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Constitutional Law - The Sixth Amendment Right to Confrontation of Witnesses as Applicable to the State Through the Fourteenth Amendment

John M. Wilson

CONSTITUTIONAL LAW — THE SIXTH AMENDMENT RIGHT TO CONFRONTATION OF WITNESSES AS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT

Petitioner was arrested in Texas, charged with armed robbery, and taken before a state judge for a preliminary hearing in which he was not represented by counsel; however, there was no prohibition against counsel at the preliminary hearing.[1] Petitioner was allowed to cross-examine the witnesses if he so desired, and he did cross-examine some of the witnesses but not the alleged victim who had identified petitioner as the robber. Petitioner was subsequently indicted for the robbery and brought to trial. Because the alleged victim had moved out of the state and did not intend to return for the trial, the prosecution sought to introduce as evidence a transcript of the victim's testimony identifying petitioner, which was taken at the preliminary hearing. Defense counsel objected that admission of the transcript would violate petitioner's right of confrontation of witnesses under the sixth and fourteenth amendments of the United States Constitution. These objections were overruled by the trial judge for the reason that petitioner had been present at the preliminary hearing and had there been afforded the opportunity of cross-examining the witness, even though petitioner had not been afforded an opportunity to cross-examine through counsel.[2] Petitioner was convicted of robbery

1. TEXAS CODE CRIM. PROC. arts. 245-266 (1925). In Texas the preliminary hearing does not accept pleas of guilty or not guilty, but only decides whether or not the accused should be bound over for the grand jury and, if so, whether or not he should be allowed bail. The Code provides that the accused may be represented by counsel if he so desires, but counsel is not appointed for him at this stage in the criminal proceedings. In the instant case, the question was raised whether failure to appoint counsel at the preliminary hearing denied petitioner the assistance of counsel within the meaning of Gideon v. Wainwright, 372 U.S. 335 (1963), but the issue was not decided by the Court, which reserved judgment as to whether the Texas preliminary hearing was so critical a stage in the proceedings as to require the appointment of counsel. The cases of White v. Maryland, 373 U.S. 59 (1963), and Hamilton v. Alabama, 368 U.S. 52 (1961), were distinguished on the ground that in each of these cases pleas to the charge could be entered at the preliminary hearing.

2. The TEXAS CODE CRIM. PROC. arts. 250, 252 (1925) provides that the accused must be present at the preliminary hearing and that he or his counsel has the right to direct- and cross-examination of witnesses.

It is well settled that the right of confrontation includes the right of cross-examination. See MCCORMICK, EVIDENCE § 19 (1954). Generally, the requirement in the states is that an opportunity for *effective* cross-examination must be afforded. See 5 WIGMORE, EVIDENCE §§ 1371, 1394 (3d ed. 1940). However, it does not appear to be well settled whether the accused must be afforded the opportunity to cross-examine through counsel. See MCCORMICK, EVIDENCE § 231 (1954). In some situations it seems evident that cross-examination in the

under the Texas statute[3] and the conviction was affirmed by the Texas Court of Criminal Appeals over petitioner's renewed contention that the use of the transcript as evidence denied him rights guaranteed by the sixth and fourteenth amendments.[4] On certiorari, the United States Supreme Court reversed and remanded. *Held,* the sixth amendment right of an accused to confront the witnesses against him is of such a fundamental nature that it is deemed essential for a fair trial and is thus made applicable to state prosecutions through the fourteenth amendment according to the same standards applicable in federal prosecutions. *Pointer v. Texas,* 380 U.S. 400 (1965).

Prior to the instant case, as was evident from *West v. Louisiana,*[5] the sixth amendment right of confrontation was not effective against the states through the fourteenth amendment. The basis of the *West* decision was that the fundamental rights of citizens in state proceedings were adequately protected by the due process guarantee of a fair trial, and that incorporation of the sixth amendment into the fourteenth amendment was thus unnecessary.[6] On the facts in *West* the Court concluded that the petitioner had been afforded due process of law[7] and

absence of counsel would be ineffective, but in the informal atmosphere of a preliminary hearing under Texas law, cross-examination by the accused might be adequate.

3. TEXAS PENAL CODE art. 1408 (1925). In accordance with the statute, petitioner was sentenced to life imprisonment.

4. Pointer v. State, 375 S.W.2d 293 (Tex. Crim. App. 1963).

5. 194 U.S. 258 (1904); *accord,* Stein v. New York, 346 U.S. 156 (1953).

6. From its earliest decisions interpreting the fourteenth amendment, the approach of the Supreme Court has been to protect only those rights which were felt to be fundamental. See, *e.g.,* Cohen v. Hurley, 366 U.S. 117 (1961); Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934); Hebert v. Louisiana, 272 U.S. 312 (1926); Twining v. New Jersey, 211 U.S. 78 (1908); Maxwell v. Dow, 176 U.S. 581 (1900); Holden v. Hardy, 169 U.S. 366 (1898); Hurtado v. California, 110 U.S. 516 (1884); Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872). If the right was required by "certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard" (Holden v. Hardy, 169 U.S. 366, 389 (1898)), it was protected from state infringement by the due process clause of the fourteenth amendment; if it was not so fundamental, it was not applied to the states through the fourteenth amendment. Due process was later defined by the Supreme Court as action that is "consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" Hebert v. Louisiana, 272 U.S. 312, 316 (1926). Further attempts to define due process are too numerous to mention, but they all convey the idea that due process is action that is "of the very essence of a scheme of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937).

7. In *West* the witness had been cross-examined *through counsel* at the preliminary hearing. When the prosecution was unable to produce the witness at the trial, a transcript of his earlier testimony was introduced into evidence.

expressed the view that the right to confrontation was not so basic or fundamental as to be *absolutely* necessary, so long as a *fair trial* was achieved without it. Since *West,* however, the Supreme Court has repeatedly termed the right of confrontation fundamental, essential, and basic to a fair trial.[8] The language in many of these decisions appears inconsistent with the holding in the *West* case.[9]

An early decision of the Supreme Court[10] rejecting the idea that the entire Bill of Rights was incorporated into the fourteenth amendment indicated that some of the provisions of the first eight amendments might possibly be protected from state action because a denial of these freedoms "would be a denial of due process of law."[11] The Court added that such provisions would be protected, not because they were contained in the Bill of Rights, but because they were so fundamental as to be essential to due process.[12]

Throughout the Court's history, individual liberties have increasingly been absorbed into the fourteenth amendment as being so fundamental that they were protected by the due

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It appears that perhaps the instant case would have been decided in accordance with *West* if there had been an opportunity to cross-examine through counsel at the hearing. The majority opinion states that "the case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." 85 Sup. Ct. 1065, 1069-70 (1965).

8. Turner v. Louisiana, 379 U.S. 466 (1965); Greene v. McElroy, 360 U.S. 474 (1959); *In re* Oliver, 333 U.S. 257 (1948); Alford v. United States, 282 U.S. 687 (1931). The decision in the *Turner* case was not as broad as the instant decision but the Court said that "'evidence developed' against a defendant shall come from a witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 379 U.S. 466, 472. See also Willner v. Commission on Character & Fitness, 373 U.S. 96 (1963).

A collection of state and English cases is found in 5 WIGMORE, EVIDENCE §§ 1367, 1395 (3d ed. 1940). For state constitutional and statutory provisions similar to the sixth amendment protection, see *id.* § 1397, n.1.

9. *But see* Stein v. New York, 346 U.S. 156 (1953).

10. Twining v. New Jersey, 211 U.S. 78 (1908).

11. *Id.* at 99. Since the passage of the fourteenth amendment, ten Justices have expressed the view that it incorporates the entire Bill of Rights and applies it to the states. Justices Bradley and Swayne took that position in the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872), as did Justice Clifford in Walker v. Sauvinet, 92 U.S. 90 (1875). A similar position was taken by Justices Field, Harlan, and Brewer in O'Neil v. Vermont, 144 U.S. 323 (1892), and by Justices Black, Douglas, Murphy, and Rutledge in Adamson v. California, 332 U.S. 46 (1947). However, this position has never commanded a majority on the Court.

12. 211 U.S. 78, 99 (1908). The opinion in *Twining* seems to raise the question whether all of the provisions in the Bill of Rights are really fundamental. For example, is the seventh amendment guarantee of a jury trial in all civil suits involving a sum in excess of twenty dollars fundamental to the maintenance of a democratic society?

process clause. When these freedoms were incorporated into the fourteenth amendment, they were held to be governed by the same standards applicable to the federal government. As late as 1922, it was held that the Constitution did not restrict the states in matters pertaining to freedom of speech,[13] but within three years there began a series of decisions which held the entire first amendment protected from state infringment.[14] Similarly, the fourth amendment freedoms were at one time held not protected from encroachment by the states,[15] but recent cases have brought them within the protection of the due process clause.[16] An early decision brought the fifth amendment's just compensation clause within the area of protection from state action because it was felt to be fundamental to the maintenance of our free society.[17] Last year *Malloy v. Hogan*[18] held the self-incrimination clause of the fifth amendment applicable to the states according to the federal standard. This case overruled prior decisions holding that the privilege against self-incrimination did not limit the states because it was not a fundamental freedom.[19] In 1963, the assistance-of-counsel provision of the sixth amendment was likewise applied to state proceedings,[20] even though earlier decisions had held that it did not apply to the states.[21] The eighth amendment's prohibition of cruel and unusual punishments is now applicable to the states[22] despite earlier decisions to the contrary.[23]

Since the instant decision applies the right of confrontation and cross-examination to the states in accordance with the

13. Prudential Ins. Co. of America v. Cheek, 259 U.S. 530 (1922).
14. Gitlow v. New York, 268 U.S. 652 (1925). See New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffen, 303 U.S. 444 (1938); DeJonge v. Oregon, 299 U.S. 353 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1936).
15. Palko v. Connecticut, 302 U.S. 319 (1937); Weeks v. United States, 232 U.S. 383 (1914).
16. Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Wolf v. Colorado, 338 U.S. 25 (1949).
17. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).
18. 378 U.S. 1 (1964).
19. Cohen v. Hurley, 366 U.S. 117 (1961); Adamson v. California, 332 U.S. 46 (1947); Snyder v. Massachusetts, 291 U.S. 97 (1934); Twining v. New Jersey, 211 U.S. 78 (1908).
20. Gideon v. Wainwright, 372 U.S. 335 (1963).
21. Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).
22. Robinson v. California, 370 U.S. 660 (1962).
23. O'Neil v. Vermont, 144 U.S. 323 (1892); McElvaine v. Brush, 142 U.S. 155 (1891); *In re* Kemmler, 136 U.S. 436 (1890).

federal standard, it is necessary to determine what the federal standard is. The Court explicitly states that the right of cross-examination is not satisfied unless there is cross-examination *through counsel.*[24] It is questionable whether this requirement had previously existed,[25] though some decisions seem to begin with the assumption that "cross-examination" is synonymous with "cross-examination through counsel."[26] These decisions perhaps suggested that normally cross-examination by someone other than counsel would be ineffective. Uncertainty on this particular point of federal law is ended by the instant case, which establishes a definite rule for both federal and state courts.

In holding that the sixth amendment right of confrontation is obligatory on the states through the due process clause of the fourteenth amendment, the Court in the instant case classified the right of confrontation as fundamental and basic—a right in the absence of which there could be no fair trial. The Court adopted the premise that the right of cross-examination is included within the right of an accused to confront the witnesses against him, and then used the broad language of *Gideon v. Wainwright* to express the idea that any provision of the first eight amendments which is "fundamental and essential to a fair

24. The majority opinion states that "because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner *through counsel* an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment." 85 Sup. Ct. 1065, 1070 (1965). (Emphasis added.)

25. It appears that the federal position on this narrow point has never been definitively stated. Apparently, until *Pointer*, the federal courts had never been called upon to decide whether the right of cross-examination had been abridged when cross-examination *through counsel* was lacking. There is, however, language in many federal cases implying that an opportunity to cross-examine is all that is required. See, *e.g.*, Brown v. United States, 234 F.2d 140 (6th Cir. 1956); Kemp v. Government of Canal Zone, 167 F.2d 938 (5th Cir. 1948); Curtis v. Rives, 123 F.2d 936 (D.C. Cir. 1941); United States v. Talbot, 133 F. Supp. 120 (Alaska 1955); United States v. Barracota, 45 F. Supp. 38 (S.D. N.Y. 1942). The language of the Federal Rules of Criminal Procedure in the area dealing with cross-examination at the preliminary hearing seems to imply that only the opportunity to cross-examine is required. See FED. R. CRIM. P. 40(b) (3).

For the majority state position see 5 WIGMORE, EVIDENCE §§ 1371, 1394 (3d ed. 1940). This text and the supporting cases express the conclusion that actual cross-examination is not required but only an opportunity to exercise the right if so desired. Section 1394 states that "*lack of counsel* does not necessarily import lack of opportunity to cross-examine." The *opportunity* for *effective* cross-examination appears to be the requirement as interpreted by Professor Wigmore. *But see* note 26 *infra* and accompanying text.

26. See, *e.g.*, Turner v. Louisiana, 379 U.S. 466, 472 (1965); *In re* Oliver, 333 U.S. 257, 273, 275, 278 (1948); Alford v. United States, 282 U.S. 687, 691-92 (1931); Motes v. United States, 178 U.S. 458, 468 (1900).

trial"[27] is therefore obligatory on the states through the fourteenth amendment. The Court stated that inclusion of the right of confrontation in the Bill of Rights reflected the belief of the draftsmen that it was basic to our free society.[28] In overruling *West*, the Court reasoned that the *West* decision was based on the proposition that the sixth amendment in its entirety did not apply to the states, and that since *Gideon*, this proposition was untrue; hence, that *West* was no longer valid. Finally, in emphasizing its present position on incorporating various provisions of the Bill of Rights within the fourteenth amendment, the Court quoted from *Malloy:* "The Court 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."[29] Thus, the rule that an accused must be afforded an adequate opportunity to cross-examine an adverse witness *through counsel* required the conclusion in this case that introduction of the transcript at the trial was a denial of the right of confrontation guaranteed by the sixth and fourteenth amendments.

It should be added that the Court took note of exceptions to the right of cross-examination such as dying declarations and the testimony of a deceased witness given at a former trial,[30] and stated that nothing in the instant decision was intended to overrule these exceptions. The Court also suggested that if petitioner had been afforded the privilege of cross-examination through counsel at the preliminary hearing, the present decision might have been different.[31]

The instant decision is part of a trend toward more complete application at the state level of the individual freedoms enumerated in the first eight amendments to the Constitution. The present concept of what is basic to justice includes more personal liberty than did the prevailing concept of an earlier era. Be-

27. 372 U.S. 335, 342 (1963).
28. See cases cited notes 8 and 9 *supra.*
29. 378 U.S. 1, 5 (1964).
30. See Mattox v. United States, 156 U.S. 237 (1895).
31. See notes 2 and 7 *supra.* The Court seems to indicate that if there had been cross-examination through counsel at the preliminary hearing then the transcript of this testimony could have been introduced into evidence at the trial in the absence of the witness. Basically, this was the factual situation in the *West* case, and it appears that *West* could be reconciled with the instant decision except for its broad language that the entire sixth amendment does not apply to the states. 194 U.S. 258, 264 (1904).

cause of this, personal privileges and freedoms are receiving more protection from state abuse than they once did. The minority position, as expressed in separate concurring opinions by Justices Harlan and Stewart, was that the state conviction should be reversed because absence of an opportunity to confront and cross-examine the witness, through counsel, was a denial of due process of law guaranteed by the fourteenth amendment, but that the fourteenth amendment should be controlling independently of the sixth. Justice Harlan argued that the Court had not incorporated the first eight amendments *in toto* was evidence that not all of the provisions of the Bill of Rights are fundamental,[32] yet the Court ignored the possibility that all parts of any one provision may not necessarily be fundamental. The traditional and indispensable diversity of the federal system, subject of course to due process of law, was also alluded to by Justice Harlan as a reason not to bind the states rigidly in the area of criminal law enforcement. The minority view would afford adequate protection for the individual liberties deemed fundamental, and, at the same time, would be more in keeping with the language and apparent intent of the fourteenth amendment. However, the majority holding is definite and explicit and also clarifies the federal rule. It appears that the other states with a Texas-type preliminary hearing, including Louisiana,[33] will be compelled to modify their procedure to bring it in accordance with the instant decision.

John M. Wilson

SECURITY DEVICES—PLEDGE—REQUIREMENT OF DISPOSSESSION

Plaintiff financed the purchase of a used automobile through defendant corporation. Delinquent on three installment payments, plaintiff "pledged" the car to defendant in consideration of an extension of thirteen days and agreement by defendant not to bring suit during the extension period. The agreement provided that if the installment notes remained unpaid at the end of the extension period, defendant could sell the car without resort to legal process; the car, however, remained in plaintiff's

32. See notes 10, 11, 12 *supra*.
33. See LA. R.S. 15:153-155 (1950).