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cannot, by necessity, preclude retrial in every instance where the jury is discharged prior to the verdict.³⁹ If the rule is retained, as it appears that it will be, there remains the necessity of determining under what circumstances retrial is precluded.⁴⁰ Under *Perez*, anytime the discharge is necessary in the interest of public justice reprosecution is constitutionally permissible. But society's interest in determining the guilt of an accused on the merits may be too easily subordinated to the rights of the accused by a protective court. Care must be taken to see that these competing interests are recognized and properly evaluated. Courts must see that retrial following a discharge of the jury does not violate policies undergirding the double jeopardy provision of the Constitution, but this determination must be made in light of the competing interests of society and the accused, and in the overall interest of justice. Overzealous concern for the rights of the defendant must not be allowed to present an "obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed."⁴¹

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Criminal Procedure—State Hearsay Exception for Co-conspirator's Statement Held not to Violate Sixth Amendment Confrontation Clause

The hearsay rule,¹ because of its many exceptions,² abounds with controversy more than any other area in the law of evidence.³ A particularly

³⁹ See *United States v. Jorn*, 91 S. Ct. 547, 554-55 (1971); SIGLER 74.

⁴⁰ See *United States v. Jorn*, 91 S. Ct. 547, 554-55 (1971). It has been suggested that the problem of attachment of jeopardy could be eliminated by the adoption of the English rule which requires a final judgment of acquittal or conviction to constitute prior jeopardy. SIGLER 223.

⁴¹ *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949).

¹ The hearsay rule has been defined as the exclusion "of testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and this resting for its value upon the credibility of the out-of-court assertion." C. McCORMICK, *LAW OF EVIDENCE* § 225 (1954).

Historically there are several rationales for the rule, the most significant ones being that the adversary should have full opportunity for cross-examination; that testimony should be given under oath; that the trier of fact should have an opportunity to observe the demeanor of the witness; and that errors in transmission are nonexistent when the declarant is in court. *Id.* § 224.

² Under the hearsay exceptions the courts have admitted into evidence out-of-court statements to prove the truth of what was asserted. 5 J. WIGMORE, *EVIDENCE* § 1420 (3d ed. 1940) [hereinafter cited as WIGMORE].

³ It has been estimated that the hearsay rule accounts for at least one third of

acute problem in this area stems from the conflict between the goals of the hearsay-rule exceptions and those of the confrontation clause of the sixth amendment.⁴ The Supreme Court has cogently stated the purposes of the confrontation clause⁵ as being

to prevent depositions or ex parte affidavits . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.⁶

On the other hand, the hearsay-rule exceptions—grounded in theory upon shifting combinations of necessity and circumstantial trustworthiness⁷—frequently have been invoked to admit evidence of the out-of-court statements of declarants not present in court and thus a fortiori not available for confrontation.⁸ The Supreme Court recently analyzed this obvious conflict in *Dutton v. Evans*,⁹ but left the ultimate resolution of the issue unclear.

Evans, the petitioner in *Dutton*, along with Truett and Williams were jointly indicted in a Georgia court for the murders of three police officers, but Evans pleaded not guilty and exercised his right under Georgia law to a separate trial.¹⁰ He was convicted of murder and sentenced to death.¹¹ Evans then brought a habeas corpus proceeding in a federal district court, alleging that he had been denied the constitutional right of confrontation

all evidentiary problems in the courts today. Note, *Erosion of the Hearsay Rule*, 3 U. RICH. L. REV. 89, 92 (1968).

⁴ "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . U.S. CONST. amend. VI. This clause applies to the states through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

⁵ The similarity of the goals of the confrontation clause and the hearsay rule might suggest that the two can be equated. However, the Supreme Court does not accept this view. "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete . . ." *California v. Green*, 399 U.S. 149, 155 (1970).

⁶ *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

⁷ 5 WIGMORE §§ 1421-22.

⁸ *Mattox v. United States*, 156 U.S. 237, 243 (1895); *Tracey v. State*, 97 Ill. 101, 106 (1880).

⁹ 400 U.S. 74 (1970).

¹⁰ *Id.* at 76.

¹¹ *Id.*

at his trial by the admission into evidence of a statement allegedly made by Williams to a fellow prisoner named Shaw.¹² Williams never appeared at Evans' trial. However, at the trial Shaw was permitted to testify that he had asked Williams the result of Williams' arraignment proceeding, whereupon Williams had remarked: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."¹³ The Georgia Supreme Court upheld the admission of Shaw's testimony under a Georgia statute permitting the admission into evidence against a defendant of statements made by the defendant's co-conspirators, provided the conspiracy is first prima facie established.¹⁴ The court held the statement admissible even though it was made during the concealment phase of the criminal project.¹⁵

The "co-conspirators" hearsay exception applied in federal courts allows admission of only those statements made by co-conspirators "in the course of and in the furtherance of the conspiracy."¹⁶ The federal rule is thus narrower than the Georgia statutory hearsay exception,¹⁷ but in *Dutton* the Court held this fact insufficient to invalidate the Georgia statute under the confrontation clause.¹⁸ In reaching this result the Court stated

¹² *Id.* at 79.

¹³ *Id.* at 77.

¹⁴ "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." GA. CODE ANN. § 38-306 (1954 rev.).

¹⁵ *Evans v. State*, 222 Ga. 392, 396-97, 150 S.E.2d 240, 244-45 (1966). The Georgia court found a conspiracy to exist because at the time the statement was made by Williams, Evans and Williams "were still concealing their identity, keeping secret the fact they had killed the deceased, if they had, and denying their guilt. There was evidence sufficient to establish a prima facie case of conspiracy to steal the automobile . . ." *Id.* at 402, 150 S.E.2d at 248. However, a more accurate view seems to be that of Justice Marshall, dissenting in *Dutton*: "It is difficult to conceive how Williams could be part of a conspiracy to conceal the crime when all the alleged participants were in custody and he himself had already been arraigned." 400 U.S. at 106 n.8.

¹⁶ 400 U.S. at 81.

¹⁷ As was stated by the plurality in *Dutton*:

It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise. . . . The hearsay exception that Georgia applied in the present case, on the other hand, permits the introduction of evidence of such an out-of-court statement even though made during the concealment phase of the conspiracy.

Id.

¹⁸ When used in the discussion of the *Dutton* case, "the Court" refers to Justice Stewart's plurality opinion. This was a four-one-four decision; Justice Harlan,

that it "has never indicated that the limited contours of the hearsay exception in federal conspiracy trials are required by the Sixth Amendment's Confrontation Clause. To the contrary, the limits of *this* hearsay exception have simply been defined by the Court in the exercise of its rule-making power in the area of the federal law of evidence."¹⁹ In so holding, the Court has deviated from its position in earlier cases, and a brief survey of recent cases concerning confrontation and hearsay problems illustrates the shift which the Court has made.

In *Pointer v. Texas*²⁰ the Court held that the sixth amendment rights of defendants in criminal trials to confront and cross-examine adverse witnesses extended to state trials.²¹ Pointer was accused of robbing one Phillips. At a preliminary hearing, witnesses were examined by an assistant district attorney. Among those questioned was Phillips, who identified Pointer as the robber. Pointer was not represented by counsel at the preliminary hearing, and he did not avail himself of his opportunity to cross-examine the witness. Before the trial Phillips moved to another state, and the prosecutor offered the transcript of Phillips' testimony into evidence against Pointer. The Court held that Pointer had not been afforded a realistic opportunity to cross-examine Phillips, and that the introduction of the evidence was a denial of the defendant's right to confrontation guaranteed by the sixth amendment.²² The facts in *Dutton* are somewhat similar to those in *Pointer*, although *Dutton* involved an out-of-court statement rather than a formal transcript from a preliminary hearing. However, this factual difference, if justifying different results in the two cases at all, would seem to dictate results contrary to the actual holding. Preliminary hearing testimony, given in defendant's presence,

representing the "one," concurred in the result but not the means of achieving it. He did not see the sixth amendment as being well suited for taking into account the many factors involved in weighing the appropriateness of evidentiary rules, and thought that application of the due-process-of-law mandate was the correct procedure for the adjudication of such issues. *Id.* at 97. One writer has sharply disagreed with Justice Harlan's view, noting that "[a] certain notion of fairness has already pervaded the courts' general treatment of evidence in criminal trials," and asserting that to suggest that the accused is "sufficiently protected by the due process clause would be to regard the confrontation clause merely as a constitutional anachronism." Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. P. A. L. REV. 741, 743 (1965).

¹⁹ 400 U.S. at 82 (emphasis added).

²⁰ 380 U.S. 400 (1965).

²¹ *Id.* at 403.

²² If a federal standard could be gleaned from this and similar cases discussed *infra*, it would be that the right of confrontation gives a criminal defendant a chance "to face and effectively cross-examine the witness testifying against him." Note, 113 U. P. A. L. REV., *supra* note 18, at 745.

obviously presents a stronger case for admission than the simple extrajudicial statement involved in *Dutton*. This seems true even if the latter statement was in fact made—a matter which is open to considerable doubt.²³

In *Douglas v. Alabama*²⁴ the court followed the *Pointer* reasoning. Douglas had been convicted in a state court of assault with intent to murder.²⁵ Loyd, Douglas's alleged accomplice who had been convicted in a prior trial, invoked the fifth amendment privilege against self-incrimination when called as a witness by the prosecution in Douglas's trial.²⁶ The prosecutor, examining Loyd as a hostile witness, read from Loyd's confession—which implicated Douglas—in order to "refresh" Loyd's memory.²⁷ After reading each sentence the prosecutor asked the witness if the statement was his. Loyd firmly declined to answer these questions, even when ordered to do so by the trial judge and faced with a contempt citation.²⁸ The Court held that the lack of opportunity to cross-examine Loyd denied Douglas his constitutional right to confrontation.²⁹ On the facts *Douglas* and *Dutton* are strikingly similar—yet the Court reached different results. In both cases the state charged two defendants with a crime and tried them separately. In both the state first prosecuted one defendant and then used the first defendant's out-of-court statement in the trial of the second defendant. In *Douglas* the Court disapproved such use because the declarant, though in court, could not be cross-examined on the statement imputed to but not admitted by him. In *Dutton* the prosecution did not even call the declarant to the stand.³⁰ If the right to cross-examine is a standard in this context, as some writers have argued,³¹ it was inexplicably denied in *Dutton*.

After *Douglas* was decided the Court developed the proposition that while the confrontation clause and the basic hearsay rule are analogous in numerous respects, it is still possible for hearsay to be admissible in exceptional circumstances, pursuant to established rules of evidence,

²³ See note 39 *infra*.

²⁴ 380 U.S. 415 (1965). *Douglas* and *Pointer* were decided on the same day.

²⁵ *Id.* at 417.

²⁶ *Id.* at 416. At the time of Douglas's trial, Loyd had an appeal pending and decided not to testify in order not to compromise his own case.

²⁷ *Id.*

²⁸ *Id.* at 416 & n.1. The judge did not in fact hold Loyd in contempt, but he interrupted Douglas's trial to sentence Loyd to twenty years in prison. *Id.*

²⁹ *Id.* at 419.

³⁰ 400 U.S. at 102.

³¹ See note 22 *supra*.

despite the resultant departure from the most stringent possible interpretation of the confrontation clause.³² *Barber v. Page*³³ is a striking example of this development. Barber and Woods were charged jointly with armed robbery in a state court, Woods having given the testimony that incriminated Barber at a preliminary hearing. By trial time Woods was in prison in another jurisdiction, and his statement was admitted in Barber's trial because Woods was not available to testify. Barber was convicted and sought habeas corpus, claiming that the use of the transcript of Woods's testimony deprived him of his right of confrontation. The Supreme Court agreed that Barber was entitled to a new trial but did not hold that the confrontation requirement barred the testimony in any event. It decided only that unavailability was not sufficiently shown in the absence of a good faith attempt to secure the presence of the witness.³⁴

If Woods was "not unavailable," one wonders why Williams was "available" in *Dutton*. In *Dutton* the state made no attempt to call Williams, and it is possible that he would have testified had he been called. He had already been convicted and possibly would not have asserted his right against self-incrimination as did Loyd in *Douglas*. Pondering the result of the state's calling Williams to the stand is a purely academic exercise, but the fact remains that under the earlier cases the state either had to confront the defendant with the witnesses against him, or (at the least, under *Barber*) prove frustration of a good faith effort to procure his presence. In *Dutton* the state was permitted to introduce damaging evidence³⁵ without bearing the risk of trial confrontation. By *Barber* standards, which require a showing of ample opportunity to cross-examine at a prior stage of the proceedings and also of a good faith effort to procure the presence of the declarant at the trial, apparently *Dutton* was decided incorrectly. Arguably, unavailability—the requirement of the hearsay rule exception—was established in *Barber*;³⁶ yet the

³² Note, *Constitutional Law—Witnesses—The Confrontation Clause of the Sixth Amendment Requires State Authorities to Make a Good Faith Effort to Produce Out of State Witnesses at Trial*, 47 TEX. L. REV. 331, 335 (1969).

³³ 390 U.S. 719 (1968).

³⁴ *Id.* at 724-25.

³⁵ For a contrary view of the quality of the evidence in question, see Justice Blackmun's concurring opinion in *Dutton*, 400 U.S. at 90.

³⁶ Various courts and commentators have in the past assumed that the mere absence of a witness from the state was sufficient grounds for dispensing with confrontation. See the cases collected in 5 WIGMORE § 1404, at n.5 (Supp. 1970). See also, e.g., McCORMICK, *supra* note 1, § 234. However, this is now a questionable theory because of the increased cooperation among the states themselves and between the states and the federal government. When a prospective witness is in federal custody, 28 U.S.C. § 2241(c)(5) (1964), gives federal courts "the power

Court again recognized that the hearsay exceptions must be applied in the context of constitutional limitations.³⁷

In *Dutton* the question arises why the prosecution even used the controversial evidence. Arguably it was crucial and damaging evidence, for under Georgia law Evans could not have been convicted on the uncorroborated testimony of his accomplice, Truett.³⁸ Corroboration was a key element in Evan's conviction, and that corroboration could well have been Shaw's questionable testimony. However, there were eighteen other witnesses besides Shaw and Truett, the eyewitness. Surely one of the eighteen could have supplied the required testimony. The Court of Appeals noted that there was grave doubt that Williams had made the statement attributed to him,³⁹ and stated that Shaw's account of his conversation with Williams was notable for "its basic incredibility."⁴⁰ In addition, the veracity of the statement, if made, was at best dubious.⁴¹ It is clear that the statement was neither necessary nor reliable, and the prejudice to Evans was in fact real. Indeed, the dissent in *Dutton* questioned whether "Williams' accusation relate[d] to Evans as a man with powerful and unscrupulous enemies, or Evans as a murderer."⁴² The plurality apparently

to issue writs of habeas corpus *ad testificandum* at the request of state prosecutorial authorities." *Barber v. Page*, 390 U.S. 719, 724 (1968).

³⁷ The doctrinal distinction between *Dutton* on the one hand, and *Pointer*, *Douglas*, and *Barber* on the other, seems tenuous at best. In the latter cases there was no mention of a conspiracy. Therefore, the hearsay exception involved was not that of a co-conspirator's statement as in *Dutton*. The sixth amendment in those cases was held to exclude the questionable evidence in issue. However, in *Dutton*, where the facts were similar—the only difference of any significance being the hearsay exception involved—the evidence in issue was admitted. Should different results obtain merely because of the co-conspirator label? The results of an affirmative answer would be startling, for if the state only has to establish a conspiracy (often an easy thing to accomplish), and if upon such a finding hearsay evidence can be admitted on the tails of the co-conspirator exception, then the constitutional right of confrontation can be effectively abrogated.

³⁸ 400 U.S. at 108.

³⁹ In the court's words,

Shaw's testimony was somewhat incredible. He testified that Williams was talking to him in a normal voice through a ten-by-ten plateglass window in a prison hospital door, while Williams was lying on a bed in the room and Shaw was standing in the hall. Shaw had stated in the Williams trial that the window was covered only by wire mesh. The fact that it was covered by a pane of plate glass was brought out in Evans' trial. Moreover, evidence was submitted but rejected by the trial court which tended to show that Shaw's testimony may have been compensation for a respite from the dull routine of prison life.

Evans v. Dutton, 400 F.2d 826, 828 n.4 (5th Cir. 1968).

⁴⁰ *Id.*

⁴¹ See note 39 *supra*.

⁴² 400 U.S. at 104.

adopted the latter interpretation, but the fact remains that without cross-examination of Williams himself, "the jury was left with only the unelucidated, apparently damning, and patently damaging accusation as told by Shaw."⁴³

The Court has labored to discover the reach of the confrontation clause when measured against conflicting demands of the hearsay exceptions. One solution to the dilemma, wholly consistent with the decision in *Barber*, would be to read the confrontation clause as a canon of prosecutorial conduct. So read, the confrontation clause would require prosecutors to make good faith attempts to procure people to testify, and to allow hearsay only when necessity, trustworthiness and fairness—arguably absent in *Dutton*—are present. Interpreted in this fashion, the confrontation clause would bind the prosecutor, notwithstanding that an exception to the hearsay rule would permit admission of the questionable statement.⁴⁴ A confrontation clause construed as a standard of prosecutorial conduct might reasonably have resulted in a contrary holding in *Dutton*. In addition, such a construction would afford improved prosecutorial behavior and more ascertainable standards.

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Criminal Procedure—Voluntariness of Guilty Pleas in Plea Bargaining Context

One of the basic purposes of our system of justice is to separate the guilty defendant from the innocent.¹ The formal trial process and the guilty plea process are the only means used to accomplish this end. The formal trial process is laced with procedural, evidentiary, and other safeguards to protect against conviction of the innocent and to ensure that the accused are better able to defend against the power and the resources of the state.² However, the guilty plea process contains far fewer safeguards, and the safeguards that do exist vary from jurisdiction to jurisdiction.³

⁴³ *Id.*

⁴⁴ *Barber v. Page*, 390 U.S. 719, 724 (1968).

¹ D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 10 (1966).

² See L. MAYERS, *THE AMERICAN LEGAL SYSTEM* 11-150 (rev. ed. 1963) for a general discussion of the safeguards available at all stages of the procedure.

³ D. NEWMAN, *supra* note 1, at 10.