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Article 10

# Constitutional Right of Confrontation Applied to States

# RECENT DECISIONS

### Constitutional Right of Confrontation Applied to States

In a Texas criminal prosecution, the state introduced, over timely objection, a transcript of testimony obtained at a preliminary hearing. At that hearing, the defendant, not represented by counsel, was afforded an opportunity to *personally* cross-examine the accusing witness, but chose not to do so. Since the witness was not present at the ensuing trial, the defendant never had an opportunity to cross-examine him *with the aid of counsel.* The United States Supreme Court reversed the defendant's conviction, *holding* that Texas had violated the right of confrontation guaranteed by the sixth amendment and made applicable to the states by the fourteenth amendment. *Pointer v. Texas,* 380 U. S. 400 (1965).

The guarantee of an accused's right to confront the witnesses against him is fundamental to Anglo-American jurisprudence.[1] It has developed from the belief that when government threatens an individual through legal action, the individual must be afforded fair opportunity to challenge the truth of the charge against him.[2] At common law, the essence of confrontation was the opportunity of the accused to cross-examine his accuser.[3] Although it was deemed highly desirable that the judge and jury be able to observe the demeanor of the witness, the right of personal confrontation was not absolute, and was dispensed with in necessity.[4] The framers of the federal constitution chose to expressly guarantee the right of confrontation in the sixth amendment, not as an absolute right, but with the qualifications inherent in the common-law rule.[5] The states generally guarantee at least common-law

[1] Virtually all the states, by constitution or by statute, and the federal constitution require that defendant be allowed to confront the witnesses against him. 5 WIGMORE, EVIDENCE § 1397 (3d ed. 1940).

[2] Greene v. McElroy, 360 U.S. 474, 496 (1959).

[3] 5 WIGMORE, EVIDENCE §§ 1395-96 (3d ed. 1940). *Id.* §§ 1395-1418 is the classic statement of the law of confrontation.

[4] See 5 WIGMORE, EVIDENCE §§ 1396, 1404 (3d ed. 1940); see also Mattox v. United States, 156 U.S. 237, 242 (1895).

[5] Mattox v. United States, *supra* note 4, at 243-44. *E.g.,* declarations from the deathbed are universally admissible without cross-examination. Dowdell v. United States, 221 U.S. 325, 330 (1911).

confrontation, some expressly requiring more (usually the face-to-face meeting of the accused and his accuser).[6] The universality of the confrontation—cross-examination privilege is the product of the belief that direct and challenging questioning is the ultimate test of the value of human statements.[7]

The Supreme Court has often indicated that it considers the right of confrontation an essential element of due process. It has described confrontation in words reminiscent of the *Palko v. Connecticut*[8] test of due process, viz., that it is inherent in the concept of ordered liberty and essential for fundamental fairness.[9] In *In re Oliver*,[10] the Court, dealing with a contempt conviction for alleged false testimony, held that due process requires the states to grant the defendant a reasonable opportunity to defend himself. By way of dicta, the Court indicated that both confrontation—cross-examination and representation by counsel were essential parts of the due process right of an accused to his day in court.[11] In the typical confrontation case, the Supreme Court has limited the issue to whether or not due process has been violated, using only the fundamental fairness standard. Although it had always indicated that confrontation was fundamental, until *Pointer* the Court had never held that confrontation was required by due process.

The role of the attorney in relation to this right has been unclear. All that common law seems to have required was an opportunity for cross-examination by a vitally interested opponent.[12] Although it was recognized that in modern criminal procedure, effective cross-examination could be conducted only by a skilled attorney,[13] apparently no formal rule requiring assistance of counsel had developed.[14] In the landmark decision of *Gideon v. Wainwright,* the Court held that by virtue of our adversary system, no person in court can be assured a fair trial unless counsel is provided for him.[15] Since the confrontation—cross-examination of witnesses is a major part of the attorney's work in criminal trials, *Gideon* prepared the way for a fuller consideration of the role of the attorney *vis-à-vis* confrontation.

In the instant case, Mr. Justice Black, writing for the Court, noted that *Gideon* had made the sixth amendment's right to assistance of counsel obligatory upon the states, and then declared that the amendment's right of confrontation is likewise a fundamental right, made applicable to the states by virtue of the fourteenth amendment's due process clause.[16] Therefore, the body of law advanced by the federal cases interpreting the sixth amendment guarantee of confrontation is binding upon the states.[17] Finally, the Court held

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[6] See State *ex rel.* Gladden v. Lonergan, 201 Ore. 161, 269 P.2d 491 (1954).

[7] 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940). The bias or falsity of the one-sided view of a witness is most effectively exposed by an opponent vitally interested in the contrary result. Greene v. McElroy, *supra* note 2, at 497.

[8] 302 U.S. 319, 325 (1937).

[9] See, *e.g.*, Turner v. Louisiana, 379 U.S. 466, 473 (1965); *In re* Oliver, 333 U.S. 257, 273 (1948).

[10] 333 U.S. 257 (1948).

[11] *Id.* at 273.

[12] See 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

[13] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[14] Pointer v. Texas, 375 S.W.2d 293, 295 (Tex. Crim. App. 1963).

[15] *Supra* note 13.

[16] Pointer v. Texas, 380 U.S. 400, 403 (1965).

[17] See *id.* at 406.

that the federal standard had been violated because the trial court had not afforded the defendant, *through counsel,* an adequate opportunity to cross-examine his accuser.[18] In a concurring opinion, Mr. Justice Harlan insisted that, since the due process clause of the fourteenth amendment was sufficient ground for reversal, the Court should not have resorted to incorporation of the federal standard of the sixth amendment guarantee.[19]

Since the Court had long regarded the right of confrontation as fundamental, it seems it was but a matter of time before it would formally incorporate this sixth amendment guarantee into the due process requirement of the fourteenth amendment. It is unusual, however, that it chose to adopt the sixth amendment's guarantee itself, *i.e.,* the federal standard *in toto* with all the nuances of the old federal decisions.[20] In this instance, the federal standard and that of the various states are virtually identical — both drawing heavily on Wigmore's definitive exposition of the law of confrontation.[21] Therefore, the principal case will effect little change in the individual's relation to the federal and state governments. Of course, there will now be a uniform confrontation standard, well-developed and quite explicit, protecting individuals from federal and state action. Further, the test of constitutionality will subsequently correspond to the federal case law; no longer will the states be subject to the uncertain test of fundamental fairness when questions of the denial of the right of confrontation arise.

The principal case, considered in conjunction with *Malloy v. Hogan*[22] (which held the federal standard of protection from compelled self-incrimination applicable to the states) seems to indicate the future incorporation of additional specific clauses of the bill of rights into the due process guarantee against the states. Such a result portends substantial changes in the law in those areas where the federal standard is more highly developed or more sensitive to the needs of protection of individuals than the standards of the various states.

As to the accused's right of counsel in confrontation, the Court's holding in the principal case might best be described as a formal integration of the previous federal law of confrontation[23] with the revolutionary holding of *Gideon v. Wainwright.*[24] Certainly *Gideon* foreclosed any further discussion of whether an attorney's aid at a criminal trial is essential to due process. The assistance of counsel is now formally held to be essential to a constitutionally valid cross-examination of an adverse witness.

*Pointer* will have a two-pronged effect on pretrial criminal procedure. First, and most obvious, is that if, at any preliminary hearing, the district attorney secures statements from witnesses who will not be present at the trial, the statements will be inadmissible unless the accused was allowed full opportunity, through counsel, to cross-examine these adverse witnesses at that

[18] See *id.* at 407.

[19] *Id.* at 408. Justices Stewart and Goldberg also concurred, Justice Goldberg offering his view as to the incorporation controversy. *Id.* at 410.

[20] *E.g., Gideon* guaranteed an indigent's right to court-appointed counsel in a state court, but did not adopt the standards previously applied to indigents in federal courts.

[21] See cases cited in notes 4, 5, 6, 9 *supra.*

[22] 378 U.S. 1 (1964).

[23] Pointer v. Texas, *supra* note 16, at 404-07.

[24] *Supra* note 13.

hearing. Secondly, and collaterally, the principal case might strongly influence the state's decision as to when it is necessary to appoint counsel to defend an accused indigent. The broad holding of *Escobedo v. Illinois*[25] (that the accused has a right to counsel when the process shifts from investigatory to accusatory) obviously creates a constitutional right to counsel long before the trial. Thus, to protect itself against unforeseen contingencies, the state may be forced to provide counsel for the indigent even before the constitution requires it.

[25] 378 U.S. 478, 490-91 (1964).

**"Allen Charge" Used in Absence of Deadlocked Jury**

Appellant was convicted of stealing from the mails, forging and uttering Government checks, and conspiring to commit the alleged acts. The United States Court of Appeals for the Fifth Circuit, reversing in part and affirming in part, *held* that the supplemental charge given the jury after their deliberation for approximately four and one-half hours did not go beyond the permissible "Allen charge,"[1] and therefore, did not constitute reversible error. *Walker v. United States,* 342 F.2d 22 (5th Cir. 1965).

Whenever the jurors, at early common law, were given the task of deliberating upon the evidence and reaching a verdict, they usually were not discharged until they had reached a verdict.[2] The purpose of keeping a jury together was twofold: (1) to keep the individual jurors free from improper influences;[3] and (2) to coerce agreement among the jurors.[4] To assure the success intended, the jurors were placed in the charge of a sworn officer of the court, without food, drink or fire (with the exception of candlelight).[5] If they did not agree before the court adjourned, they were carried around in a cart until a verdict was "bounced out."[6]

In the United States, this common-law practice was followed until 1851, when the Massachusetts Supreme Judicial Court in *Commonwealth v. Tuey,*[7] upheld the following charge which was read to a jury, after a reported deadlock:

[1] Allen v. United States, 164 U.S. 492 (1896). The charge permitted in *Allen* instructs the minority juror to examine the questions submitted to him with a proper regard for the conclusion of the majority; he need not, however, necessarily acquiesce in that conclusion.

[2] Shoukatallie v. R., 3 All E.R. 996, 1000 (1961).

[3] McHenry v. United States, 276 Fed. 761, 763 (D.C. Cir. 1921).

[4] *Ibid.*

[5] Shoukatallie v. R., *supra* note 2; *accord,* McHenry v. United States, *supra* note 3.

[6] 31 U. CHI. L. REV. 386 (1964); *accord,* McHenry v. United States, *supra* note 3.

[7] 62 Mass. (8 Cush.) 1 (1851).