[11]

At Carr's trial, Carr sought to have himself, his mother, and a friend testify that Wood on numerous occasions had made statements to them implicating Wood alone in the crime and exonerating Carr as not being the Otto involved in the sale.[12] This offer was made after Wood, on voir dire, invoked his privilege against self-incrimination and refused to testify about his relation with the defendant or his out-of-court statements.[13] The judge excluded the testimony of the three witnesses as inadmissible hearsay, and Carr was convicted.[14] Carr made a post-verdict motion for a new trial, and the trial judge reported the question of the admissibility of the hearsay. The judge stated that if his exclusion were found to be error, he would grant the motion for a new trial.[15]

After reviewing the facts of the case and the offers of proof, the Supreme Judicial Court turned to the checkered history of the rule against admitting declarations against penal interest as an exception to the hearsay rule. The Court noted the development of the rule in Massachusetts,[16] the influence in America of the *Sussex Peerage Case*,[17] and criticism leveled at the rule by Mr. Justice Holmes [18] and leading Anglo-American text writers.[19] It went on to review abolition of the

---

[9] *Id.* at 2313, 369 N.E.2d at 971.

[10] *Id.*

[11] *Id.* at 2314, 369 N.E.2d at 971.

[12] *Id.* at 2312, 369 N.E.2d at 971.

[13] *Id.* at 2314, 369 N.E.2d at 971.

[14] *Id.* at 2312, 369 N.E.2d at 971.

[15] *Id.* at 2313, 369 N.E.2d at 971.

[16] *Id.* at 2315-16, 369 N.E.2d at 972.

[17] 8 Eng. Rep. 1034 (1844). See text at notes 5-7 *supra.*

[18] 1977 Mass. Adv. St. at 2316, 369 N.E.2d at 972 *quoting* Donnelly v. United States, 228 U.S. 243, 277 (1913) (Holmes, J. dissenting). Justice Holmes stated in part:

> The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no statement is so much against interest as a confession to murder. . . .

1977 Mass. Adv. Sh. at 2317, 369 N.E.2d at 972.

[19] 1977 Mass. Adv. Sh. at 2317, 369 N.E.2d at 972-73 *citing* McCormick, *supra* note 2, at § 278 (2d ed. 1972); R. Cross, Evidence 465 (4th ed. 1974); 5 J. Wigmore, Evidence § 1477 (Chadbourn rev. ed. 1974).

rule by model code draftsmen [20] and judicial abrogation of the rule in New York [21] and California.[22] The Court then turned to abrogation of the rule in the Federal Rules of Evidence, regarding this as "[m]ost suggestive and significant . . . ." [23]

Rule 804(b)(3) of the Federal Rules of Evidence incorporates both declarations against financial interest and declarations against penal interest as exceptions to the hearsay rule.[24] To be admissible, a declaration against penal interest must meet a higher threshold than a declaration against proprietary or pecuniary interest: not only must the statement at the time of its making be so contrary to the declarant's penal interest that a reasonable man would not have made it if it were not true, but it must also be attended with "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement." [25]

The Court, "impressed favorably" by the federal evidentiary rule, stated that it would be "followed in substance" in the Commonwealth, but the Court would not commit itself to total adoption of Rule 804(b)(3) because of still outstanding study of the problem by a committee appointed by the Court.[26] It then turned to the twin requirements that the statement be corroborated and be against the declarant's penal interest. Because of the undeveloped nature of the evidence, the Court felt unable to resolve the issues as they affected Wood's statements.[27]

As for the corroboration requirement, it was left for the trial court on remand to "consider as relevant factors the degree of disinterestedness of the witnesses giving corroborative testimony [Carr, his mother, and

---

[20] 1977 Mass. Adv. Sh. at 2317, 369 N.E.2d at 973 *citing* MODEL CODE OF EVIDENCE rule 509 (1942); UNIFORM RULES OF EVIDENCE rule 63(10) (1974 rev. ed.).

[21] 1977 Mass. Adv. Sh. at 2317, 369 N.E.2d at 973 *citing* People v. Brown, 26 N.Y.2d 88, 308 N.Y.S.2d 825, 257 N.E.2d 16 (1970).

[22] 1977 Mass. Adv. Sh. at 2317, 369 N.E.2d at 973 *citing* People v. Spriggs, 60 Cal.2d 868, 36 Cal. Rptr. 841, 389 P.2d 377 (1964).

[23] 1977 Mass. Adv. Sh. at 2318, 369 N.E.2d at 973.

[24] FED. R. EVID. 804(b)(3) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Id.

[25] *Id.*

[26] 1977 Mass. Adv. Sh. at 2319, 369 N.E.2d at 974.

[27] *Id.* at 2320, 369 N.E.2d at 974.

his friend] as well as the plausibility of that testimony in the light of the rest of the proof." [28]

The Court's discussion of the "against declarant's penal interest" requirement is especially interesting in light of the facts of *Carr*. After he was arrested, Wood was declared drug-dependent under General Laws chapter 123, section 47.[29] The case against Wood was accordingly stayed for a year, with the indictment to be dismissed upon successful completion of a prescribed treatment.[30] The Court pointed out that this might raise an issue as to "whether Wood reasonably would fear that penal consequences might flow from his disclosures." [31] For if the trial judge were to make the determination that Wood's involvement in the drug treatment program had the effect of making the statements—at the time of their making—not truly against Wood's penal interest, then the testimony of Carr, his mother, and his friend would not be admissible. The Court hastened to point out: "The fact that Wood's claim of privilege was allowed does not necessarily betoken an affirmative answer to this question." [32] In a footnote the Court, following its decision in *Commonwealth v. Di Pietro*,[33] stated that Wood's successful invocation of this privilege made him "unavailable" for the purposes of the unavailability of the declaration against interest exception.[34]

While *Carr* allowed the Court to reexamine its prior position on the declaration against penal interest rule, the case did not afford the Court the opportunity to develop more fully the scope of the rule newly adopted in Massachusetts. One has to wonder if the statements were in the first place against Wood's penal interest. If Wood had said, "I did it, and Carr did not," his statement concerning Carr would probably be regarded as against Woods penal interest, because he would be substituting himself for Carr as the guilty party. But if Wood had said, "I did it, but Carr was not involved with me," it is hard to see how the part of his statement exonerating Carr can be against Wood's penal interest. Whether or not Carr was involved with him will not affect his penal interest, and accordingly such a statement does not seem to be as inherently trustworthy as a "substituting" statement.

A more nagging problem concerns Wood's status as a drug-dependent person who at the end of successful treatment would be entitled to a

[28] *Id.*
[29] *Id.*
[30] *Id.* *See* G.L. c. 123, § 47, para. 22.
[31] 1977 Mass. Adv. Sh. at 2321, 369 N.E.2d at 974.
[32] *Id.*, 369 N.E.2d at 974-75.
[33] 1977 Mass. Adv. Sh. 1971, 367 N.E.2d 811. *Di Pietro* is discussed at § 7.2 *infra.*
[34] 1977 Mass. Adv. Sh. at 2320 n.20, 369 N.E.2d at 974 n.20. See note 24 *supra.*

dismissal. The test adopted by Rule 804(b)(3) is formulated as an objective one: whether a reasonable man, albeit in the declarant's position, would, at the time of the utterance, have feared criminal punishment might follow from his statement.[35] McCormick points out that difficulty inheres in exploring the actual state of mind of the declarant, and concludes that an objective test will produce "satisfactory results in the vast majority of cases." [36] This may be one of the minority of cases where an objective test will not be probative of fear of punishment: Wood's dismissal was not certain; it hinged on whether he successfully completed his drug treatment program. Here, the subjective factors of Wood's likelihood of completing the year-long program, and how much time remained to it, rise to the fore.

It will remain for future cases to develop the scope of the rule in Massachusetts now adopted by *Carr*, just what is against the declarant's penal interest and how well corroborated is a statement. In this the Court will likely be guided by the experience of other jurisdictions in resolving these issues. For the moment, at least, the Court has made an important breakthrough in taking away one of the most illogical inconsistencies that are part and parcel of the hearsay rule.

§7.2. Admission of Prior Testimony of Unavailable Witness: Assertion of Testimonial Privilege as Constituting Unavailability. In *Commonwealth v. Di Pietro*,[1] the Supreme Judicial Court expanded the meaning of an "unavailable witness" to include witnesses who successfully assert a testimonial privilege and refuse to testify at trial. The *Di Pietro* Court held that the testimony of a witness at a probable cause hearing may be introduced into evidence as an exception to the hearsay rule in a subsequent trial or retrial at which that witness claims a testimonial privilege, provided the previous testimony meets other conditions for admissibility.[2]

Prior to this decision, Massachusetts case law extended only to allow introduction of the previous testimony of witnesses in situations where the witness had died,[3] had become insane since giving the original testimony,[4] or could not be found or compelled to return to the commonwealth for the re-trial of the same case.[5] The Court stated that

---

[35] See note 24 *supra*.

[36] McCormick, *supra* note 2, § 278 at 83 (1978 Supp.).

§7.2. [1] 1977 Mass. Adv. Sh. 1971, 367 N.E.2d 811.

[2] *Id.* at 1984, 367 N.E.2d at 818.

[3] *See* Commonwealth v. Mustone, 353 Mass. 490, 491, 233 N.E.2d 1, 3 (1968).

[4] *See* Temple v. Phelps, 193 Mass. 297, 304, 79 N.E. 482, 484 (1906).

[5] *See* Commonwealth v. Clark, 363 Mass. 467, 470-71, 295 N.E.2d 163, 166 (1973); Commonwealth v. Gallo, 275 Mass. 320, 328-34, 175 N.E. 718, 722-24 (1931).

it was unaware of any Massachusetts case law where the question of unavailability arose in the context of the exercise of an evidentiary privilege.[6] Hence, the question was a novel one to the Court.

The defendant in *Di Pietro* was convicted of unarmed robbery and of first degree murder.[7] At trial, the defendant had objected to the admission of a transcript of the testimony of the defendant's wife at the probable cause hearing. The defendant asserted that because his wife was present in the courtroom, the condition precedent for the admission of previous testimony, that the witness be unavailable, had not been satisfied.[8]

At the time of the probable cause hearing, the witness, Marianne Berlanger, had not yet married the defendant. However, four days before the trial, the defendant and Ms. Berlanger were married.[9] When she was called to testify at the trial Ms. Berlanger asserted her marital privilege as provided by General Laws chapter 233, section 20,[10] and refused to testify against her husband.[11] The Commonwealth then offered in evidence the transcript of Ms. Berlanger's testimony at the district court probable cause hearing.[12] Admitting that the evidence was hearsay, the Commonwealth argued that because the witness had become unavailable, the testimony was admissible as an exception to the hearsay rule.[13]

Agreeing with the Commonwealth that the prior testimony was admissible, the Supreme Judicial Court stressed that its concern would be "whether the *testimony* of the witness is sought and is available and not whether the witness' body is available."[14] The Court saw no reason to distinguish between the unavailability of expected testimony because of the death of a witness and the unavailability of testimony of a witness who is present but chooses to exercise a privilege not to testify.[15] Quoting *Commonwealth v. Gallo*,[16] the Court stated that the ground for the admission of previous testimony in such circumstances

---

[6] 1977 Mass. Adv. Sh. at 1987, 367 N.E.2d at 819.

[7] *Id.* at 1971, 367 N.E.2d at 813.

[8] *Id.* at 1972 n.1 & 1984, 367 N.E.2d at 813 n.1 & 818.

[9] *Id.* at 1972-73, 367 N.E.2d at 813.

[10] G.L. c. 233, § 20 provides in relevant part: "Second, Except as otherwise provided in section seven of chapter two hundred and seventy-three, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other.

[11] 1977 Mass. Adv. Sh. at 1977, 367 N.E.2d at 815.

[12] *Id.* at 1978, 367 N.E.2d at 815.

[13] *Id.*

[14] *Id.* at 1987, 367 N.E.2d at 819, *quoting* Mason v. United States, 408 F.2d 903, 906 (10th Cir. 1969), *cert. denied* 400 U.S. 993 (1971).

[15] 1977 Mass. Adv. Sh. at 1987-88, 367 N.E.2d at 819.

[16] 275 Mass. 320, 334, 175 N.E. 718, 724 (1931).

is that "necessity requires it to the end that justice may be done." [17] The Court emphasized that in the instant case, the defense had cross-examined Ms. Berlanger at the probable cause hearing to the extent that it chose to do so,[18] and that, therefore, the paramount condition for admissibility had been met.[19]

Having determined that Ms. Berlanger was an "unavailable witness" for purposes of the exception to the hearsay rule, the Court proceeded to answer a second challenge to the admissibility of Ms. Berlanger's previous testimony raised by the defendant. The defendant attacked the introduction of the transcribed testimony into evidence under the provisions of General Laws chapter 221, section 91B, which limits the transcripts that can be introduced as evidence to "official" transcripts.[20] The transcript in the instant case was prepared by a stenographer provided by the defendant at his own expense as was a permissible practice at the time under then section 91B. That statute did not allow transcripts prepared for defendants to be admitted as evidence under General Laws chapter 233, section 80.[21]

The Court agreed that at the time of the defendant's trial in the superior court in April of 1975, chapter 233, section 80, by its terms, applied only to "[t]ranscripts from stenographic notes duly taken under authority of law in the Supreme Judicial, Superior and Probate Courts." [22] However, the Court proceeded to conclude that "there is no requirement of the law of this Commonwealth that the prior testimony of a witness who since testifying, has become unavailable to testify at a later trial, may be proved only by means of an official transcript complying in every respect with the strictures of G.L. c. 233, § 80." [23] In reaching this conclusion, the *Di Pietro* Court relied on its prior decision of *Commonwealth v. Mustone*,[24] wherein the Court had stated that it did not view chapter 221, section 91B, as making unofficial transcripts of district court proceedings "inadmissible if, under common law principles, they could be admitted apart from G.L. c. 233,

---

[17] 1977 Mass. Adv. Sh. at 1988, 367 N.E.2d at 819.

[18] *Id.* at 1976, 367 N.E.2d at 815.

[19] *Id.* at 1987, 367 N.E.2d at 819. Whether meeting this condition entitles the Commonwealth to admission of the prior testimony is not entirely free from doubt. See text at notes 36-44 *infra* discussing *Barber v. Page*, 390 U.S. 719 (1968).

[20] 1977 Mass. Adv. Sh. at 1998-99, 367 N.E.2d at 824.

[21] G.L. c. 233, § 80 and G.L. c. 233, § 91B were amended by Acts of 1975, c. 457, §§ 1 & 2 and would now allow introduction of the testimony via transcripts under the circumstances present in *Di Pietro*, where the stenographer was not appointed by the court but provided by the defendant.

[22] 1977 Mass. Adv. Sh. at 1998-99, 367 N.E.2d at 824.

[23] *Id.* at 2000, 367 N.E.2d at 824.

[24] 353 Mass. 490, 233 N.E.2d 1 (1968).

§ 80, as an exception to the hearsay rule or otherwise." [25] Quoting further from *Mustone*, the Court stated: "The stenographer and any other person may testify about what was said at the earlier hearing, if the trial judge determines that, through the witness, the former testimony can be substantially reproduced in all material particulars and that the witness is now unavailable." [26]

Having thus concluded that there was no error in admitting the previous testimony of Ms. Berlanger under the "unavailable witness" exception to the hearsay rule, the Court affirmed the conviction.[27]

The reasoning of the *Di Pietro* Court in expanding the meaning of an unavailable witness to include witnesses who successfully assert testimonial privileges is sound. While the question had never been confronted in Massachusetts, the Court's decision rested upon precedents developed in other jurisdictions.[28] It is only natural to construe the term "unavailable witness" to encompass all situations where the witness' testimony cannot be obtained in open court for whatever reason, so long as the witness is truly unavailable. While the Court did not decide the question, it would seem that the "unavailable witness" should also include a witness who will not speak, not out of entitlement to a privilege, but out of outright refusal to testify on the matter at issue. This situation, as well as the witness with poor memory, is covered by the Federal Rule of Evidence 804(a) definition of unavailability.[29] Since the Court was influenced by the physical presence of the witness in *Di Pietro*, it appears that the Court will in time expand its definition of unavailability to cover these situations.

The *Di Pietro* Court was also faced with a claim that the defendant's constitutional right of confrontation [30] had been violated by the intro-

---

[25] 1977 Mass. Adv. Sh. at 2000, 367 N.E.2d at 824-25 *quoting Mustone*, 353 Mass. at 493 n.1, 233 N.E.2d at 4 n.1.

[26] 1977 Mass. Adv. Sh. at 2000-01, 367 N.E.2d at 825 *quoting Mustone*, 353 Mass. at 494, 233 N.E.2d at 4.

[27] 1977 Mass. Adv. Sh. at 2005, 367 N.E.2d at 827.

[28] *See id.* at 1989-92, 367 N.E.2d at 820-21 for extensive citations to authorities.

[29] FED. R. EVID. 804(a) provides in relevant part:

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant— . . .

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testified to a lack of memory of the subject matter of his statement . . . . *Id.*

[30] *See* U.S. CONST. amend. VI "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."); MASS. CONST. pt. I, art. XII ("[E]very subject shall have a right . . . to meet the witnesses against him face to face. . . .").

duction at his trial of previous testimony.[31] The Court disagreed, stating that the point "has long since been foreclosed against the defendant's contention by numerous decisions of this court and other courts."[32] The Court viewed the accused's confrontation rights as preserved whenever the accused has had an opportunity to cross-examine the unavailable witness in a prior proceeding,[33] which Di Pietro did in fact do.[34] The Court did not see this rule affected by recent decisions of the United States Supreme Court, stating:

> While it may appear that varying results have been reached in several of the more recent decisions of the United States Supreme Court involving the admissibility of the prior testimony of a witness, the differences in results were due to differences in underlying facts rather than to any change in the basic interpretation of the confrontation clause.[35]

The Court's dismissal of the importance of the United States Supreme Court cases may have been a little too easy. While the Supreme Court has not spoken conclusively on the issue, certain statements from *Barber v. Page*[36] indicate that the Supreme Judicial Court's distinction "on the underlying facts"[37] might not be tenable. In *Barber*, the Court overturned the petitioner's conviction on the grounds that he had been denied his sixth and fourteenth amendment rights to confront the witnesses against him.[38] At the time of the petitioner's trial, the State of Oklahoma had contended that the prosecution's star witness was unavailable because he was incarcerated in a federal prison in Texas.[39] Agreeing with this contention, the trial judge allowed the witness' testimony at the probable cause hearing to be introduced as evidence, over the defendant's objection.[40] This testimony was admitted even though the defendant's counsel had not cross-examined the witness at the prior proceeding.[41]

---

[31] 1977 Mass. Adv. Sh. at 1978-79, 367 N.E.2d at 816.
[32] *Id.* at 1979, 367 N.E.2d at 816.
[33] *Id.* at 1979-82, 367 N.E.2d at 816-17 *quoting* Mattox v. United States, 156 U.S. 237, 241 (1895); Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437 (1837).
[34] *See* 1977 Mass. Adv. Sh. at 1976, 367 N.E.2d at 815.
[35] *Id.* at 1983-84, 367 N.E.2d at 818 *citing* California v. Green, 399 U.S. 149, 165-68 (1970); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400, 402-08 (1965).
[36] 390 U.S. 719 (1968).
[37] *See* 1977 Mass. Adv. Sh. at 1983-84, 367 N.E.2d at 818.
[38] 390 U.S. at 720-21.
[39] *Id.* at 720.
[40] *Id.*
[41] *Id.* at 720, 722.

The Supreme Court reversed the conviction, stating that the witness was available and that, therefore, the petitioner must be given an opportunity to confront him at trial.[42] Here, the "underlying facts" are different from *Di Pietro*. Most significant, however, is the Court's dicta that it would have reached the same result even if the defendant had cross-examined the witness at the probable cause hearing.[43] In broad language the Court stated:

> The right to confrontation is basically a trial right. It concludes 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 the 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.[44]

Thus, *Barber v. Page* appears to contain a caveat directed at the state courts that there are constitutional limitations beyond which the definition of an "unavailable witness" cannot be expanded. The point at which a state's interpretation of an "unavailable witness" runs afoul of the right of the accused to confront the witnesses against him remains unclear. Whether the definition of "unavailable witness" adopted by the Supreme Judicial Court in *Di Pietro* is constitutionally acceptable for criminal trials is yet to be determined.

---

[42] *Id.* at 724-25.

[43] *Id.* at 725.

[44] *Id.* Prior to *Barber*, the Court of Appeals for the Third Circuit upheld the admission at trial of testimony taken at probable cause hearings when the witness became unavailable. But the court questioned this practice noting that there is a great difference in the strategy and tactics used in the cross-examination of a witness during a trial and those used in a probable cause hearing. *See* Government of the Virgin Islands v. Aquino, 378 F.2d 540, 549 (3d Cir. 1967).