July 2012

State Evidentiary Rules Prohibiting Impeachment of One's Own Witness Must Yield to a Criminal Defendant's Right to a Fundamentally Fair Trial (Welcome v. Vincent)

Julie H. Simpson

Follow this and additional works at: http://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.stjohns.edu/lawreview/vol52/iss2/9

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact cerjann@stjohns.edu.
STATE EVIDENTIARY RULES PROHIBITING IMPEACHMENT OF ONE’S OWN WITNESS MUST YIELD TO A CRIMINAL DEFENDANT’S RIGHT TO A FUNDAMENTALLY FAIR TRIAL

Welcome v. Vincent

Pursuant to traditional common law principles, a party is prohibited from attacking the credibility of his own witness. In recent years, however, this longstanding evidentiary maxim has been questioned on both utilitarian and constitutional grounds. Accordingly,

1 The rule of evidence which prohibits a party from impeaching his own witnesses on the theory that such party “vouches” for the credibility of those witnesses is of uncertain origin. One theory advanced in explanation of the rule is that it stemmed from the decisory oath of the Roman law, which prohibited a party who called a witness from later claiming that the witness was incompetent when such witness was subsequently called by the opponent. Another theory holds that the rule arose out of the trial by compurgation prevalent in the Middle Ages. Under that system of trial, the parties to a dispute enlisted “oath-helpers” who swore to the veracity of the party calling them as a witness. See generally 3A J. Wigmore, Evidence §§ 896-899 (Chadbourn rev. ed. 1970); Ladd, Impeachment of One’s Own Witness—New Developments, 4 U. Chi. L. Rev. 69, 76-80 (1936) [hereinafter cited as Ladd]. A third explanation of the rule is based upon transition from the inquisitorial method of trial to the adversary system. See generally id. at 70-72; Note, Impeaching One’s Own Witness, 49 Va. L. Rev. 996 (1963).

2 Professor Wigmore has contended that since the rule proscribing impeachment of one’s own witness is no longer based upon the idea that a party is bound by the witness’ statements or that he guarantees his witness’ credibility, the only possible rationale for the rule is the prevention of coercion of the witness. Professor Wigmore found little merit in this explanation, however, since the rule serves only to protect the dishonest witness and has almost no effect upon those who testify truthfully. See 3A J. Wigmore, Evidence §§ 897-899 (Chadbourn rev. ed. 1970).

According to Dean Ladd, since a party no longer has complete choice as to whom he calls as witnesses, there is no rational basis for assuming that he vouches for those whom he does call. Although he recognized that the concept of identifying a witness with a party stems from the adversary system, Dean Ladd argued that it is unreasonable to expect “a party to predict with accuracy what [the witness’] testimony will be in advance . . . .” Ladd, supra note 1, at 80.

Finally, Professor Morgan has concluded that since witnesses today usually testify to the facts in dispute and not to the veracity of the parties, a rule prohibiting a party from impeaching his own witness has no place in the modern adversary system. According to Professor Morgan, the many attempts to modify the rule illustrate that it no longer serves a useful purpose. See E. Morgan, Basic Problems of Evidence 70, 71 (1961).

3 The Supreme Court has long recognized that the right of cross-examination is “one of the safeguards essential to a fair trial.” Alford v. United States, 282 U.S. 687, 692 (1931). In Pointer v. Texas, 380 U.S. 400, 403 (1965), the Supreme Court held that the “sixth amendment’s right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.” See also In re Oliver, 333 U.S. 257, 273 (1948). Furthermore, the Pointer Court stated that the right of confrontation includes the right to cross-examine witnesses at a preliminary hearing. 380 U.S. at 406. In Barber v. Page, 390 U.S. 719 (1968), the Court extended the Pointer decision, holding that even where the defendant does not avail himself of the right to cross-examine a witness at a preliminary hearing, he does not waive the right to confront the witness at trial. Id. at 725. Further protection was afforded criminal defendants when the Court held, in Bruton v.
while this traditional "voucher" rule has been adopted by most jurisdictions, it gradually has been modified by various judicially created exceptions. Against this backdrop, the Second Circuit, in *Welcome v. Vincent*, held that a state trial court's refusal to allow a defendant to question his own witness concerning the latter's prior confession to the crime for which the defendant was being tried, to impeach the witness' credibility, constituted a denial of the defendant's right to a fundamentally fair trial and thereby violated the fourteenth amendment.

Defendant Welcome had been convicted of two murders committed during the course of an armed robbery. Prior to Welcome's indictment, another individual, Albert Cunningham, had been indicted and tried for the murders. At Cunningham's trial, New York police detectives testified concerning admissions made to them by Cunningham. Although a written confession was admitted into evidence, Cunningham had not signed it, nor had he sworn to his oral statements. In fact, prior to his trial, he had repudiated the confession on the ground that it had been elicited by coercive techniques. Nevertheless, Cunningham's statements were found to have been made voluntarily and were held admissible at trial. Thereafter,
despite the existence of these inculpatory statements, the charges against Cunningham were dropped during his trial.\textsuperscript{11}

Welcome and two codefendants subsequently were indicted and brought to trial in the New York Supreme Court, Bronx County. Called as a witness by Welcome, Cunningham offered testimony upon direct examination which was consistent with his earlier admissions to the police.\textsuperscript{12} Upon cross-examination by the state, however, Cunningham denied having participated in the crime, claiming he had mistakenly believed on direct examination that defense counsel had been inquiring about the content of his prior “confession” to the police.\textsuperscript{13} Thereafter, defense counsel attempted to impeach Cunningham by questioning him as to his “confession.”\textsuperscript{14} The trial court disallowed this line of questioning, reason-

---

\textsuperscript{11} 549 F.2d at 855. Subsequently, at Welcome’s trial, the Bronx District Attorney appeared and informed the court of his belief that Cunningham’s confession was unreliable. He indicated that Cunningham, a drug addict suffering from withdrawal symptoms, “would have admitted anything.” Id. Additionally, the prosecutor pointed out that a lie detector test suggested that Cunningham had not been implicated in the crime. The district attorney also asserted that it would have been impossible for Branch and Green, the two persons named by Cunningham, to have committed the robbery and murders, since one was in jail and the other was out of the state at the time. Id. Moreover, the district attorney noted that Cunningham had failed to identify the date of the crime, the building in which the crime took place, and the fourth participant in the crime. Finally, the prosecutor claimed that Cunningham’s statements were not made against his penal interest. 418 F. Supp. at 1092-93. Unlike the district court, the Second Circuit expressed doubt as to the district attorney’s claims that the statements were unreliable. The court pointed out that Cunningham had directed the police to the scene of the crime on two occasions, had indicated his awareness of the date of the crime, and had known the number of participants in the crime. In addition, the Second Circuit found that Cunningham’s statements were against his penal interest, since they implicated him in an armed robbery and two murders. 549 F.2d at 858 n.4.

\textsuperscript{12} See note 14 infra.

\textsuperscript{13} 549 F.2d at 856. See note 14 infra.

\textsuperscript{14} 549 F.2d at 856. Welcome’s attorney on direct examination had attempted to question Cunningham about his conversations with the detectives and the assistant district attorney. The trial judge sustained the prosecutor’s objection to this line of questioning, and allowed defense counsel to interrogate Cunningham only about the roles played by him and others in the murders. 418 F. Supp. at 1090-91. Cunningham then testified that he, Branch and Green drove to the Bronx on the date of the murders, armed with a shotgun and pistols, and robbed
ing that Cunningham was not technically an adverse witness, since Cunningham’s testimony had not incriminated Welcome. Following his conviction, Welcome pursued the available avenues of appellate review, to no avail. Thereafter, Welcome filed a petition for habeas corpus relief in federal district court. The district court held that Welcome had not been deprived of his right to a fair trial by virtue of the trial court’s refusal to allow impeachment of the witness Cunningham. In holding that defendant had been denied a fair trial as a result of the state trial court’s adherence to the traditional rule prohibiting impeachment of one’s own witness, the Second Circuit, in an opinion authored by Judge Oakes, relied heavily upon the Supreme Court decision in Chambers v. Mississippi. In Chambers, the defendant had introduced into evidence the sworn out-of-court confession of his witness, McDonald.

the Katz brothers’ realty office. On cross-examination, however, Cunningham denied robbing the Katz’ office, claiming that he had “misunderstood defense counsel and thought his questions referred to the confession . . . .” Id. at 1091.

15 418 F. Supp. at 1091. Defense counsel argued that since Cunningham had mentioned the confession in response to cross-examination by the prosecutor, the prosecution had “opened the door” to the defense’s questions aimed at establishing that Cunningham’s prior oral statements “were inconsistent with the answers given on cross-examination.” Id. The prosecutor argued in sidebar discussion that he had not elicited the reference to the “confession” from Cunningham, and the trial judge indicated that, had the prosecutor moved to strike the reference to the confession, the motion would have been granted. Id. at n.8.

16 Defendant’s conviction was affirmed without opinion by the Appellate Division of the New York Supreme Court in People v. Welcome, 39 App. Div. 2d 841, 331 N.Y.S.2d 995 (1st Dep’t 1972) (mem.). After Judge Burke initially denied leave to appeal to the New York Court of Appeals, defendant was granted leave by Chief Judge Breitel. 549 F.2d at 854. In the meantime, defendant moved, pursuant to N.Y. CRIM. PROC. LAW § 440.10(1)(g), (h) (McKinney 1971), for a new trial and vacatur of his conviction on the ground that a “prosecution witness has recanted his trial testimony and admitted perjuring himself.” 549 F.2d at 854. The Supreme Court, Bronx County, denied the motion and the appellate division affirmed the denial without opinion. People v. Welcome, 46 App. Div. 2d 860, 361 N.Y.S.2d 378 (1st Dep’t 1974) (mem.). Consolidating the direct appeal and the appeal from the denial of the motion for a new trial, the New York Court of Appeals, in People v. Welcome, 37 N.Y.2d 811, 338 N.E.2d 328, 375 N.Y.S.2d 573 (1975) (per curiam), dismissed the direct appeal and affirmed the denial of the motion for a new trial.

17 418 F. Supp. at 1089. The defendant based his habeas corpus action upon two grounds. First, he claimed that the trial court’s refusal to allow him to cross-examine Cunningham about the latter’s prior statement to the police deprived him of a fundamentally fair trial in violation of the due process clause of the fourteenth amendment. Second, the defendant contended that he had also been deprived of his due process right to a fair trial as a result of perjured testimony given by a prosecution witness. Id. at 1091-93.

18 Id. at 1094.

19 The Second Circuit found it unnecessary to consider Welcome’s claim that he had been denied a fair trial due to perjured testimony offered by a prosecution witness, since it found grounds for reversal in the trial court’s refusal to allow the defendant to cross-examine Cunningham as to his confession. 549 F.2d at 856. See note 17 supra.

On cross-examination, McDonald repudiated the confession. When defense counsel attempted to question McDonald regarding the confession and repudiation, the trial court ruled that McDonald could not be classified as an adverse witness and therefore was not subject to impeachment by the defendant. This ruling, coupled with the trial court's subsequent exclusion, as inadmissible hearsay, of the testimony of three witnesses to whom McDonald had confessed, led the Supreme Court to conclude that defendant Chambers had been denied "a trial in accord with traditional and fundamental standards of due process." In view of the limitation of the Chambers holding to the facts therein presented, the Welcome court recognized that it was not bound by that decision in resolving the present case. Due to the additional factor of the hearsay exclusion in Chambers, the Supreme Court, unlike the Second Circuit, had not been called upon to determine "whether a significant restriction on a defendant's examination of a witness who has confessed to the crime is alone enough to deny the defendant a fair trial." Nevertheless, in holding that the imposition of such a restriction may in itself result in the denial of a fair trial, Judge Oakes pointed to the emphasis in Chambers on a defendant's right to cross-examine witnesses and the importance of that right in ensuring a fair trial. Examining the factual setting of both Welcome and Chambers, the Second Circuit found a comparable degree of prejudice to each defendant stemming from the trial court's rigid applica-

\[\text{\small 410 U.S. at 291. On appeal, the Mississippi Supreme Court had upheld the trial court's ruling on the ground that "McDonald's testimony was not adverse to appellant" because '[n]owhere did he point the finger at Chambers.' }\]

\[\text{\small Id. at 292 (quoting Chambers v. State, 252 So. 2d 217, 220 (Miss. 1971) (per curiam)).}\]

\[\text{\small 410 U.S. at 292-93. The Chambers Court found that the excluded statements appeared trustworthy and that their admission was critical to the defendant's case. }\]

\[\text{\small Id. at 302. Exceptions to the hearsay rule traditionally are based upon a showing that the statements are trustworthy and that there is some necessity for their admission into evidence. 5 J. Wigmore, Evidence §§ 1421, 1422 (3d ed. 1940). For a discussion of the hearsay rule and its connection to the right of confrontation, see id. §§ 1395-1400; Younger, Confrontation and Hearsay: A Look Backward, A Peek Forward, 1 Hofstra L. Rev. 32 (1973).}\]

\[\text{\small Id. at 302-03.}\]

\[\text{\small 549 F.2d at 857.}\]

\[\text{\small Id. Commenting on the apparent emphasis in the Chambers opinion, Judge Oakes noted that, in light of that decision,}\]

\[\text{\small [t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." . . . It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."}\]

\[\text{\small Id. (citations omitted) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).}\]

\[\text{\small 549 F.2d at 857.}\]
tition of the rule proscribing impeachment of one's own witness.\footnote{Id.} Brushing aside the state trial court's reliance upon Cunningham's status as a nonadverse witness,\footnote{549 F.2d at 858.} the Welcome court pointed to the rejection in Chambers of such a technical ground for denying a defendant's right to cross-examine witnesses who give testimony damaging to him.\footnote{Id.} According to Judge Oakes, "Chambers makes clear that [defendant] did not give up his due process right to examine Cunningham thoroughly . . . by calling Cunningham to the witness stand."\footnote{Id.}

The Second Circuit went on to reject the district court's attempt to distinguish the instant case from Chambers. The district court had determined that Cunningham's confession appeared unreliable, and contrasted this with the situation in Chambers, where a denial of due process had been found "because the confession and related hearsay statements . . . bore 'persuasive indications' of reliability and 'trustworthiness.'"\footnote{549 F.2d at 858.} Hesitant to characterize Cunningham's confession as unreliable,\footnote{Id.} and uncertain whether the

\footnote{549 F.2d at 858.}

\footnote{Id.} The Second Circuit observed that the inability of Welcome to present Cunningham's confession to the jury deprived the jury of "information bearing directly on the key decision . . . whether to believe Cunningham's initial admission of guilt, which, if true, would have exonerated [Welcome]."\footnote{Id.} The court noted similarity to the Chambers situation "where 'all that remained from [the witness'] testimony was a single written confession countered by an arguably acceptable renunciation. Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination . . . .'"]\footnote{Id.} (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)). The district court concluded that the Supreme Court in Chambers had found a denial of the defendant's right to "'a [fair] trial in accord with traditional and fundamental standards of due process,' because the [combination of all the trial court's rulings] made Chambers' defense 'far less persuasive' than it would have been had his opportunity to present evidence not been restricted."\footnote{418 F. Supp. at 1092 (footnote omitted) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 302 (1973)).} According to the Welcome district court, the finding of a denial of due process in Chambers was based largely upon the exclusion of hearsay statements which bore persuasive indications of reliability.\footnote{Id. at 1092.} In analyzing the situation in Welcome, the district court did not find that Cunningham's prior statements to the police were persuasively trustworthy and held, therefore, that the court's refusal to allow cross-examination of Cunningham as to his confession did not damage Welcome's defense "to such an extent as to deny him a fundamentally fair trial."\footnote{Id. at 1093.}

\footnote{See 549 F.2d at 858.}
Supreme Court in *Chambers* had even considered the confession's trustworthiness, the *Welcome* court concluded that the witness' statement need not be so reliable as to support a conviction in order to be admissible for impeachment purposes. Nonetheless, Judge Oakes emphasized that the *Welcome* holding applies only to situations where a witness on the stand has made a prior confession which has some semblance of reliability and which, if true, would exculpate the defendant.

The decision of the Second Circuit in *Welcome* appears necessary to effectuate the constitutionally guaranteed right to a fundamentally fair trial. The *Welcome* court, as have other courts in the years since *Chambers*, focused upon whether the prior statement of the witness actually exculpated the defendant, rather than whether it merely incriminated the witness. Such an approach recognizes that the retraction of an exculpatory statement may be as damaging to the accused's case as is a direct incrimination of the defendant by the witness. The damaging nature of the retraction is the factor giving rise to the defendant's right of cross-examination, a right which should not be lost in a technical and often illusory distinction based upon whether the defense or the prosecution originally called the witness. Moreover, by requiring only that the confession have

---

34 *Id.* at 859.
35 *Id.* at 858-59.
36 In light of *Chambers*, a number of courts have determined that the exclusion of evidence may not form the basis of an unfair-trial claim unless the evidence excluded is exculpatory as to the defendant. In *Maness v. Wainwright*, 512 F.2d 88 (5th Cir. 1975), *cert. denied*, 425 U.S. 893 (1977), the Fifth Circuit found that the excluded evidence did not sufficiently exculpate the defendant to warrant finding the denial of a fair trial. *Id.* at 92. Subsequently, in *United States v. Hughes*, 529 F.2d 838 (5th Cir. 1976), the same court held that there was no showing of a denial of a fair trial where the prior statements of the witness which were excluded were not necessarily exculpatory, but rather might only have proved that the witness and the defendant were accomplices. *Id.* at 841. In *Commonwealth v. Gee*, 354 A.2d 875 (Pa. 1976), the Supreme Court of Pennsylvania, relying on *Chambers*, recognized that "in some circumstances the strict application of a state's voucher rule to prevent a defendant from cross-examining or contradicting a witness he himself has called can be a denial of his right to due process of law." *Id.* at 881. Nevertheless, the *Gee* court held that since the statements of certain eyewitnesses to the crime did not directly exculpate the defendant and were in fact collateral to the issue of defendant's guilt, due process did not require that defense counsel be allowed to question these eyewitnesses as to those statements. *Id.* at 883. In a case involving the exclusion of hearsay statements of the defendant's two brothers which were self-inculpatory, the Appellate Division of the New Jersey Superior Court held that there had been no denial of due process. *State v. Sease*, 138 N.J. Super. 80, 350 A.2d 262 (App. Div. 1975) (per curiam). In so holding, the court noted that since the crime could have been perpetrated by more than one person, the statements excluded were not necessarily exculpatory as to the defendant. *Id.* at 83, 350 A.2d at 264.
37 *549 F.2d* at 858-59.
38 See 410 U.S. at 298-99; note 30 and accompanying text *supra*. 
“some semblance of reliability” in order to trigger the defendant’s right of confrontation, instead of focusing upon the inaccuracies in Cunningham’s statement, the Second Circuit appears to have adopted a more cogent position than that of the district court. In order to ensure a defendant a fair trial, it would seem essential that all evidence which is exculpatory as to the defendant, including confessions by others, be presented to the jury for its evaluation.

Although it based its holding upon the due process right to a fair trial, rather than upon the defendant’s right to confront wit-

---

39 549 F.2d at 859.
40 Not only did the Second Circuit skeptically view the district court’s contention that Cunningham’s confession did not meet the test of reliability required under Chambers, but it was of the opinion that Chambers required “persuasive indications” of trustworthiness and reliability only in relation to the admission of hearsay evidence and not where a defendant seeks to cross-examine a witness as to prior exculpatory statements. Id. at 858. See text accompanying notes 29-31 supra. Since the witness is on the stand and can be questioned as to his prior statement, it is submitted that reliability is not an issue in determining whether to prohibit the defendant from impeaching a witness called by him. Rather, it is only in relation to hearsay testimony, where the witnesses are not available to be questioned, that reliability is a factor that should be considered. See, e.g., Dutton v. Evans, 400 U.S. 74, 89 (1970).


In the course of its opinion, the Welcome court, as had the Chambers Court before it, disclaimed any intention to constitutionalize the law of evidence. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Welcome v. Vincent, 549 F.2d 853, 859 (1977). In this regard, the Chambers Court stated that:

In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial. 410 U.S. at 302-03.

Without further explanation, however, Justice Rehnquist stated in his dissenting opinion in Chambers that “[w]ere [he] to reach the merits . . . [he] would have considerable difficulty in subscribing to the Court’s further constitutionalization of the intricacies of the common law of evidence.” Id. at 308 (Rehnquist, J., dissenting). See generally Note, Chambers v. Mississippi: Due Process and the Rules of Evidence, 35 U. Pitt. L. Rev. 725 (1974).

42 The Second Circuit in Welcome followed Chambers in relying upon the due process clause of the fourteenth amendment, rather than the confrontation clause of the sixth amendment, as authority for the reversal of a state criminal conviction. See Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973). This approach had previously been advocated by Justice Harlan in Dutton v. Evans, 400 U.S. 74, 93 (1970) (Harlan, J., concurring). The Justice argued that the confrontation clause was “not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence. . . . The task is far more appropriately performed under the aegis of the Fifth and Fourteenth Amendments’ commands that federal and state trials, respectively, must be conducted in accordance with due process of law.” Id. at 96-97. Accord, California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring). See generally Note, Chambers v. Mississippi: Due Process and the Rule of Evidence, 35 U. Pitt. L. Rev. 725 (1974).
nesses testifying against him, the Welcome court's opinion is in line with the general trend recognizing the importance of the latter right. The concern of the judiciary for a defendant's right to cross-examine witnesses was recently reflected in Davis v. Alaska. There, the Supreme Court held that a state statute prohibiting the admission into evidence of juvenile records, which the defendant sought to utilize in order to show the possible bias of a prosecution witness then on probation, violated the defendant's right under the confrontation clause to cross-examine effectively the witness against him. In so ruling, the Court reaffirmed that state evidence rules will be subjected to constitutional scrutiny in order to assure the rights of criminal defendants to cross-examine witnesses. Subsequent to Davis, the District Court for the District of Connecticut, in Chesney v. Robinson, held that a state rule mandating secrecy of grand jury proceedings must defer to the defendant's right of confrontation. These decisions seem to manifest a growing concern with the protection of a defendant's 'right to cross-examine witnesses. In both cases, the state interest in applying the evidentiary rule at issue was arguably greater than that in Welcome; yet, in each case the rule was subordinated to the defendant's constitutional rights. It is not surprising, therefore, that where an evidentiary rule which has as little support as the doctrine prohibiting impeachment

---

In a number of decisions, the Supreme Court has indicated that the rights provided by the confrontation clause of the sixth amendment are incorporated into the due process clause of the fourteenth amendment and therefore may not be infringed by state governments. See, e.g., Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).


415 U.S. at 320.

See id. at 318. In State v. Hembd, 232 N.W.2d 872 (Minn. 1975), the Minnesota Supreme Court held that under Davis the evidentiary privilege associated with the physician-patient relationship must yield to a criminal defendant's right of confrontation. In Hembd, which involved a charge of false imprisonment, the court found that the exclusion of certain medical records which would have weight to the defense violated the confrontation clause of the sixth amendment. Id. at 876.


403 F. Supp. at 311. Specifically, the court in Chesney held that a rule prohibiting impeachment of a prosecution witness by use of the witness' grand jury testimony violates the defendant's right of confrontation. Id. at 310-11.
of one's own witness comes into conflict with a defendant's constitutional right to cross-examine witnesses, the former principle would be displaced by the weightier constitutional considerations.

The Second Circuit decision in Welcome reflects the recent trend toward modification of state evidentiary rules to ensure conformity with constitutional provisions. While avoiding the outright invalidation of evidentiary principles, the federal courts have weighed the interests of the state against those of the defendant and often required the state to bear a heavy burden in demonstrating that a particular rule of evidence serves a legitimate interest. The Welcome holding thus adds to the growing body of decisions addressing the problem of a constitutional standard for the application of evidentiary rules. Whether such rules are measured against the right to a fair trial or the right to confront witnesses, the development of a constitutional standard should provide a framework within which courts can fairly apply evidentiary rules in criminal trials.

Julie H. Simpson

---

50 See note 2 supra.
51 Even prior to the adoption of the new Federal Rules of Evidence, at least two circuits had concluded that the rule proscribing impeachment of one's own witness should not be applied in federal criminal trials. See, e.g., United States v. Bryant, 461 F.2d 912, 918-19 (6th Cir. 1972); United States v. Freeman, 302 F.2d 347, 351 (2d Cir. 1962), cert. denied, 375 U.S. 958 (1963). In Freeman, the Second Circuit held that a witness may be impeached by the party calling him irrespective of whether he is adverse or hostile to that party. Id. at 351. Similarly, the Sixth Circuit, in Bryant rejected the notion that a witness must be adverse in the traditional sense before he may be impeached by the party calling him, and instead required a showing of hostility. 461 F.2d at 918.

At least one other court since Chambers has held that the denial of a defendant's right to impeach his own witness in certain instances is alone sufficient to require reversal of a criminal conviction. See United States v. Torres, 477 F.2d 922 (9th Cir. 1973). In Torres, the Ninth Circuit reversed a federal conviction, finding that, by virtue of the trial court's refusal to allow defense counsel to impeach his own witness where such impeachment was crucial to the defense, defendant had not received a fair trial. Id. at 923.

52 See notes 45-49 and accompanying text supra.
53 In Chambers, the Supreme Court recognized that in certain instances a legitimate state interest may outweigh a defendant's right to confrontation. Nonetheless, the denial of the confrontation right, according to the Chambers Court, "calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (quoting Berger v. California, 393 U.S. 314, 315 (1969) (per curiam)). Accord, Davis v. Alaska, 415 U.S. 204 (1974); Mancusi v. Stubbs, 408 U.S. 204 (1972); Chesney v. Robinson, 403 F. Supp. 306 (D. Conn. 1975), aff'd without opinion, 538 F.2d 308 (2d Cir.), cert. denied, 429 U.S. 867 (1976).