COMMENT

*CHAMBERS V. MISSISSIPPI**: THE LIMITS OF DUE PROCESS—THE "VOUCHER" RULE AND THE EXCEPTION FOR HEARSAY DECLARATIONS AGAINST INTEREST

I. INTRODUCTION

The due process clause has become a talisman of sorts for criminal defendants. The clause has been relied upon both to invalidate rules prejudicial to the defendant and to require procedures to protect him.[1] In *Chambers v. Mississippi*[2] the Supreme Court once again called upon this bulwark to extricate a defendant from criminal conviction.

The Court, however, may have been too eager to draw its due process sword. Although a proper result was reached in *Chambers*, the Court's analysis may diminish the protection heretofore provided by the Constitution. Via analysis notable for its lack of forthrightness, the majority transplanted the right of cross-examination from the confrontation clause to the due process clause by substituting a balancing test for the absolute standard of the sixth amendment. The implications of this maneuver become clear when it is juxtaposed with the Court's refusal to declare the denial of the right of cross-examination, by itself, to constitute reversible error.

Having devitalized the right of cross-examination, the Court found it necessary to consider a second claimed denial of due process. Ironically, in so doing, the Court set the precedent for further expansion of due process protection. The Court invalidated the mechanical application of a state rule of evidence as contrary to due process, thereby opening the way for future attacks upon state evidentiary rules which previously were otherwise immune from constitutional assault.

This Comment will discuss the propriety of the Supreme Court's employment of due process, its holding, and the implications which follow therefrom.

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* 410 U.S. 284 (1973).

1. The due process clause of the fourteenth amendment has become a major safeguard for nonfederal criminal defendants both through incorporation of many provisions of the Bill of Rights and in its own right. For examples of the former see Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to be confronted with witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (right to refrain from giving self-incriminating testimony); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to assistance of counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule of the fourth amendment right to be secure against unreasonable searches and seizures). For examples of the due process clause standing by itself, see Miller v. Pate, 386 U.S. 1 (1967) (use of fabricated evidence by prosecutor); Thompson v. Louisville, 362 U.S. 199 (1960) (minimal evidentiary support required for conviction); In re Murchison, 349 U.S. 133 (1955) (biased judge); Jordan v. De George, 341 U.S. 223 (1951) (void for vagueness); Cole v. Arkansas, 333 U.S. 196 (1948) (reasonable notice of the charge).

2. 410 U.S. 284 (1973). Justice Powell delivered the opinion of the Court, in which Chief Justice Burger, and Justices Douglas, Brennan, Stewart, White, Marshall, and Blackmun concurred. Justice Rehnquist dissented on a procedural issue and did not reach the merits.

II. BACKGROUND

A. Facts

Defendant Leon Chambers was charged with the murder of officer "Sonny" Liberty, a Woodville, Mississippi, policeman. Several months after Chambers' arrest, one Gable McDonald agreed to make a statement to Chambers' attorneys regarding Liberty's murder. McDonald made a sworn written confession admitting that he had shot officer Liberty. McDonald acknowledged to Chambers' attorneys that the confession was voluntary and signed the statement. One month later, at a preliminary hearing, McDonald repudiated his sworn confession to the murder.

B. Trial Court Rulings

At his trial Chambers attempted to develop two lines of defense. First, he attempted to prove that he did not shoot Liberty.[3] There was some contradictory evidence concerning this defense, but the weight of evidence seemed to support Chambers.

Chambers' second defense, the one involved in this appeal, was that Gable McDonald had shot Liberty.[4] When the State did not call McDonald as a witness, Chambers was forced to do so himself.[5] He laid a predicate for the introduction of McDonald's sworn out-of-court confession, had it admitted into evidence, and read it to the jury. During cross-examination by the state, McDonald indicated that he had repudiated the confession, alleging that he had been induced to confess by false promises that he would not go to jail and that he would share in a sizable tort recovery from the town. McDonald then presented an alibi which placed him in a cafe at the time the shooting occurred. At the conclusion of cross-examination, Chambers moved to examine McDonald as an adverse witness. The trial court denied the motion, thereby precluding Chambers from impeaching McDonald. The court based its decision on the common law rule, followed in Mississippi, that the proponent vouches for the credibility of his witness.

Prevented from directly attacking McDonald's repudiation of his confession, Chambers sought to introduce the testimony of three witnesses to whom McDonald had allegedly admitted, on separate occasions, that he had shot officer Liberty. The State objected to the admissibility of this testimony on the ground that it was hearsay. The trial court sustained the objection with respect to each witness.[6]

C. Issues on Appeal

In structuring his appeal, the petitioner framed his two allegations of error as a single violation of the due process clause of the fourteenth amendment.[7] Chambers alleged that the trial court's separate rulings—the first of which prevented Chambers from cross-examining McDonald as an adverse witness and the second of which prevented the admission of the testimony from the three other witnesses—denied him a fair trial.

III. A DEFENDANT'S RIGHT OF CROSS-EXAMINATION

The Supreme Court began its analysis with the premise that the "right of an accused in a criminal trial to due process is, in essence, the right to a fair oppor-

3. Id. at 289.
4. The Court distinguished the two defenses because different evidence was introduced to prove them.
5. 410 U.S. at 291.
6. 252 So. 2d 217, 220 (Miss. 1971).
7. 410 U.S. at 290 n.3.

tunity to defend against the State's accusations."[8] Two essential elements of this "fair opportunity," the Court declared, are the "rights to confront and cross-examine witnesses and to call witnesses in one's own behalf."[9]

Justice Powell, writing for the majority, first addressed the trial court's ruling which had denied Chambers the opportunity to cross-examine McDonald: "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the Constitutional right of Confrontation . . . ."[10] In asserting this proposition the Court relied on the long line of cases interpreting the confrontation clause of the sixth amendment. As early as 1895, in *Mattox v. United States*,[11] the Court recognized that the primary function of the confrontation clause was to give an accused the opportunity to cross-examine witnesses against him.[12] This reading of the confrontation clause has been consistently reaffirmed in subsequent decisions.[13] Indeed, in its 1973 term, the Court had occasion to state: "Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' . . ."[14]

Although the Court has not been able to settle upon the exact scope of the confrontation clause,[15] in *Chambers*, Justice Powell stated that "the right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[16] However, the Court failed to explain adequately what would constitute "appropriate cases" or "legitimate interests."[17] Thus, the precise scope of confrontation remains unclear.

A. The "Voucher" Rule

Against this background, the Court examined the trial court's denial of Chambers' motion to cross-examine McDonald. The lower court had denied the motion on the basis of the common law "voucher" rule. Under this rule a party "vouches" or

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8. Id. at 294.

9. Id. at 295. See In re Oliver, 333 U.S. 257 (1948), and discussion of *Oliver* in text accompanying notes 34-38 infra.

10. 410 U.S. at 295. The sixth amendment to the Constitution reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the Witnesses against him . . . ." U.S. Const. amend. VI.

11. 156 U.S. 237 (1895). It should be noted that the *Chambers* opinion cites authorities which characterize the right of cross-examination as an element of two different constitutional provisions. In re Oliver considered cross-examination a component of fourteenth amendment due process, whereas Mattox v. United States defined it as a right derived from the confrontation clause of the sixth amendment. This difference becomes significant under the Supreme Court's handling of the trial court's ruling. See text accompanying notes 50-51 infra.

12. The right to confrontation also serves lesser functions: to make the witness testify under oath, and to give the jury the opportunity to see and judge the witness' demeanor and bearing on the stand. See 5 J. Wigmore, Evidence §§ 1395 et seq. (3d ed. 1940) [hereinafter 5 Wigmore].

13. E.g., Pointer v. Texas, 380 U.S. 400 (1965). The Court, applying the confrontation clause to the states for the first time, declared: "As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine witnesses against him." Id. at 406-07.

14. Davis v. Alaska, 415 U.S. 308, 315 (1974) (citation omitted).

15. In the past six years the Court has reformulated the requirements of the confrontation clause almost every time it has considered the question. See Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968).

16. 410 U.S. at 295.

17. The Court cited *Mancusi*, but that case does not yield a clear statement of "legitimate interests."

guarantees the credibility of his witness. The practical result of the rule is that, subject to limited exceptions, a party cannot impeach a witness he calls to the stand.[18]

The "voucher" rule has evolved over a long period and it is generally agreed that its history is obscure.[19] It apparently was conceived during the period when trials were determined by opposing groups of partisan "oath-helpers" marshalled by each party.[20] One of the parties would swear to his case with elaborate formalities, and the "oath-helpers" would swear to the truthfulness of the party's oath. In this context, it was sensible to require a party to stand or fall by what his witness, the "oath-helper," swore to. Although the original justification for the rule has little relationship to current practice, the "voucher" rule has become an accepted feature of twentieth century trial procedure.[21] The modern justification for the continued use of the anachronistic "voucher" rule was expressed by Professor Simon Greenleaf over a century ago:

> When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence, tending to show them to be unworthy of belief.[22]

The unstated assumption underlying this reasoning is that a party has an unlimited choice of people to call as witnesses in presenting his case. However, a party can choose from among only those persons who have knowledge concerning a relevant fact or event.[23] In rejecting the "voucher" rule in the context of current criminal trial practice, the *Chambers* Court recognized that this assumption is unwarranted, observing that "in modern criminal trials defendants are rarely able to select their witnesses: they must take them where they find them."[24]

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18. E. Morgan, Basic Problems of Evidence 69 (1962).

19. 3A J. Wigmore, Evidence § 896 (Chadbourn rev. 1970) [hereinafter 3A Wigmore]; C. McCormick, Handbook of the Law of Evidence § 38 (2d ed. 1972) [hereinafter McCormick].

20. 3A Wigmore, supra note 19, § 896.

21. The reason for the persistence of the rule in present day trial practice, despite the disappearance of "oath-helpers" and the emergence of factual witnesses, is difficult to trace. According to Wigmore:

> This notion that a party must stand or fall by what his partisan affirms was long in disappearing. It was a natural consequence of this notion that the party should not be allowed to dispute what his own chosen witness says. Such (presumably) was the instinctive thought all through the earlier periods of our recorded trials, and long after the time when witnesses in the modern sense had taken the place of compurgators. But for a considerable period there is no trace of a positive rule on the subject. There must have been the feeling; perhaps no opposition to it was attempted.

3A Wigmore, supra note 19, § 896 (footnote omitted).

22. S. Greenleaf, Evidence § 442 (12th ed. 1866), as quoted in 3A Wigmore, supra note 19, § 898.

23. 2 J. Wigmore, Evidence § 650 (3d ed. 1940); McCormick, supra note 19, § 10.

24. 410 U.S. at 296. The "voucher" rule is discarded by the Federal Rules of Evidence, Rule 607: "The credibility of a witness may be attacked by any party including the party calling him." The Advisory Committee's Notes state: "The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary." Fed. R. Evid. 607 (effective July 1, 1975).

Another modern rationale for the "voucher" rule, not mentioned by the Court, is that the power to impeach is the power to coerce the witness to testify as desired, under threat of defaming his character if he does not. See Whitaker v. Salisbury, 32 Mass. (15 Pick.) 534,

The Supreme Court also rejected the State's argument that Chambers' right to confrontation did not even arise because McDonald was not a witness "against" Chambers, since his testimony did not directly or specifically implicate Chambers in the crime. Justice Powell disposed of this contention by pointing out that because the State's theory of the murder implicated only one person, the effect of McDonald's repudiation was seriously damaging to the defendant. This, he declared, was sufficient to invoke the right of confrontation.[25] In summing up its discussion of the trial court's refusal to allow Chambers to cross-examine McDonald, the Court said:

> The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against." The "voucher" rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.[26]

While the Court's discussion suggests that Chambers had, indeed, been denied the right to confront a witness against him within the meaning of the sixth amendment, the Court's conclusion seems premised on the due process clause: "due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[27] The analysis of the nature, function, and scope of the right of cross-examination, with which the Court began its discussion of the "voucher" rule, was based solely on cases which discussed this right as one grounded in the sixth amendment.[28] Significantly, however, Justice Powell never once adverted to the sixth amendment or the confrontation clause, though he did speak of the "right of confrontation."[29] It is equally unclear whether the discussion concerning the meaning of the word "against" was directed toward the confrontation clause or the premise initially stated by the Court.[30] But whatever the ambiguities present in the discussion, they are absent from the conclusion. Justice Powell's language clearly reflects his premise which characterized the right of cross-examination as an element of due process.[31] Thus, while it is difficult to determine whether the discussion was intended as a due process analysis of the right to cross-examination or a traditional confrontation clause analysis, the holding is clearly couched in due process terms.

B. Cross-Examination: A Due Process or Confrontation Clause Standard?

The Court's treatment of the "voucher" rule as applied by the trial court raises a number of questions. First, should the right of cross-examination properly be viewed as an element of due process? Second, assuming cross-examination flows

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545 (1834). The simple answer is that if the witness testifies falsely in favor of his proponent, the adversary will surely impeach him. Why, therefore, should the proponent be prevented from impeaching false testimony when the adversary is permitted? Such a rule places the proponent at the mercy of the witness and the adversary. See 3A Wigmore, supra note 19, § 899; McCormick, supra note 19, § 38.

25. 410 U.S. at 297-98.

26. Id.

27. Id. at 294. See text accompanying notes 8-9 supra.

28. Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1970); Bruton v. United States, 391 U.S. 123 (1968); Mattox v. United States, 156 U.S. 237 (1895).

29. 410 U.S. at 297.

30. See text accompanying notes 8-9 supra. Compare the confrontation clause, quoted in note 10 supra, with the Court's premise.

31. See text accompanying notes 8-9 supra.

from the confrontation clause, should the threshold determination of whether the right of cross-examination has been violated in state trials be made according to due process? Finally, assuming a denial of the right of cross-examination, should the effect of such denial be assessed according to due process?

The initial inquiry concerns the Court's apparent view of the right of cross-examination as a component of due process. The earliest decisions by the Supreme Court dealt with cross-examination as a concomitant of the sixth amendment's confrontation clause.[32] These decisions, however, were limited to federal cases; in 1904, the Court held that the sixth amendment right of confrontation did not apply to trials in state courts.[33]

Notwithstanding the earlier cases, the right of cross-examination was characterized as an element of due process in *In re Oliver*.[34] The defendant in *Oliver* was convicted of contempt by a state trial court.[35] The Supreme Court reversed the conviction, holding, as one basis for its decision, that due process requires a reasonable opportunity for an accused to defend against the charge.[36] The Court broadly declared that a reasonable opportunity includes "as a minimum, a right [of the accused] to examine witnesses against him, to offer testimony, and to be represented by counsel."[37] It is noteworthy that this characterization of due process closely parallels the last three clauses of the sixth amendment, because when *Oliver* was decided in 1948 there was no precedent for applying any aspect of the sixth amendment to state trials.[38] Since the sixth amendment was not applicable to the states, the Court apparently framed what were essentially sixth amendment rights in due process terms to reach a fair result.

Subsequently, however, in *Gideon v. Wainwright*,[39] the Court held the sixth amendment right to counsel binding on the states under the fourteenth amendment. Two years later, in *Pointer v. Texas*,[40] the Court relied on *Gideon* in holding the sixth amendment right to confrontation likewise binding on the states. Significantly, while *Pointer* acknowledged with approval the language from *Oliver*, its holding was stated purely in terms of the "confrontation guarantee of the Sixth Amendment."[41] Subsequent to *Pointer* and prior to *Chambers*, not one decision in which the right to cross-examination was discussed cited *In re Oliver* or its view of the right to cross-examination as an element of due process. It thus appears that until *Chambers* the Supreme Court has, with a single exception, consistently adhered to the view that the right of a criminal defendant to cross-examine witnesses against him derives from the confrontation clause of the sixth amendment. Such a well estab-

32. Kirby v. United States, 174 U.S. 47 (1899); Mattox v. United States, 156 U.S. 237 (1895).

33. West v. Louisiana, 194 U.S. 258 (1904).

34. 333 U.S. 257 (1948).

35. The defendant was subpoenaed to appear before a judge acting as a "one-man grand jury" pursuant to state law. Mich. Comp. Laws (1929) §§ 17217-20. During the secret hearing the one-man grand jury cited Oliver for contempt for evasive answers. In an instant metamorphosis, the one-man grand jury became a judge and the witness became a defendant. Although the nature of the proceedings had changed to that of a trial, they remained secret and the defendant was summarily convicted. Id. at 258-59.

36. The other ground for reversal was that due process requires a public trial. Id. at 266.

37. Id. at 273.

38. The sixth amendment reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

39. 372 U.S. 335 (1963).

40. 380 U.S. 400 (1965).

41. "We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment . . . ." Id. at 406.

lished precedent constitutes persuasive evidence that the due process characterization of cross-examination, as enunciated in *In re Oliver*, is an aberration.

Turning to the second question raised earlier—whether a due process standard should be used to establish a violation of a defendant's right to cross-examination—one cannot justify such an approach by the mere fact that this right is binding on the states under the due process clause. There is no precedent for this argument. In *Pointer v. Texas*,[42] the very case in which the Court held the confrontation clause applicable to the states, the Court indicated the contrary was true: "[W]e hold that the right of an accused to be confronted with the witnesses against him must be *determined* by the same standards whether the right is denied in a federal or state proceeding . . . ."[43] Despite its inability to settle upon the precise scope of the right of confrontation, the Court has, in subsequent state trial cases, consistently applied the standard it felt required by the confrontation clause, not the due process clause.[44] As the Court noted in *California v. Green*,[45] "[T]he modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant will often raise questions of compatibility with the defendant's constitutional right to confrontation. Such questions require attention to the reasons for, and the basic scope of, the protections offered by the Confrontation Clause."[46]

The conclusion that the Court has heretofore applied a sixth amendment standard to both federal and state cases is reinforced by the Court's treatment of another sixth amendment right—the right to trial by jury.[47] In *Duncan v. Louisiana*,[48] the Court held:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.[49]

In sum, the use of a due process standard to establish the violation of a defendant's right of cross-examination cannot be supported by historical precedent.

Finally, Justice Powell's use of a due process standard to determine the effect of an ascertained denial of the right of cross-examination is open to question. The decision, examined in light of earlier cases which focused on the sixth amendment, seems to indicate that denial of the right to cross-examination is a less harmful error under a due process standard than it would have been under a confrontation standard. In those cases in which the Supreme Court held that the defendant was denied the right to cross-examine a witness in violation of the confrontation clause, the Court reversed the convictions solely on the basis of those violations.[50] In

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42. 380 U.S. 400 (1965).

43. Id. at 407-08 (emphasis added). Although the precise relationship between the right to cross-examination and the right to confrontation is not entirely clear, see text accompanying notes 15-17 supra, the latter at least includes the former. See text accompanying notes 10-14 supra.

44. See cases cited in note 15 supra.

45. 399 U.S. 149 (1970).

46. Id. at 156.

47. The sixth amendment reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

48. 391 U.S. 145 (1968).

49. Id. at 149. Subsequently, in Apodaca v. Oregon, 406 U.S. 404 (1972), the Court approved the use of non-unanimous jury verdicts in state criminal trials. *Apodaca*, however, did not undercut the holding in *Duncan*, but touched a tangential question. In *Apodaca* the Court decided only that all the requirements governing a federal jury trial need not be adhered to by the states in designing their own jury trial process.

50. Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

Chambers, the denial of the right to cross-examine a witness was no less harmful than the denial in the above cases. Yet the Court, measuring the denial of the right of cross-examination against the right to due process, did not reverse on this error alone.[51]

The Court claimed that such a decision was unnecessary because the defendant had framed his objections to the trial court's two rulings as a single issue.[52] However, the defendant's objection to the second ruling involved a virtually unprecedented application of due process[53] which the Court could have avoided by a decision resting solely on the denial of the right of cross-examination. Not only would such a decision have been consistent with the Court's practice of avoiding unnecessary constitutional decisions,[54] but it would have comported with previous decisions.[55] If the Court wanted to reach the second ruling, it could have done so without diluting the effect of a denial of the right of cross-examination by stating the errors as alternative grounds for reversal.

Other possible justifications for the approach used by Justice Powell in *Chambers* do not withstand analysis. One such justification is that previous confrontation cases involved the admission against the defendant of hearsay[56] or the equivalent of hearsay,[57] whereas *Chambers* involved the "voucher" rule. However, the distinction is one of form, not substance. When hearsay uttered by an unavailable declarant is admitted against the defendant, the right of cross-examination is denied because the witness testifies to an out-of-court statement made to him by another person who is not in court and not subject to cross-examination. The defendant thus has no opportunity to cross-examine the unavailable declarant concerning the statement. In contrast, where the "voucher" rule is applied as it was in *Chambers*, the declarant is on the witness stand. The defendant is prohibited from cross-examining the witness merely on the basis of the procedural technicality that he called the witness to the stand to testify, and thereby guaranteed the witness' credibility. Although the underlying trial situation and the nature of the rules which occasioned the denial are clearly distinguishable, the operative effect of the "voucher" rule as applied in *Chambers* was nevertheless precisely the same as the effect of the admission of hearsay in the prior cases. In each instance, the accused was denied the opportunity to cross-examine a person who made statements damaging to his defense. The harm involved in each situation was that the defendant could neither search this person's

51. 410 U.S. at 298.

52. "We need not decide, however, whether this error alone would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses." Id.

53. See State v. Santiago, 53 H. 254, 492 P.2d 657 (1971). The Supreme Court of Hawaii held the admission of the defendant's prior convictions to impeach his credibility under Hawaii Rev. Stat. §§ 621-22 (1968) was a denial of the right of the accused to testify in his own behalf, in violation of the due process clause of the fourteenth amendment.

54. Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) (concurring opinion of Brandeis, J.).

55. See cases cited in note 50 supra.

56. Mancusi v. Stubbs, 408 U.S. 204 (1972) (reported testimony from a previous trial), Dutton v. Evans, 400 U.S. 74 (1970) (out-of-court statement by a co-conspirator); Barber v. Page, 390 U.S. 719 (1968) (reported testimony from a preliminary hearing); Pointer v. Texas, 380 U.S. 400 (1965) (prior reported testimony).

57. Bruton v. United States, 391 U.S. 123 (1968). *Bruton* involved the equivalent of hearsay in that the evidence, a confession by a codefendant which implicated Bruton, was admitted solely against the codefendant. The trial court instructed the jury to disregard the evidence with respect to Bruton. The Supreme Court indicated it did not feel the jury would in fact limit the evidence as instructed. Since the codefendant refused to take the stand, Bruton could not cross-examine him concerning the confession. The net effect was the same as if hearsay had been admitted against Bruton.

perception and memory nor impeach his credibility. Justice Powell expressly rejected a distinction based on a difference of form when he said, "The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality . . . ."[58]

Similarly, any attempt to justify the Court's approach in *Chambers* on the basis of historical analysis would clearly be stale. It might be argued that the Framers had no intention of prohibiting the application of the "voucher" rule by including the right to confront witnesses in the sixth amendment. In fact, the Court has stated that the confrontation clause was intended to prevent trials from being conducted by *ex parte* affidavits or depositions.[59] However, the Court has applied the sixth amendment to situations where confrontation was denied, not by *ex parte* affidavits, but by admission of testimonial hearsay evidence against the defendant.[60] Since the Court was apparently unconcerned that such an application of the sixth amendment was not envisioned by the Framers of the confrontation clause, this argument has little force in justifying a failure to apply the clause in the present situation where the net effect is comparable.

C. The Confrontation Clause and the Hearsay Rule

The case for incorporating the right of cross-examination among the several guarantees of due process was advanced by Justice Harlan in his concurring opinion in *Dutton v. Evans*.[61] He argued:

> Regardless of the interpretation one puts on the words of the Confrontation Clause, the clause is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence. The failure of Mr. Justice Stewart's opinion to explain the standard by which it tests Shaw's statement, or how this standard can be squared with the seemingly absolute command of the clause, bears witness to the fact that the clause is being set a task for which it is not suited. 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. It is by this standard that I would test federal and state rules of evidence.[62]

Though he implicitly recognized that the rule of evidence which was the focus of *Dutton* involved a possible conflict with the confrontation clause, Justice Harlan advocated resorting to a due process standard to avoid the difficulties of articulating a viable confrontation standard. Indeed, Justice Harlan declared that he would test all rules of evidence according to due process. The Court apparently adopted this approach in *Chambers*.

It is a reasonable inference that the Court adopted its due process approach in *Chambers* in part because of the theoretical conflict between the absolute mandate of the confrontation clause and the recognized exceptions to the hearsay rule.[63]

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58. 410 U.S. at 297-98.
59. Mattox v. United States, 156 U.S. 237 (1895). See text accompanying note 77 infra.
60. See cases cited in note 56 supra.
61. 400 U.S. 74 (1970).
62. Id. at 96-97.
63. See Read, The New Confrontation-Hearsay Dilemma, 45 S. Cal. L. Rev. 1 (1972); Younger, Confrontation and Hearsay: A Look Backward, A Peek Forward, 1 Hofstra L. Rev. 32 (1973).

Hearsay is evidence, the probative value of which depends upon someone who cannot be cross-examined.[64] In general, hearsay is inadmissible, but many exceptions to the rule have evolved.[65] If the confrontation clause is held to be violated whenever the accused is denied the right to cross-examine a witness against him, hearsay would never be admissible against the defendant because it is by definition not amenable to cross-examination. The result of such an interpretation would be to render hearsay evidence inadmissible, even where traditionally admissible pursuant to a recognized exception.

In *Pointer v. Texas*,[66] the Court apparently overlooked this theoretical problem and equated a denial of the right to cross-examine a witness with a violation of the confrontation clause. However, it is clear that the Court did not intend to render all hearsay inadmissible, because in *Pointer* it expressly acknowledged the continuing validity of at least one exception to the hearsay rule.[67] More recent decisions by the Court have attempted to avoid this theoretical inconsistency by defining a less absolute but functionally satisfactory standard for the confrontation clause.[68] The problem is to articulate an easily applicable standard which strikes the proper balance between the interest of the defendant in subjecting all damaging witnesses to cross-examination on one hand, and the interest of the state in presenting all reasonably reliable incriminating evidence on the other. The Court's difficulty in articulating such a standard is made evident by a reading of the cases from *Pointer* to *Mancusi v. Stubbs*.[69]

The Court's task in defining a sixth amendment test for protecting the right of confrontation has been complicated by its desire to avoid constitutionalizing the hearsay rule. As the Court indicated in *California v. Green*:[70]

> 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.[71]

Although Wigmore advocates the theory that the sixth amendment is the constitutional embodiment of the hearsay rule,[72] the Court has refused to accept this interpretation. The Court's refusal to adopt Wigmore's position reflects its desire to maintain a flexible position at a time when many commentators are urging a complete re-evaluation of the hearsay rule.[73]

Viewed against this background, Justice Powell's reliance on due process may be seen as an attempt to avoid the problems arising from a strict application of the confrontation clause and to arrive at a pragmatic alternative. While the intention is laudable, the result may be to encourage the demise of the confrontation clause.

D. Confrontation: The Proper Standard

While the opportunity to cross-examine witnesses may be brought under the umbrella of due process, as it was in *Oliver*,[74] the Framers felt the right to confront

64. 5 Wigmore, supra note 12, § 1361; McCormick, supra note 19, § 246.
65. 5 Wigmore, supra note 12, §§ 1364, 1420.
66. 380 U.S. 400 (1965).
67. 380 U.S. at 407.
68. Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970).
69. See cases cited in notes 66 and 68 supra. Justice Harlan noted the failure of the *Dutton* plurality opinion to explain adequately its standard. See text accompanying note 62 supra.
70. 399 U.S. 149 (1970).
71. Id. at 155.
72. 5 Wigmore, supra note 12, § 1397.
73. See Dutton v. Evans, 400 U.S. 74, 86 n.17 (1970).
74. 333 U.S. 257 (1948).

witnesses was a conceptually distinct right. If this distinction were not drawn, there would have been no reason to include the confrontation clause in the sixth amendment in addition to the due process clause in the fifth amendment. Moreover, the language of the sixth amendment is absolute. It begins: "In *all* criminal prosecutions . . . ."[75] The Framers evidently intended by this language that a denial of the right of confrontation is always reversible error. As one commentator aptly stated, "[T]o suggest that the accused is sufficiently protected by the due process clause would be to regard the confrontation clause merely as a constitutional anachronism."[76]

Furthermore, the interests protected by the confrontation clause are not the same as those protected by the due process clause. As early as 1895, the Court stated that the confrontation clause was primarily designed

> . . . to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. . . .[77]

This interpretation was reaffirmed in *Douglas v. Alabama*[78] where the Court quoted this passage with approval. In contrast, the due process clause was designed to ensure the accused a fair trial in general.[79]

The parameters of a right specifically protected by the Constitution, such as the right of confrontation, should not be subsumed beneath a doctrine of general fairness. The danger of substituting a doctrine of general fairness for one of specific requirements was well expressed by Justice Black: "[A]s restated by my Brother Harlan . . . 'due process of law requires only fundamental fairness.' . . . [Such a test] depends entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution."[80] The due process standard is too amorphous and too subjective a standard by which to determine a violation of so invaluable a right as cross-examination,[81] for which the Framers provided separate protection. It is likewise too flexible a standard to determine the effect of a denial of a right given absolute sanction by the sixth amendment. This is evidenced by the Court's refusal in *Chambers* to reverse solely on the ground that Chambers' right to cross-examination had been denied where such denial was measured against a due process standard.

The foregoing analysis indicates that the use of due process standards to test the trial court's application of the "voucher" rule is vulnerable to attack on several grounds. Precedent will not support a determination of either the violation of the right to cross-examination or the effect of its denial by the measure of due process. To the contrary, the Court has examined such cases under the confrontation clause of the sixth amendment. Since the context of the denial of cross-examination in *Chambers* cannot be substantially distinguished from these cases, and since the protection which the two clauses provide is different, the Court should have followed a confrontation analysis.

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75. U.S. Const. amend. VI (emphasis added).

76. Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. Pa. L. Rev. 741, 743 (1965).

77. Mattox v. United States, 156 U.S. 237, 242-43 (1895).

78. 380 U.S. 415, 418-19 (1965).

79. Adamson v. California, 332 U.S. 46 (1947). The Court stated: "A right to a fair trial is admittedly protected by the due process clause of the Fourteenth Amendment." Id. at 53.

80. Duncan v. Louisiana, 391 U.S. 145, 168-69 (1968) (concurring opinion of Black, J.).

81. "[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, supra note 12, § 1367.

IV. A DEFENDANT'S RIGHT TO INTRODUCE EVIDENCE IN HIS OWN BEHALF

Whereas the previous discussion concluded that the Court improperly used a due process standard to test the trial court's application of the "voucher" rule, the following discussion argues that the Court, having unnecessarily reached the trial court's second ruling,[82] correctly applied a due process standard to the lower court's application of the hearsay rule.

According to Justice Powell, the second of the two rulings in *Chambers* involved the right of an accused to call witnesses in his own behalf.[83] Despite the Court's broad statement of the constitutional right at stake, the issue actually concerned a much narrower question. The trial court did not prevent defendant Chambers from calling any or all witnesses he desired. Rather, the trial court sustained the prosecutor's objections to the admissibility of certain testimony from three witnesses on the ground that it was hearsay. Each witness was prepared to testify that Gable McDonald had confessed to him that he, McDonald, had killed Officer Liberty. While each alleged confession was clearly hearsay, each was also a declaration against penal interest. However, Mississippi restricts the exception to the hearsay rule for declarations against interest to pecuniary or proprietary interests.[84] As a matter of state law, therefore, the trial court's ruling was proper.

A. Hearsay and Declarations Against Interest

The trial court's ruling and the Supreme Court's handling of the ruling are more comprehensible when viewed against the historical development and present status of the hearsay rule. The function of the rule is to enable the trier of fact to determine the trustworthiness of the evidence in the case by making inadmissible evidence which cannot be subjected to the essential test of cross-examination.[85] Nevertheless, many exceptions to the hearsay rule have developed during its long history.[86] Under these exceptions, hearsay may be admissible if it has the requisite "circumstantial probability of trustworthiness,"[87] or, in other words, alternative assurances of reliability which substitute for the test of cross-examination. As Wigmore wrote:

> The theory of the Hearsay rule is that many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.[88]

The exception to the hearsay rule for declarations against interest evolved from separate rules which dealt with specific pecuniary and proprietary evidentiary problems.[89] Eventually, the broad exception, which permitted the admission of all declarations of facts against the interest of an unavailable declarant, was accepted.[90]

82. See text accompanying notes 52-55 supra.

83. The trial court ruled that certain testimony of three witnesses offered by the defendant was inadmissible because it was hearsay. 410 U.S. at 292; 252 So. 2d 217, 220 (Miss. 1971).

84. See H. McElroy, Mississippi Evidence § 46 (1955).

85. 5 Wigmore, supra note 12, §§ 1360 et seq.

86. For a detailed history see id. § 1364.

87. Id. § 1422. See generally id. §§ 1420-22.

88. Id. § 1420.

89. For a detailed history of the exception, see id. § 1476. A briefer history may be found in McCormick, supra note 19, § 278.

90. 5 Wigmore, supra note 12 § 1476.

It was based on the assumption that a person is unlikely to make a statement palpably against his own interest at the time it is made unless the statement is true.[91] This is the alternative assurance of reliability for declarations against interest which substitutes for the test of cross-examination.

It was not until 1844 that a distinction was drawn between penal interests on the one hand and pecuniary or proprietary interests on the other. In the *Sussex Peerage Case*,[92] the House of Lords arbitrarily (and, according to Wigmore, in the face of precedent) excluded a declaration of fact which would have subjected the declarant to criminal liability, thereby confining the exception to declarations of facts against either pecuniary or proprietary interest. This limitation was imported to the United States and in 1913 received the Supreme Court's approval in *Donnelly v. United States*,[93] over Justice Holmes' vigorous dissent. The restriction, also criticized by Wigmore,[94] has been discarded in recent years by a number of states, among them California[95] and New York.[96] Nevertheless, Mississippi retains the more limited exception,[97] as do most states. Although in *Chambers* the Supreme Court intimated some dissatisfaction with the rule,[98] it did not find it necessary to re-examine the rule's general validity.[99] Instead, the Court limited its examination of the exception to its application by the trial court.

A crucial prerequisite to the Court's conclusions was that the offered testimony appeared to be highly trustworthy. Justice Powell scrutinized the circumstantial probability of the testimony's trustworthiness. He concluded that "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability."[100] The hearsay offered by Chambers satisfied a variety of traditional indicia of trustworthiness: (1) each of McDonald's confessions was made spontaneously to a close acquaintance; (2) the confessions were corroborated by other evidence in the case; (3) each confession was self-incriminating and against the declarant's interest; and (4) McDonald was in court, under oath, and available for cross-examination.[101] Justice Powell attributed special significance to this last factor.[102]

The Court based its analysis on the premise, stated at the outset,[103] that the right of an accused to present witnesses in his own behalf is protected by due process.[104] But the Court cautioned that the defendant must comply with the established rules of procedure and evidence, which are designed to assure fairness and reliability in the determination of guilt or innocence.[105] While the rule against hearsay is one of the more venerable rules of evidence, the exceptions are equally well-established. The Court concluded:

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91. Id. § 1476; McCormick, supra note 19, § 276.
92. 11 Cl. & F. 109 (1844).
93. 228 U.S. 243 (1913).
94. 5 Wigmore, supra note 12, § 1476.
95. People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964).
96. People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970).
97. H. McElroy, Mississippi Evidence § 46 (1955).
98. 410 U.S. at 299-300. The Federal Rules of Evidence broaden the exception for declarations against interest to encompass statements against penal or social interests. Fed. R. Evid. 804(b)(4) (effective July 1, 1975).
99. 410 U.S. at 299-300.
100. Id. at 300.
101. Id. at 300-01.
102. Id. at 301.
103. See text accompanying notes 8-9 supra.
104. 410 U.S. at 301.
105. Id. at 302.

> The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony was also critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.[106]

Though the Court did not specify what standard it was employing in assessing the application of the rule, there can be little doubt that it was the due process standard. Not only did the Court state that the right of an accused to call witnesses in his own behalf was essential to due process,[107] but the phrase "applied mechanistically to defeat the ends of justice" strongly suggests due process considerations. Finally, the Court's ultimate holding was grounded on due process.[108]

B. Due Process and State Rules of Evidence

The application of pure due process to a state rule of evidence is virtually unprecedented.[109] State evidence rules have been successfully challenged where they violated a specific constitutional provision, such as freedom from unreasonable searches and seizures,[110] or the right to confront witnesses.[111] Due process has also been applied to state procedural rules.[112] But research has revealed no case in which the Supreme Court has applied a pure due process test to a state rule of evidence. The novelty of this approach is substantiated by Justice Harlan's inability to cite supporting authority when he recommended this approach in his concurring opinion in *Dutton v. Evans*.[113] Harlan there advocated testing all federal and state rules of evidence, including those involving a confrontation issue, against due process.

Unprecedented though it may have been, the application of due process to a state rule of evidence which did not conflict with other constitutional provisions was most appropriate. As the Court indicated, rules of "evidence [are] designed to assure both fairness and reliability in the ascertainment of guilt or innocence."[114] In the past the Court has recognized a similar function for due process: "The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction."[115] Thus, the functional parallelism of due process and the rules of evidence makes the former the appropriate constitutional standard for the latter.

Moreover, the due process standard is well suited to balancing the interests of the accused against the interests of the State.[116] It is clear that the State has a legitimate interest in devising rules which assure that the trier of fact will have a reasonable basis upon which to assess the reliability of the evidence submitted. Against this interest must be weighed the defendant's interest in presenting all reliable evidence in his defense. The *Chambers* case is an excellent example of this balancing process. Although the evidence offered by Chambers did not fit within any of Mississippi's recognized exceptions to the hearsay rule, the alternative assurances of reliability of the hearsay statements were considerable—well beyond the assurances demanded

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106. Id.
107. See text accompanying notes 8-9 supra.
108. 410 U.S. at 302. See text accompanying note 119 infra.
109. See note 53 supra.
110. Mapp v. Ohio, 367 U.S. 643 (1961).
111. Pointer v. Texas, 380 U.S. 400 (1965).
112. In re Oliver, 333 U.S. 257 (1948).
113. 400 U.S. 74 (1970). See the passage quoted in full in text accompanying note 62 supra.
114. 410 U.S. at 302.
115. Adamson v. California, 332 U.S. 46, 57 (1947).
116. See text accompanying note 62 supra.

of hearsay within recognized exceptions. In addition, the declarant was in court and available for cross-examination concerning the hearsay statements. As the Supreme Court declared, mere mechanical formalism should yield to fairness.[117]

Both in function and in flexibility, the due process standard is well suited to test state rules of evidence which otherwise are immune from constitutional restraints.

V. THE HOLDING AND ITS IMPLICATIONS

Just as the Court avoided a decision based solely on the denial of the right of cross-examination,[118] so too, the Court avoided basing its decision on this unjust application of the hearsay rule alone. Rather, the Court decided the case on the combined effect of the trial court's two rulings. Justice Powell concluded: "[T]he exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process."[119]

The immediate significance of the *Chambers* decision is somewhat obscured by the Court's restrictive holding. The reasons behind the Court's decision to approach the case through the conjunctive effect of the two rulings may, however, provide an important clue in assessing the ultimate impact of the case. The defendant based his appeal on the cumulative effect of the trial court's rulings, contending that the rulings frustrated his efforts to develop his defense.[120] Chambers argued that the rulings, in combination, denied him due process; the Court agreed. The opinion clearly adopts the defendant's framing of the issue by deciding on the cumulative impact rather than on the individual rulings themselves. Thus it is at least arguable that the posture of the defendant's argument confined the Court to its restrictive holding.

The defendant's framing of the issue aside, there does not appear to be any reason in logic which would compel such a narrow holding. The Court never explained the cumulative effect, but implied that the rulings were cumulative because each ruling prevented Chambers from developing testimony favorable to his defense. The Court stated: "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 *or* had the other confessions been admitted."[121] This statement, viewed in conjunction with the Court's holding, suggests that if the trial court had ruled in Chambers' favor on one of the two issues, thereby permitting him to develop some of the evidence, the result might have been different. To reach a different result one must accept the proposition that where a defendant is prevented from developing only one of two lines of defense, the impact is not so great as if he were prevented from developing both lines of defense.

This reasoning is unsound. It assumes that the defendant has an undeniable right to develop only a certain quantum of evidence in his defense; once he has gone beyond this minimum level, any denial of his right to develop evidence in his defense is less harmful. On the contrary, even where the defendant is prevented from developing only a single piece of evidence in his defense, no one but the trier of fact can say whether the additional bit of evidence in conjunction with the other evidence would

117. See text accompanying note 106 supra. It is interesting to observe that if McDonald had been the defendant, the hearsay testimony would have been admissible under the recognized exception for admissions of parties. Query whether the evidence becomes more reliable by the mere switching of defendants?

118. See note 52 supra.

119. 410 U.S. at 302.

120. Id. at 290-91 n.3.

121. Id. at 294 (emphasis added).

have been sufficient to exonerate the defendant. Thus, if the trial court had ruled favorably to Chambers on one ruling and unfavorably on the other, and if the unfavorable ruling were unconstitutional, the impact would have been equally harmful to the defendant. To deny a defendant the right to develop *all* available, reasonably reliable evidence in his defense is to deny him a fair opportunity to defend against the State's accusations.

Aside from the influence exerted by the manner in which Chambers cast his appeal, the narrow decision may also reflect, to some extent, the reluctance of the Court to make broad rulings about constitutional issues. One may therefore hypothesize that either ruling by a trial court would be sufficient by itself to require reversal. With respect to the cross-examination issue, the Court has in the past reversed a conviction solely on the denial of the right of confrontation.[122] Whether the Court would find the denial of due process through the application of a state evidentiary rule sufficient grounds for reversal is less clear. However, where due process has been denied through the application of state procedural rules, the Court has reversed a conviction.[123] Since the unyielding application of rules of evidence can be no less harmful to the defendant than the imposition of unfair procedures, an evidentiary violation of due process should likewise require reversal.

VI. CONCLUSION

It is to be hoped that the treatment of the right to cross-examination in due process terms was an aberration which flowed from the petitioner's framing of the issues and the Court's emphasis on the overall impact of the two rulings by the trial court. The confrontation clause is far more appropriate for determining the existence and effect of a denial of the right of cross-examination. The protection which this clause affords a defendant is more secure than that provided by the due process clause. Prior decisions by the Court have delineated specific requirements of the confrontation clause which may be lost within the general concept of fundamental fairness.

The precedent for applying due process to state rules of evidence should be developed into a recognized standard. This would alleviate the consequences suffered by a defendant through the application of arbitrary distinctions based on history rather than logic. Due process is the proper standard to test evidentiary rules because both are designed to ensure fairness in the determination of guilt or innocence. Moreover, due process is the appropriate means by which to strike the delicate balance between the conflicting interests of the state and the defendant.

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122. Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, 380 U.S. 257 (1965).
123. See, e.g., In re Oliver, 333 U.S. 257 (1948).