Constitutional Right of Confrontation Applied to States
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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. 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. At common law, the essence of confrontation was the opportunity of the accused to cross-examine his accuser. 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. 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. 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).

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). 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.

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 test of due process, viz., that it is inherent in the concept of ordered liberty and essential for fundamental fairness. In In re Oliver, 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.

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. Although it was recognized that in modern criminal procedure, effective cross-examination could be conducted only by a skilled attorney, apparently no formal rule requiring assistance of counsel had developed. 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. 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. Therefore, the body of law advanced by the federal cases interpreting the sixth amendment guarantee of confrontation is binding upon the states. Finally, the Court held...
that the federal standard had been vio-
lated because the trial court had not af-
forded 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 amend-
ment was sufficient ground for reversal, the
Court should not have resorted to incor-
poration 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 it-
self, *i.e.*, the federal standard *in toto* with
all the nuances of the old federal deci-
sions.\(^{20}\) In this instance, the federal stan-
dard and that of the various states are virtu-
ally 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 indi-
vidual's relation to the federal and state
governments. Of course, there will now be
a uniform confrontation standard, well-
developed and quite explicit, protecting in-
dividuals from federal and state action.
Further, the test of constitutionality will
subsequently correspond to the federal
case law; no longer will the states be sub-
ject to the uncertain test of fundamental
fairness when questions of the denial of
the right of confrontation arise.

The principal case, considered in con-
junction with *Malloy v. Hogan*\(^ {22}\) (which
held the federal standard of protection
from compelled self-incrimination appli-
cable to the states) seems to indicate
the future incorporation of additional spe-
cific 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 fed-
eral 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 revolu-
tionary 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 wit-
ness.

*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 state-
ments from witnesses who will not be pres-
ent at the trial, the statements will be in-
admissible 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.
RECENT DECISIONS

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. Illinois25 (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.


“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,” 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.

4 Ibid.
5 Shoukatallie v. R., supra note 2; accord, McHenry v. United States, supra note 3.