



12-1-1965

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Recommended Citation

Philip L. Kellogg, *Criminal Procedure -- Sixth Amendment Right of Confrontation Made Obligatory in State Prosecutions*, 44 N.C. L. REV. 173 (1965).

Available at: <http://scholarship.law.unc.edu/nclr/vol44/iss1/18>

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If a solution is achieved in addition to the problems that now frequent the courts, however, there are others that may become significant in the future. For example, does a collateral attack on a criminal judgment become merely a civil proceeding in which the sixth amendment does not apply? This expanding involvement of *Escobedo* into other areas of criminal litigation points to the need for a more definite enunciation of its limitations. It would seem desirable for courts to be required to consider such a fundamental right with some degree of uniformity.

WILLIAM H. FAULK, JR.

Criminal Procedure—Sixth Amendment Right of Confrontation Made Obligatory in State Prosecutions

[T]he privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts, and in prosecutions in the state courts is assured very often by the constitutions of the states. *For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held.*¹

So wrote Mr. Justice Cardozo some thirty-one years ago. But it was not until 1965, in the cases of *Pointer v. Texas*² and *Douglas v. Alabama*,³ that this assumption was squarely affirmed.

In *Pointer* defendant was accused of robbery, and at a preliminary hearing the victim testified, giving a detailed account of the crime and identifying Pointer as its perpetrator. Neither Pointer nor Dillard, an alleged accomplice, were represented by counsel at the hearing, but Dillard tried to cross-examine the victim, and Pointer was said to have attempted cross-examination of some of the other witnesses.⁴ At Pointer's trial, because the robbery victim had moved permanently out of the jurisdiction, the state offered as evidence a transcript of this witness's prior testimony. Pointer's counsel objected, arguing that the right to confrontation had been denied at the hearing. The objection was overruled because Pointer had been "accorded the opportunity of cross examining the wit-

¹ *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). (Emphasis added.)

² 380 U.S. 400 (1965).

³ 380 U.S. 415 (1965).

⁴ 380 U.S. at 401.

nesses"⁵ Pointer was convicted and sentenced to life imprisonment.⁶ The Texas Court of Criminal Appeals affirmed.⁷ The United States Supreme Court reversed, holding that the fourteenth amendment makes the sixth amendment's guarantee of confrontation⁸ obligatory upon the states⁹ and confrontation had in fact been denied to Pointer.¹⁰

In *Douglas*, the Court reversed a decision by an Alabama circuit court which had been affirmed by the Court of Appeals of Alabama.¹¹ Douglas had been convicted of assault with intent to murder.¹² Loyd, his alleged accomplice who had been found guilty in a previous trial, invoked the fifth amendment privilege against self-incrimination when called as a prosecution witness. Examining Loyd as a hostile witness,¹³ the prosecutor read from a confession signed by Loyd and implicating Douglas. This was to "refresh his recollection";¹⁴ and after reading each sentence the prosecutor asked Loyd if he had made such a statement. Loyd steadfastly refused to answer these questions, even when ordered to answer by

⁵ *Id.* at 402.

⁶ *Pointer v. State*, 375 S.W.2d 293, 294 (Tex. Crim. App. 1963). Since defendant was convicted of robbery *with firearms*, he could have received the death sentence. See Tex. Pen. Code Ann. art. 1408 (1953).

⁷ 375 S.W.2d 293 (Tex. Crim. App. 1963).

⁸ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. (Emphasis added.)

⁹ 380 U.S. at 403-06.

¹⁰ *Id.* at 406-08. However, the Court rejected the argument that the facts constituted a denial of the right to counsel. *Id.* at 402-03.

¹¹ *Douglas v. State*, 163 So. 2d 477 (Ala. Ct. App. 1963). The Supreme Court of Alabama denied review. 276 Ala. 703, 163 So. 2d 496 (1964).

¹² 380 U.S. at 417.

¹³ After Loyd's refusal to testify in defiance of an order that he do so, the trial judge granted the prosecutor's motion to "declare [Loyd] a hostile witness and give me the privilege of cross-examination." *Id.* at 416.

¹⁴ *Ibid.* The right to use a hostile witness's written memorandum to refresh his recollection has occasionally been recognized. See Comment, *The Forgetful Witness: Refreshing Memory and Past Recollection Recorded*, 3 U.C.L.A.L. REV. 616, 618 (1956). *But see* *Voyles v. Columbia Terminals Co.*, 223 S.W.2d 870 (Mo. Ct. App. 1949). There the court states that it should not be permitted "in the guise and on the pretext of refreshing the witness' recollection, to make use of a favorable memorandum with an actual view to contradicting the witness or inducing him to change his testimony." *Id.* at 872. Use of the confession in *Douglas* seems clearly guise and pretext.

the trial judge and threatened with a contempt citation.¹⁵ The confession was never offered in evidence. The United States Supreme Court held that the lack of opportunity to cross-examine Loyd as to the confession denied Douglas the right secured by the confrontation clause.¹⁶

The right of confrontation set out in the sixth amendment is essentially an evidentiary concept.¹⁷ Its basis is in the hearsay rule, which rejects as untrustworthy testimony not subjected to the scrutiny of cross-examination.¹⁸ Cross-examination is considered indispensable because of its force as a truth-assuring device.¹⁹ There are well-established exceptions²⁰ to the rule, and these have been carried over generally as exceptions to the confrontation requirement.²¹

But the admission of evidence that exceptions to the hearsay rule permit does not always mean a complete denial of confrontation. When transcripts of testimony taken at a former trial or preliminary hearing from a later unavailable witness are admitted, frequently there has been an opportunity to cross-examine at the prior proceeding. There has been confrontation, but has the confrontation been *effective*? This was the question in *Pointer*.²²

In *Douglas*, however, the objection resulted from a lack of opportunity to test, by cross-examination, the confession at *any* time. Since Loyd testified to his name and refused to testify further, there was no opportunity to cross-examine him at the trial.²³ This

¹⁵ 380 U.S. at 416 & n.1. The judge did not proceed with the contempt citation, but interrupted defendant's trial to sentence Loyd to twenty years imprisonment.

¹⁶ 380 U.S. at 418-20. The Court also held that Douglas' counsel had not waived his constitutional right by failure to make timely objection. *Id.* at 420-23.

¹⁷ The right of "confrontation" was synonymous at the common law with the right to cross-examination at the time of adoption of the sixth amendment. 5 WIGMORE, EVIDENCE § 1397 at 128-29 (3d ed. 1940). But confrontation has developed to include the additional right to be "face to face" with the witness before a judge and jury, although it is regarded as dispensable when impracticable. *Id.* § 1365.

¹⁸ *Id.* § 1362 at 3.

¹⁹ *Ibid.*

²⁰ *E.g.*, dying declarations, statements of fact against interest, declarations about family history, attestation of a subscribing witness, regular book entries in the course of business. *Id.* § 1426. See generally *Id.* § 1420-27.

²¹ *Id.* § 1398 at 141.

²² There was a "confrontation," but the Court apparently considered that *Pointer* could not make effective use of the opportunity to cross-examine.

²³ The scope of cross-examination is usually limited to matters dealt with in direct examination or connected therewith. 5 WIGMORE, EVIDENCE § 1885

contention is scarcely weakened by Loyd's already having been convicted and perhaps not having had the right to rely on the fifth amendment in his refusal to testify.²⁴ The prosecutor's reading of the confession and Loyd's refusing to answer were not testimony, hence neither were subject to cross-examination by the defendant. Nevertheless, the confession was a crucial link in the case against Douglas, and its reading by the prosecutor may easily have been the equivalent of testimony in the minds of the jury.

In addition to the confrontation problem *Pointer* presented the closely allied question of right to counsel. The Court rejected *Pointer's* argument that he had been denied the right to counsel at the preliminary hearing within the meaning of *Gideon v. Wainwright*,²⁵ as focused by *White v. Maryland*.²⁶ The Court observed that in Texas preliminary hearings whether the accused shall be bound over to the grand jury and, if so, whether he shall be admitted to bail are the only questions decided. In *White*, the Court said, there was a hearing in which pleas were received, and this constituted a "critical stage" in the prosecution, entitling the defendant to counsel. The Court reserved the question whether there might be other circumstances making the Texas preliminary hearing a "critical stage" to the defendant for which counsel would be required.²⁷ Yet it is difficult to say that the taking of testimony later used against *Pointer* did not make the hearing a "critical stage." That testimony was crucial to his conviction. The Court's holding in *Escobedo v. Illinois*²⁸ has resulted in a considerable variation among state courts as to when the right to counsel attaches before trial.²⁹ *Pointer* clearly is not the final word on this issue.

Arguments based on denial of the right of confrontation by

at 532 (3d ed. 1940). This is the rule in a majority of the states. *Id.* § 1890 at 548. However, wide latitude is permitted on cross-examination in Alabama. *Murphy v. State*, 42 Ala. App. 60, 151 So. 2d 800 (1963). Nevertheless, since the prosecutor's reading of Loyd's confession was not evidence, there could have been no opportunity to cross-examine.

²⁴ 380 U.S. at 416. The argument against the availability of the fifth amendment's protection is of very doubtful validity. At the time, Loyd had not been sentenced and planned to appeal. Although Douglas' counsel was also Loyd's counsel the Court indicated that there had been no collusion on this point. *Id.* at 420.

²⁵ 372 U.S. 335 (1963).

²⁶ 373 U.S. 59 (1963).

²⁷ 380 U.S. at 403.

²⁸ 378 U.S. 478 (1964).

²⁹ See 44 N.C.L. Rev. 161 (1965) for a discussion of state court applications of *Escobedo v. Illinois*.

state courts have occurred infrequently, since most states guarantee confrontation, either constitutionally or by statute.³⁰ Nevertheless, prior to *Pointer* and *Douglas*, the application of the sixth amendment's right of confrontation to the states was inconsistent.³¹ This inconsistency was created by conflicting statements in three cases.

In *West v. Louisiana*³² the Court pronounced, in dictum, that the sixth amendment did not apply to proceedings in state courts.³³ The principle was not there applicable, however, since the defendant, through counsel, had actually cross-examined the witness at the preliminary hearing.

In *In re Oliver*³⁴ a Michigan judge, partially relying on testimony of a witness whom Oliver had not confronted, sentenced the defendant to jail for contempt of court. The Court held that such a procedure was a denial of petitioner's right to due process of law under the fourteenth amendment:

A person's right to a reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.³⁵

In *Stein v. New York*³⁶ petitioner was convicted on a felony-murder charge partially as a result of confessions of codefendants who had not testified at the trial. The Court responded unfavorably to petitioner's contention that he had been denied the opportunity to cross-examine in violation of his sixth and fourteenth amendment

³⁰ *E.g.*, N.C. CONST. art. I § 11 provides: "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense . . ." No North Carolina cases were found that would have been affected by the decisions in the principle cases. In fact, the North Carolina Supreme Court ordered a new trial in a case somewhat similar to *Douglas*. An accomplice testified against the defendant and then invoked the privilege against self-incrimination when cross-examined by defendant's counsel. The court held that this deprived the defendant of his right to cross-examine. *State v. Perry*, 210 N.C. 796, 188 S.E. 639 (1936). Forty-six states have constitutional provisions for confrontation and two others grant the protection by statute. See 5 WIGMORE, EVIDENCE § 1397, n.1 (3d ed. 1940).

³¹ See McKay, *The Right of Confrontation*, [1959] WASH. U.L.Q. 122, 124.

³² 194 U.S. 258 (1904).

³³ *Id.* at 262.

³⁴ 333 U.S. 257 (1948).

³⁵ *Id.* at 273.

³⁶ 346 U.S. 156 (1953).

rights. Mr. Justice Jackson, for the majority, said: "[O]bjection to the introduction of these confessions is that as to [petitioner] they are hearsay. The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."³⁷ *Stein* has been much criticized,³⁸ principally because the Court dispensed with the constitutional denial by saying apparently that the defendant's guilt had been established beyond a reasonable doubt at the trial. The statements in these three cases illustrate the difficulty resulting from the Court's application of the doctrine that the fourteenth amendment protects only those rights that are essential to a "scheme of ordered liberty."³⁹ Rights within the scope of this doctrine were subjected to the additional test of whether their preservation in the specific case as applied to the specific defendant were necessary to insure a fair trial. And that determination in turn depended upon a concurrence among the justices in their individual concepts of a "fair trial."

The full significance of *Pointer's* guarantee of the sixth amendment's right of confrontation in state criminal trials is that the right is a *part* of the sixth amendment. It is an application to the states of a specific portion of the Bill of Rights. Mr. Justice Harlan termed the decision "another step in the onward march of the . . . 'incorporation' doctrine."⁴⁰ The doctrine in its fullest force has been championed primarily by Mr. Justice Black.⁴¹ Simply put, it would "incorporate" the entire Bill of Rights into the due process clause of the fourteenth amendment. The view adopted by a majority of the Court in recent years has been called "selective" incorporation,⁴² and the decisions applying it have brought selected guarantees of the Bill of Rights within the fourteenth amendment. The doctrine has been long and hotly debated.⁴³ It will not be discussed extensively here, but it should be noted that the *Pointer* and

³⁷ *Id.* at 196.

³⁸ *E.g.*, Gorfinkel, *The Fourteenth Amendment and state criminal proceedings—"ordered liberty" or "just deserts,"* 41 CALIF. L. REV. 672 (1953).

³⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁴⁰ 380 U.S. at 408 (opinion of Harlan, J., concurring).

⁴¹ *Adamson v. California*, 332 U.S. 46, 71 (1947) (opinion of Black, J., dissenting); Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960). See *Pointer v. Texas*, 380 U.S. at 411 (opinion of Goldberg, J., concurring).

⁴² 380 U.S. at 408 (opinion of Harlan, J., concurring).

⁴³ See, *e.g.*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation. Id.* at 140.

Douglas decisions are indicative of the progress made by those on the Court who favor incorporation.

The concurring opinions in both cases make it clear that this is the principal issue on which the justices differ.⁴⁴ Mr. Justice Harlan thought that the Court's present policy of "selective" incorporation "increasingly subjects state legal processes to enveloping federal judicial authority."⁴⁵ But Mr. Justice Goldberg replied to this, observing that Mr. Justice Harlan's approach of "concept of ordered liberty" would require the Court "to intervene in the state judicial process with considerable lack of predictability and with a consequent likelihood of considerable friction."⁴⁶

The effect of *Pointer* and *Douglas* will be to bring about increased vigilance by the Court in insuring that state courts grant the full confrontation privilege of the sixth amendment.⁴⁷ In addition, the decisions portend a shift in emphasis in future confrontation cases to the issue of whether specific exceptions to the hearsay rule are carried over into the sixth amendment's confrontation standard.⁴⁸ It was announced in *Malloy v. Hogan*⁴⁹ that "the Court

⁴⁴ In both cases Mr. Justice Harlan and Mr. Justice Stewart, while concurring in the Court's judgment on the grounds that petitioners had been denied the right of "confrontation" implicit in the 'concept of ordered liberty' embodied in the due process clause of the fourteenth amendment, dissented from the Court's broad application of the sixth amendment's right of confrontation to the states. *Pointer v. Texas*, 380 U.S. 400 (1965). *Id.* at 408-09 (opinion of Harlan, J., concurring). *Id.* at 409-10 (opinion of Stewart, J., concurring), *Douglas v. Alabama*, 380 U.S. 415, 423 (1965) (opinions of Harlan, J. and Stewart, J., concurring). Mr. Justice Goldberg concurred in both the judgment and the reasoning, but took the opportunity to set out his views on the incorporation doctrine.

⁴⁵ 380 U.S. at 409 (opinion of Harlan, J., concurring).

⁴⁶ *Id.* at 413-14 (opinion of Goldberg, J., concurring).

⁴⁷ See *Dowdell v. United States*, 221 U.S. 325 (1911). In construing a Philippine statute modeled after the sixth amendment, the Court set out the standard required in federal courts.

This . . . intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination.

Id. at 330.

⁴⁸ This issue has been resolved in a few fact situations in cases decided prior to the principal decisions in federal courts. See generally, Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 400 (1959).

⁴⁹ 378 U.S. 1 (1964).

has not hesitated to reexamine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme."⁵⁰ *Pointer* and *Douglas* represent continuance of this reexamination by a majority of the Court. As the Court moves away from the "concept of ordered liberty," Mr. Justice Goldberg's comment is representative: "[T]o deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual."⁵¹

Confrontation, under these decisions becomes a *right*, applicable in every case, not solely in those cases where it seems "fair" to a majority of the Court. The uniformity alone achieved by the application of the confrontation clause to the states seems to justify the Court's shift in constitutional theory in this area.

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Federal Jurisdiction—Erie Doctrine—Federal Rules of Civil Procedure

*Hanna v. Plumer*¹ involved personal injury claims arising out of an automobile accident which was allegedly caused by the negligence of a deceased Massachusetts citizen. The petitioner, a citizen of Ohio, instituted the suit against the decedent's executor, also a Massachusetts citizen, in the District Court for the District of Massachusetts on the ground of diversity of citizenship. Process was served by leaving copies of the summons and complaint with the respondent's wife at his home. This form of service was sufficient to comply with rule 4(d)(1) of the Federal Rules of Civil Procedure;² however, a special Massachusetts statute required com-

⁵⁰ *Id.* at 5.

⁵¹ 380 U.S. at 414.

¹ 380 U.S. 460 (1965).

² Fed. R. Civ. P. 4(d)(1). This rule provides that service shall be made in the following manner:

Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . .