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COMMENT

EVIDENCE—HEARSAY AND CONFRONTATION—THE ADMISSION AS SUBSTANTIVE EVIDENCE OF A PRIOR STATEMENT MADE BY A WITNESS WHO AT TRIAL HAS NO RECOLLECTION EITHER OF MAKING THE STATEMENT, OR OF THE EVENTS IT DESCRIBES, NEITHER VIOLATES THE GENERAL LAW OF EVIDENCE NOR DENIES DEFENDANTS' CONSTITUTIONAL RIGHT TO CONFRONTATION. *United States v. Payne*, 492 F.2d 449 (4th Cir.), *cert. denied*, 419 U.S. 876 (1974).

In *United States v. Payne*,[1] three brothers found guilty of conspiracy to utter forged Federal Reserve notes[2] appealed their convictions on the ground that the district court erroneously and unconstitutionally admitted into evidence an unsigned statement of a fourth brother, Burrell Payne. The statement, which implicated the Payne brothers, was made to a Secret Service agent who testified at trial that he interrogated Burrell and transcribed the statement until Burrell complained of dizziness, headache and loss of memory.[3] Called by the government to testify at his brothers' trial, Burrell, who pleaded guilty at a separate arraignment,[4]

1. 492 F.2d 449 (4th Cir.), *cert. denied*, 419 U.S. 876 (1974).
2. 18 U.S.C. § 472 (1970). Section 472 provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligations or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

3. 492 F.2d at 450. The statement contained the notation that Burrell was advised that he had the right to remain silent, that anything he said could be used against him, and that the statement was made of his own free will and without promise of immunity. The statement provided that in November of 1971, Burrell obtained from Hubert Payne 35 counterfeit $10 bills, apparently as a gift, and that he passed them with the help of a fourth codefendant at various places in western Virginia and southern West Virginia. Later, Burrell received additional counterfeit bills from Hubert by paying two dollars for each $10 bill. Burrell also stated that "I believe my brothers Roland, Clifford and Chester also had some counterfeits." The statement ended with the notation that it was incomplete and unsigned because "subject complains of lapses of memory and dizzy spells." The statement was signed by the interrogating agent. *Id.* at 450-51.
4. Six months before his brothers' trial, Burrell pleaded guilty in his own case to the same charge. At his arraignment, he was interrogated as to the voluntariness of his plea. *See* FED. R. CRIM. P. 11. The record of that proceeding shows that he evidenced no difficulty in understanding the court's questions, and even his counsel affirmed that he understood what he was doing. 492 F.2d at 452. The court then sought to determine if there was a factual basis for the guilty plea. *See* FED. R. CRIM. P. 11. The Secret Service agent testified to the interview with Burrell, and his testimony agreed with the contents of the statement. Burrell admitted having been advised of his rights and having signed the waiver before being questioned by the agent. The court accepted the guilty plea. 492 F.2d at 450.

claimed no recollection of pleading guilty, of talking to Secret Service agents, or of passing counterfeit money. Burrell was shown the statement but stated that it failed to refresh his memory concerning the events described in the statement or the interview with the Secret Service agent. The trial court concluded that Burrell was not feigning the inability to remember and subsequently admitted the written statement as substantive evidence.[5] The Fourth Circuit Court of Appeals, in a two-one decision,[6] affirmed the convictions and held that the admission of the statement made by Burrell Payne did not violate general hearsay principles of evidence law or the confrontation clause of the sixth amendment.[7]

The right of confrontation[8] and the hearsay rule[9] both exclude certain evidence unless the declarant actually testifies and

5. *Id.* at 456.

6. Judge Widener dissented. *Id.* at 455.

7. At the outset, it is pertinent to note that the majority opinion in *Payne* overlooks the rule of Lutwak v. United States, 344 U.S. 604 (1953), and Krulewitch v. United States, 336 U.S. 440 (1949), that in a federal conspiracy trial, a statement made by a conspirator, out of court and not in the course or furtherance of the conspiracy, is not admissible against fellow conspirators. Thus, a statement made in the concealment phase is not admissible. Apparently, *Payne* could have been reversed on this ground alone. In his dissent, Judge Widener noted the majority opinion's failure to follow this rule but devoted the bulk of his opinion to addressing the issues raised by the manner of the majority's disposition of the case. 492 F.2d at 457, 465.

8. U.S. CONST. amend. VI states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

9. In 5 J. WIGMORE, EVIDENCE § 1364 (Chadbourne rev. 1974) [hereinafter cited as WIGMORE], the author states in part:

> Under the name of the hearsay rule, then, will here be understood that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it.

See also C. MCCORMICK, EVIDENCE § 246 at 584 (2d ed. 1972) (emphasis omitted) [hereinafter cited as MCCORMICK] in which the following definition is offered:

> Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.

The Federal Rules of Evidence [hereinafter cited as FED. R. EV.] were approved by Congress on January 2, 1975, to take effect 180 days later. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1. The Federal Rules are reported at 12A U.S. CODE CONG. & AD. NEWS 1-38 (1975). Hearsay is defined in rule 801(c): "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 802 excludes the admission of hearsay unless it falls under a specific exception: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by an Act of Congress."

is subject to cross-examination in court. Although similar, the two principles are not identical in purpose or in application.[10] The rule against hearsay seeks to insure the reliability of evidence by excluding testimony when the declarant's credibility cannot be tested. When the declarant is unavailable[11] for testimony, a hearsay statement is excluded because it is not verified by oath, is not made before a jury capable of observing the declarant's demeanor, and because the declarant is not subjected to cross-examination. Since, however, a total prohibition of hearsay would substantially reduce the quantity of evidence, numerous excep-

10. *See* California v. Green, 399 U.S. 149, 155 (1970), in which the Court stated:

> 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 and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence . . . .

In Dutton v. Evans, 400 U.S. 74, 86 (1970), the Court stated: "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now." *See also The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 111 (1970); MCCORMICK, *supra* note 9, § 252 at 606-07.

Professor Wigmore, generally unsympathetic to claims of the individual against the state, reduced the confrontation clause to simply a right to cross-examine the witnesses produced by the prosecutor at trial. 5 WIGMORE, *supra* note 9, § 1397. For a criticism of Wigmore's view, *see* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972) [hereinafter cited as *Graham*]. *But see* Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 6-8 (1972) [hereinafter cited as *Read*], in which the author indicates that most commentators agree with Wigmore that hearsay and confrontation are coextensive rules whose purpose is to protect the value of cross-examination. He refers to F. HELLER, THE SIXTH AMENDMENT 104-06 (1951), for a similar proposition. 45 S. CAL. L. REV. at 6 n.20.

11. The issue of availability of the declarant is treated in the Federal Rules of Evidence. Rule 803 sets out 24 exceptions to the hearsay rule which do not require unavailability. The Advisory Committee's Note stated that the rule

> is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility.

Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 323 (1972). The exceptions falling under rule 804, however, require the declarant to be "unavailable" as a witness, as defined in 804(a). The Advisory Committee's Note stated that rule 804

> proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.

56 F.R.D. at 323. Under rule 804(a)(3), Burrell was unavailable, because he "[testified] to a lack of memory of the subject matter of his statement."

tions to the hearsay rule have been created.[12] For example, a statement made as former testimony may be admissible when the oath and cross-examination requirements are met.[13] Likewise, a prior statement of a witness that is inconsistent with his testimony at trial is sometimes admissible as substantive evidence on the theory that the declarant is then present to attempt to reconcile that inconsistency to the court and jury.[14] Past recollection recorded, a further exception to the hearsay rule, allows admission of a prior writing that the witness can verify was true at the time it was made, although the witness can no longer recall the events described by the writing.[15] The goal of the confrontation requirement encompasses not only the substantive reliability of testimony but also the procedural fairness of the trial by providing the criminal defendant with the right to examine and test the state's evidence in court.[16] Due to the working interrelationship

12. Fourteen exceptions are listed in 5 WIGMORE, *supra* note 9, § 1426; 28 exceptions are listed in FED. R. EV. 803-04.

13. FED. R. EV. 804(b)(1) gives this definition of former testimony which is not excluded by the hearsay rule:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

See also MCCORMICK, *supra* note 9, § 255 at 616.

14. *See* MCCORMICK, *supra* note 9, § 251; FED. R. EV. 801(d)(1)(A).

15. FED. R. EV. 803(5) gives this definition of recorded recollection which is not excluded by the hearsay rule:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

See also MCCORMICK, *supra* note 9, § 299, at 712 which states:

> As the rule permitting the introduction of past recollection recorded developed, it required that four elements must be met: (1) the witness must have firsthand knowledge of the event, (2) the written statement must be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it, (3) the witness must lack a present recollection of the event, and (4) the witness must vouch for the accuracy of the written memorandum.

16. The exact intent of the confrontation clause is probably undiscoverable. *See Read, supra* note 10, at 6. A good discussion of the historical origins of the confrontation clause is found in Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH L. REV. 67 (1969). Because confrontation has been historically interrelated with the hearsay rule, however, it is not surprising to discover that the clause is also used to maximize the

of the right to confrontation and the hearsay rule, an expansion of exceptions to the hearsay rule may have the effect of denying rights provided by the confrontation clause.

Hearsay Aspects of Payne

Reliability is a major basis for admission as an exception to the hearsay rule, and Burrell's prior statement in *Payne* was not without some indications of reliability and trustworthiness. At the time the statement was made Burrell had been advised of his constitutional rights and understood that what he said could be used against him.[17] Further, as a declaration against Burrell's penal interest, the statement would probably not have been made if untrue.[18] Not knowing Burrell's relationship with his brothers,

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probability that the truth will emerge. *See* Semerjian, *The Right of Confrontation*, 55 A.B.A.J. 152, 153 (1969) [hereinafter cited as *Semerjian*], in which the author notes that "if the accused is not given the opportunity to bring all known relevant information to bear on the testimony against him, this purpose cannot be effectively realized." *Id.* at 156. *See* Jencks v. United States, 353 U.S. 657 (1957). The reliability of a conviction is enhanced when the witness makes the accusation in the presence of the jury and is then cross-examined by the defendant, because the testimony is more likely to be truthful. *See* Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 U.C.L.A. L. REV. 366 (1966). The article concludes that the constitutional rights of the individual have consistently outweighed the concern for efficient judicial administration, and additional administrative burdens are justified to protect the criminal defendant's guarantee of confrontation. *Id.* at 380. *See also* Mattox v. United States, 156 U.S. 237, 242-43 (1895). Society seeks this enhanced reliability in response to a natural fear of conviction and imprisonment of the innocent. *Semerjian, supra* at 153. Another reason advanced for the confrontation right is that it is believed to be a method to control prosecutorial misconduct and resulting unfair trials. Comment, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1438-39 (1966).

17. 492 F.2d at 450. *But see* Judge Widener's dissent doubting that the statement could be admitted as substantive evidence at Burrell's trial because on its face it did not comply with Escobedo v. Illinois, 378 U.S. 478 (1964), or Miranda v. Arizona, 384 U.S. 436 (1966). 492 F.2d at 457 n.6.

18. While the concept of declaration against penal interest is only slowly gaining approval as a determinant of admissibility, it remains a positive indicator of the truthfulness of the statement insofar as it recounts Burrell's activities. *See* MCCORMICK, *supra* note 9, § 278 at 673; Dutton v. Evans, 400 U.S. 74, 89 (1970). FED. R. EV. 804(b)(3), in defining a statement against interest as excluded from the rule against hearsay, states in pertinent part:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

See McClain v. Anderson Free Press, 232 S.C. 448, 102 S.E.2d 750 (1958). *See also* 79 DICK. L. REV. 189 (1974), which studies the admissibility of declarations against penal interest in light of Commonwealth v. Hackett, 225 Pa. Super. 22, 307 A.2d 334 (1973). The appellate court reversed, as a denial of defendant's right to due process, the exclusion as hearsay

however, one could not without great difficulty predict the accuracy of the portions relating to them; the assumption that reasonable men do not make statements against their own interest does not necessarily apply to statements against the interest of others.[19] Beyond these factors, however, the "indicia of reliability"[20] are less substantial. As Judge Widener noted in his dissent:

> [T]he statement itself is unsworn to, unsigned, not in Burrell's handwriting, and was concluded with the inscription that it was incomplete and unsigned because Burrell complained of "lapses of memory and dizzy spells." The statement itself . . . is suspect on its face . . . .[21]

The prime factor determinative of actual reliability should be the condition of Burrell's memory at the time the statement was made; however, ex post facto evaluation of such a condition would be practically impossible. In any event, the court did not rest its decision on these factors.

The court first referred to Burrell's statement as a past recollection recorded. The statement, however, fails to comply with all the elements of Dean McCormick's definition of this hearsay exception.[22] The written statement was made two months after the events it described, but such a delay may be permissible under the rule. Whether it was made while Burrell had an accurate memory of the events is, at best, unclear since the taking of the statement was terminated when he complained of loss of

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by the trial court of an *exculpatory* statement from a third party. The author collects these justifications favoring admissibility:

> It has been argued that there is no reason for making a distinction between declarations against penal interest and declarations against pecuniary interest, that no statement is more strongly against interest than that adverse to one's penal interest, that such a limitation is inconsistent with the broad language originally employed in stating the reason and principle of the present exception, and that a declaration against one's penal interest will adversely affect one's pecuniary interest, and thus should be admissible. The opposing rationales causing the split of authority seem to be based upon a difference of opinion as to whether or not the threat of criminal prosecution is sufficient to preclude an individual from making an untruthful statement against his penal interest.

Id. at 193 (footnotes omitted).

19. *See* Note, *Preserving the Right to Confrontation - A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 755 (1965) [hereinafter cited as *Preserving the Right*].

20. The phrase "indicia of reliability" is from the plurality opinion in *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

21. 492 F.2d at 457.

22. *See* note 15 *supra*.

memory. More significantly, however, Burrell failed to vouch for the accuracy of the written statement; at the trial he failed to recollect even its making, as well as the events it described. It is imperative to the operation of the exception that the witness adopt the statement, because its reliability is based on that verification of its accuracy.[23] Burrell's failure to authenticate the statement places the statement outside the boundaries of the past recollection recorded exception.[24]

The court then reasoned that a statement which does not meet the tests for trustworthiness under the past recollection recorded exception may still be admissible under *that* exception if it complies with the reliability requirements for other recognized exceptions.[25] The court developed its rationale for admitting the

23. 12A U.S. CODE CONG. & AD. NEWS at 63-64 gives this additional commentary on rule 803(5) (recorded recollection exception to the hearsay rule) from the Senate Report in the legislative history section:

> Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." . . . [T]he important thing is the accuracy of the memorandum rather than who made it.

24. Even if the statement were to qualify as past recollection recorded, it is unsettled whether it may be admitted as substantive evidence. The court in *Payne*, citing *California v. Green*, correctly noted that the majority position is that such evidence may not be offered as substantive evidence but may be introduced to impeach the credibility of a witness who changes his story at trial. It also noted that the minority view could permit substantive use because the dangers of hearsay are reduced when the witness testifies. If forced to choose, the court indicated that in this case, they would have been influenced by the potential fostering of perjury because Burrell might feign the memory loss if it would exclude the statement. The court, however, did not base its determination that the statement was admissible on this exception and so did not make that choice. Instead it turned to the former testimony and prior inconsistent statement exceptions to find admissibility. 492 F.2d at 451-52.

25. The court's attempt to avoid mechanical application of the hearsay rule when the rule's purpose is substantially fulfilled is not without merit. Federal Rules of Evidence 803(24) & 804(b)(6) provide that "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness" should not be excluded by the hearsay rule. The Advisory Committee's Note gave this explanation:

> It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6) are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area . . . .

statement by applying the standards for establishing reliability (and hence admissibility) under two other exceptions, prior inconsistent statements and former testimony. The majority declared that "prior inconsistent statements of a witness available for cross-examination may be received as affirmative proof when they were made at a former trial or before a grand jury."[26] They then found that the unchallenged testimony of the Secret Service agent at Burrell's arraignment, under the circumstances of the arraignment, satisfied those reliability standards, although the statement itself obviously did not fit the other requirements of those exceptions.[27] The court found that the testimony, as pre-

56 F.R.D. at 320. To carefully control that "growth and development" and to regulate the creation of additional hearsay exceptions, Congress, in adopting the rules, added these restrictions; and the rule now provides an exception for

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED.R.EV. 803(24) & 804(b)(5). *See also* Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 973-74 (1974).

26. 492 F.2d at 451. For support, the court cited United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970) and United States v. Insana, 423 F.2d 1165 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970). Neither case, however, is directly applicable to *Payne*, and both cases dealt with the issue only in dicta. In *Mingoia*, grand jury testimony was used, not as affirmative evidence, but to impeach a witness at trial. 424 F.2d at 713. *Insana* concerned a witness who admitted his false lack of recollection was due to a desire "not to hurt anyone." 423 F.2d at 1170. Although a feigned memory loss coupled with an admitted wish not to harm others is a reaffirmation of the statement or at least a strong indication of its reliability, Burrell made no such admissions, and the trial court concluded that Burrell had suffered an actual loss of memory. 492 F.2d at 456.

27. There is disagreement whether prior statements should be admitted as substantive evidence where the witness disclaims all present knowledge, because the opportunities for testing the statement through cross-examination may be significantly diminished. Common-law practice did not permit prior inconsistent statements to be introduced even for impeachment unless the witness had actually given inconsistent testimony concerning the event described in the prior statement. *See* California v. Green, 399 U.S. 149, 169 n.18 (1970). FED. R. EV. 801(d)(1)(A) seems to limit admissibility to cases in which the witness actually testifies at trial and makes statements contradictory to those made at an earlier time. In adopting the Federal Rules, Congress narrowed the exception by requiring that the statement now inconsistent must have been made earlier "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . ." *Id.*

sented at the arraignment, did not qualify as testimony under oath or subject to cross-examination. The majority's apparent rationale was that since statements in former testimony can be admitted because of their reliability, Burrell's statement should also be admitted if found reliable. The reliability of former testimony, however, results from the oath or cross-examination, and neither circumstance was present in Burrell's arraignment. Burrell did not testify at his arraignment, either to the making of the statement or to its truth. At his brothers' trial he was unable to recall the statement and thus could not verify it under oath at that time. Burrell was not cross-examined at his arraignment, and he could not be *effectively* cross-examined at the trial as to the truth of a statement he did not remember making. There was no jury at the arraignment, and even had there been one, Burrell did not testify about the statement. The jury at the trial was likewise unable to observe demeanor during testimony. Of course,

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The House Report in the legislative history, 12A U.S. CODE CONG. & AD. NEWS at 76-77, states in regard to this change:

> The Rule as amended draws a distinction between types of prior inconsistent statements . . . . The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding [and] an oath . . . provide firm additional assurances of the reliability of the prior statement.

Under the new rule, Burrell's statement would clearly have not qualified as a prior inconsistent statement. "On the face of it, a prior statement describing an event may not be inconsistent with testimony that the witness no longer remembers the event." MCCORMICK, *supra* note 9, § 251 at 604; FED. R. EV. 801(d)(1)(A). If the judge concludes the witness's claim of lack of memory is untrue, the claim might act as a repudiation of the prior statement, and thus pave the way for its admission as inconsistent. In *Payne*, however, the trial court concluded Burrell honestly had no recollection. 492 F.2d at 456. *See* Reutlinger, *Prior Inconsistent Statements: Presently Inconsistent Doctrine*, 26 HASTINGS L.J. 361 (1974), in which the author inquires:

> For that matter, how does one cross-examine a witness with respect to a statement that the witness will not even admit he made? . . . [N]ot only is the cross-examiner deprived of the opportunity to force an immediate admission by the witness that his conclusion . . . was faulty, but he cannot obtain an admission of errors at all from a witness who will not even agree that he stated the premise. He cannot elicit an explanation of the inconsistency if the witness will not or cannot concede that it exists.

Id. at 372. The author then considers a loss of recollection, the situation in *Payne*:

> Where the witness does not presently recall even the events with which his former statement was allegedly concerned, even some of the critics of the orthodox rule [that prior out-of-court statements by present witnesses should be excluded when offered to prove the truth of the matters stated therein, but may be admissible if inconsistent with, and offered to impeach present testimony by the witness] concede that cross-examination on the prior statement is futile.

Id. at 372 n.38.

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the Secret Service agent was under oath at both proceedings and was cross-examined at the trial before the jury, but this cross-examination went only to the fact of the actual making of the statement, not to the truth of the matters asserted therein. The court's conclusion, therefore, that the agent's testimony "impressively demonstrated"[28] the accuracy of Burrell's statement, was clearly specious. There was no challenge to the agent's testimony that a statement was made, or to his transcription of it, but without firsthand knowledge of the events it described, his testimony could not bear on the truthfulness of the statement.

The majority relied solely on Burrell's failure to object to the agent's testimony at the arraignment hearing as the indicator of reliability:

> [T]here can be no question in our minds that Burrell's attention was directed to his statement, that he had ample opportunity to disavow the fact of the interview and what was discussed, or to assert his lack of recollection of all or any part of it, and that his silence, in the presence of the court, amounted to tacit admissions that the interview took place, that he remembered it and that he acknowledged the correctness of [the agent's] testimony of his answers.[29]

This justification is unconvincing since Burrell was entering a guilty plea and could not have been expected to challenge the testimony that enabled him to do so. The majority admitted that Burrell was never asked specifically if he controverted the agent's testimony, or even if he controverted the results of the interrogation, and the majority also admitted that the statement itself was not placed in evidence at the arraignment.[30] In short, Burrell's silence at his arraignment failed to guarantee the trustworthiness of the statement, and the majority's assumption that the circumstances of the arraignment minimized the possibility of a false statement was not well-grounded.[31] Additionally, some portions of the statement implicating his brothers were not described at all at the arraignment, and thus, even under the rationale of the majority, there was no "silent tacit admission" of the truthfulness of those parts of the statement.

The reliability the majority found to support admission of

28. 492 F.2d at 451.
29. *Id.* at 452.
30. *Id.*
31. *See Preserving the Right*, *supra* note 19, at 748-49.

this statement under the past recollection recorded exception is ephemeral. The conclusion that "under the special facts of this case, the reliability of the record of Burrell's past recollection was sufficiently established"[32] is a clear error. The court in *Payne* fashioned, sub silentio, a new standard for excepting recorded past recollections from the hearsay rule. In the process, it disregarded the efficacy of the limitations on the past recollection recorded exception and substituted another standard for ascertaining reliability by juxtaposing elements of three hearsay exceptions. The danger in this new exception is that, under any standard, Burrell's statement was deficient in reliability. Admission of the statement defies general evidentiary rules and raises serious constitutional issues under the sixth amendment right to confrontation.

Confrontation Aspects of Payne

The issue of the denial of the constitutional right to confrontation was raised by the admission of Burrell's statement when he was unable to respond to questions about the statement on cross-examination. The defendants argued that, although Burrell was physically present at the trial, his claim of total lack of recollection of the statement and of the events resulted in a failure of confrontation. In finding no constitutional violation in the admission of Burrell's statement, the majority in *Payne* relied on the Supreme Court opinion in *California v. Green*.[33]

In *Green*, the defendant was tried for furnishing marijuana to Melvin Porter, a 16-year-old minor. Porter was arrested for selling marijuana to an undercover police officer and shortly thereafter identified Green to the police as having personally delivered the marijuana to him. A week later at Green's preliminary hearing, Porter again named Green as his supplier but testified that Green had merely shown him where the drug was hidden at Green's parents' house. At this preliminary hearing, Porter was extensively cross-examined on his testimony by Green's attorney. Two months later at the trial, during which Porter was again the chief witness, he claimed that he had been heavily under the influence of LSD at the time and was unable to remember anything other than having obtained some marijuana. To refresh his

32. 492 F.2d at 452.
33. 399 U.S. 149 (1970).

memory, the prosecutor read portions of the earlier testimony; but on cross-examination Porter indicated that, while his memory of the preliminary hearing was refreshed, his recollection of the actual episode was still unclear. At the trial, both Porter's preliminary hearing testimony and that of a police officer as to Porter's original statement to the police were admitted as substantive evidence under a California evidentiary rule. Green was convicted and appealed on the ground that the admission of Porter's prior statements denied Green the right to confrontation. The conviction was reversed in the state court system, with the state supreme court construing the sixth amendment to require exclusion of Porter's prior statements because neither the right to cross-examine Porter at trial about his current and prior testimony, nor the opportunity to cross-examine him at the preliminary hearing, satisfied the requirements of the confrontation clause.[34] The United States Supreme Court reversed and upheld the conviction. In a four-one-four opinion, the Court concluded that the admission at trial of Porter's testimony at the preliminary hearing did not violate Green's sixth amendment rights, but it did not reach the issue concerning the police officer's testimony as to Porter's original statement. The Court characterized the issue as "whether a defendant's constitutional right to be confronted with the witnesses against him is necessarily inconsistent with a State's decision to change its hearsay rules to reflect the minority view"[35] permitting the substantive use of a prior inconsistent statement. The Court concluded that use of a prior statement probably would not violate the confrontation clause when the declarant testified as a witness "as long as the defendant is assured of full and effective cross-examination at the time of trial."[36] The majority in *Green* found that the issue of "[w]hether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause"[37] was not ripe for decision, because its resolution depended on the specific facts of the case and because the Court was hesitant to proceed without

34. People v. Green, 70 Cal.2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

35. 399 U.S. at 155.

36. *Id.* at 159. At this point in the discussion of *Green*, the majority in *Payne* remarked in a footnote: "It should be noted, however, that this statement was made on the implied factual basis that the declarant made an inconsistent statement at the trial rather than, as here, claimed, [*sic*] a complete absence of recollection." 492 F.2d at 453 n.3.

37. 399 U.S. at 168.

the California court's views of what the record disclosed on this issue.[38] Justice Harlan had no such hesitancy, however, and in his concurring opinion stated his conclusion that "the Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial."[39]

In *Payne*, the majority concluded that, under the principles of *Green*, there was no denial of confrontation, because Burrell was produced as a witness and was "available" for cross-examination. In reaching this conclusion, the majority admitted that "by reason of Burrell's claim of complete failure of recollec-

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38. *Id.* at 168-70.

39. *Id.* at 172, 174 (Harlan, J., concurring) (emphasis in original). Justice Harlan then explained his view:

> The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available. To the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts . . . I think confrontation is nonetheless satisfied.

Id. at 188-89.

Since the *Payne* majority rests its conclusion on this statement by Harlan, it is important to recognize the position of the other members of the Court. A footnote in the decision helps to clarify the situation:

> Even among proponents of the view that prior statements should be admissible as substantive evidence, disagreement appears to exist as to whether to apply this rule to the case of a witness who disclaims all present knowledge of the ultimate event. Commentators have noted that in such a case the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished . . . . [T]he preliminary draft of proposed rules of evidence for lower federal courts seems to limit admissibility to the case where the witness actually testifies concerning the substance of the event at issue . . . . [This] position accords with the common-law practice of not permitting prior inconsistent statements to be introduced even for impeachment purposes until and unless the witness has actually given "inconsistent" testimony concerning the substance of the event described in the prior statement.

399 U.S. at 169 n.18. The Court cites Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 53 (1954); Comment, *Substantive Use of Extrajudicial Statements of Witnesses Under the Proposed Federal Rules of Evidence*, 4 U. RICH. L. REV. 110, 119 & n.40 (1969); Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, rule 801(c)(2)(i), Advisory Comm. Notes at 165 (1969). The Advisory Committee's Note for the prior inconsistent statement rule, rule 801(d)(1)(A), states: "The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness . . . ." Since these proposed rules were submitted to Congress by the Supreme Court itself, this is certainly an indication that the Court thinks the better rule is to require testimony which actually is inconsistent, and that is not the case with Burrell's statement. *See* note 24 *supra*.

tion, the scope of effective cross-examination excluded inquiry with regard to the substantive evidence of guilt on the part of Burrell's brothers."[40] The majority reasoned that since total loss of memory differed only in degree from partial loss, and since in *Green* the Court permitted admission of a statement when a partial loss of recollection was claimed, then even with a full loss of memory as in *Payne*, the statement should also be admitted.[41] The majority's analogy is inaccurate, however, because the statement in *Green* was admitted when only a partial failure of recollection was claimed and when the statement was subject to a prior full cross-examination. This is not a simple difference in degree because Burrell's statement had no such prior verification by cross-examination and because the loss of memory was total. The reliance on *Green* is misplaced in that the facts of the two cases are substantially different. In *Green*, Porter was thoroughly cross-examined at the preliminary hearing by Green's attorney. In *Payne*, Burrell did not testify at his arraignment; his testimony at the trial consisted essentially of failing to remember anything about the alleged crime. Burrell's statement was not made under oath or in the presence of a jury, nor was he cross-examined by defendants' counsel at the time it was made. The Court in *Green* noted that these lost protections could be regained only by full and effective cross-examination at the trial.[42] In *Payne*, however, no such full cross-examination was possible, as even the majority acknowledged.[43]

The majority concluded its discussion of the confrontation issue by stating:

> It is true that where complete failure of recollection is claimed, the truth of the earlier statement is not verified by an oath. . . . It is also true that where complete failure of recollection is claimed the truth of the earlier statement is not tested by cross-examination with regard to its substantive content, but *California v. Green* . . . indicates that we should reverse only if we conclude that "apparent lapse of memory so affected . . . [the] right to cross-examine as to make a critical difference in

40. 492 F.2d at 454.

41. *Id.*

42. 399 U.S. at 158.

43. 492 F.2d at 454. Another difference between the cases is that in *Green*, one purpose for allowing the state rule to stand was to permit the states to promote expansion of the rules of evidence; *Payne* is not a state case, but a prosecution in federal district court for conspiracy to violate a federal statute.

the application of the Confrontation Clause . . . ." [W]e cannot reach that conclusion here.[44]

The majority's conclusion is incorrect because if Burrell's lapse of memory does not so affect the right to cross-examine as to make a critical difference in the application of the confrontation clause, it is difficult to imagine any situation which would.

The situation in *Payne* is similar to that in *Douglas v. Alabama*.[45] In *Douglas*, the prosecutor read a codefendant-witness's prior confession to him on the stand to refresh his memory. Loyd, the witness, refused to answer any questions and invoked the fifth amendment right against self-incrimination. Police officers then testified that Loyd had made the confession. The Supreme Court held that the admission of the prior statement resulted in a denial of Douglas's right to confrontation on the ground that Douglas was unable to cross-examine Loyd as to the portions of the statement incriminating him and that any cross-examination of the officers only showed that the statement was made, not that it was true. The Court noted that Loyd's refusal to answer could have been interpreted by the jury as an admission of the truth of the statement and concluded that effective confrontation was possible only if Loyd affirmed the statement as his.[46] As in *Douglas*, Burrell did not affirm the prior statement, and the testimony of the Secret Service agent only showed that a statement had been made. Similarly, Burrell's loss of memory also could have been interpreted by the jury as a silent admission that the statement was true. By analogy to *Douglas*, the defendants in *Payne* were denied the right of confrontation.

Green and its companion case[47] have rightly been criticized[48]

44. *Id.*

45. 380 U.S. 415 (1965).

46. *Id.* at 419-20.

47. In *Green* and *Dutton v. Evans*, 400 U.S. 74 (1970), the Supreme Court attempted to sever the hearsay rule from the confrontation clause in an effort to give the states leeway to broaden their evidentiary rules. *Evans* was a habeas corpus proceeding by Alex Evans, who had been convicted of murder in a Georgia court. The state had presented twenty witnesses including an eyewitness, who detailed Evans' part in the crime. The court also admitted over objections (for denial of confrontation and hearsay) the statement of one witness that when he asked an alleged accomplice, a fellow prisoner, how he made out in court, the alleged accomplice had replied, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." The statement was admitted under a Georgia statute which allowed admission of a conspirator's statements against other conspirators. The Fifth Circuit upheld the defendant's writ because the exception was broader than that allowed in federal conspiracy trials. The Supreme Court reversed in a 4-1-4 decision. The plurality opinion expressed the view that the state evidentiary rule did not violate the

for rejecting the body of confrontation case law developed by the Warren Court by applying a due process fairness or "indicia of reliability"[49] standard[50] and for failing to develop a coherent theory of the relationship between hearsay and confrontation.[51]

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sixth amendment merely because the state rule did not coincide exactly with the federal rule, and that the circumstances did not constitute a denial of confrontation because the statement was not "crucial" or "devastating", and there were "indicia of reliability" to warrant admission of the statement. Justice Harlan concurred in the result on the ground that the application of the state statute satisfied the due process requirements for a fair trial.

The result of the decisions in *Green* and *Evans* was to further muddle an already confused area of the law of evidence—the issue of whether the relaxation of the hearsay rule should be allowed to deny confrontation, or whether the lack of confrontation should permit the exclusion of reliable and relevant evidence. *See Read, supra* note 10, in which the author concludes that the view espoused in every major Supreme Court decision since 1894, that the core value protected by the confrontation clause is cross-examination, can no longer be considered the law after *Evans*. In investigating whether the Court's incorporation of the confrontation clause into the fourteenth amendment in *Pointer v. Texas*, 380 U.S. 400 (1965), in effect constitutionalized the hearsay rule, the author surveys the historical background of both confrontation and hearsay including previous decisional law and reform attempts. He then dissects the Supreme Court opinions in *Green* and *Evans*, analyzing both the decisions as a whole and the individual justices' positions. The article concludes with six approaches to take in determining to what extent, if any, the hearsay rule is constitutionalized by the confrontation clause.

48. *See* Davenport, *The Confrontation Clause and The Co-Conspirator Exception In Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1381 (1972), in which the author cautioned that "unless closely shepherded, the consequences . . . could trample the essence of the right guaranteed by the confrontation clause—the opportunity for a criminal defendant to probe the truth of the evidence presented to show his guilt." This fear was realized in *Payne* by the court's unwarranted and dangerous extension of the *Green* and *Evans* rule.

49. Justice Marshall, in *Dutton v. Evans*, 400 U.S. 74 (1970), dissented because the admission was so inherently prejudicial:

> If "indicia of reliability" are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all in protecting a criminal defendant against the use of extra-judicial statements not subject to cross-examination and not exposed to a jury assessment of the declarant's demeanor at trial. I believe the Confrontation Clause has been sunk if any out-of-court statement bearing an indicium of a probative likelihood can come in, no matter how damaging the statement may be or how great the need for the truth-discovering test of cross-examination.

Id. at 100, 110 (Marshall, J., dissenting) (footnote omitted).

50. Note, *The Burger Court and The Confrontation Clause: A Return to the Fair Trial Rule*, 7 JOHN MARSHALL J. OF PRAC. & PROC. 136 (1973):

> It is clear . . . that by 1970 a majority of the Court not only had been unwilling to carry the holdings of earlier Supreme Court confrontation cases to their logical conclusion, but also was trying to avoid their application entirely by substituting either an "indicia of reliability" test or a due process approach.

Id. at 153. The note deals with the present Court's apparent return to the due process fairness approach to the confrontation clause.

51. *See* Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1

The majority in *Payne* was also unable to resolve this issue and concluded by holding that an unsubstantiated statement which is not remembered by its maker and which is, at best, of questionable reliability, sufficiently fulfills the requirements for an exception to the hearsay rule. Further, the statement was held to comport with the right to confrontation, although the declarant was never able at any point in the proceedings to make any comment on the circumstances of its making or the truth of its contents. It is unfortunate that such a confused analysis should result in criminal convictions.[52]

HOFSTRA L. REV. 32 (1973), where the author states:

> This is bad judicial craftmanship, for unilluminated by such a theory [of the relationship between hearsay and confrontation] the Court decides in the dark, heedless of consistency with the past and implications for the future.

Id. at 41.

52. *See* Comment, *The Uncertain Relationship Between the Hearsay Rule and the Confrontation Clause*, 52 TEX. L. REV. 1167 (1974), in which the author, after a thorough examination of the various legal theories concerning the confrontation and hearsay rules, warned:

> Unless all courts dealing with these difficult problems develop a clearer method of analysis and better articulate their reasoning, there is a substantial risk that an innocent defendant will bear the burden of a court's confrontation error.

Id. at 1209.