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would be induced by the existence of the murder charge. Therefore, while the inclusion of that charge would constitute harmless error from the state's viewpoint, it would not be so innocuous to the defendant.

The Chief Justice could have merely ended his decision at this point, reversing and remanding in favor of the defendant. However, this would leave both petitioner and respondent in a quandry. Should Price be tried a third time? Burger asked for post-argument memoranda from opposing counsel in an effort to resolve this question. The result was a remand to the Georgia courts for judicial construction of their statutes.

It must be noted that *Price v. Georgia* did not, in Burger's view, broaden the protection afforded by the fifth amendment; it merely followed the law established in *Green*. If this were the case, *Price* could have easily been resolved by the trial court. Instead it reached the Supreme Court because the state of the law was not as clear as Burger would have one believe. The cases fall on both sides of the issue. *Kepner* and *Green* favor the petitioner. *Trono* and *Brantley* favor the state. The facts of these cases are not distinguishable. In essence, they all presented the same issue as *Price*, but were decided in opposite ways.

Moreover, the reasoning found in the precedents upon which Burger could rely proved unconvincing and contrived. Neither the waiver theory of *Trono*, nor the implicit acquittal theory of *Green* were tenable.

Faced with these conflicting decisions, Burger used *Price* not merely as an affirmation of the holding in *Green* but rather as a means to assure that the prohibition against double jeopardy was well defined and would therefore occupy a preeminent place among the freedoms granted by the Bill of Rights.[44] Indeed, he redefined the characteristics of that guarantee against double jeopardy. Double jeopardy applies to the possibility of second punishment, not to its becoming a reality. It is the threat of a second trial at which the constitutional prohibition is aimed. In this context, a second trial could never be "harmless error" even if the same verdict obtained. Continuing jeopardy will allow retrial after appeal on the charge appealed, but not on a greater charge. The significance of *Price*, therefore, is that it tends to clarify the law of double jeopardy by settling some of the basic issues left confused or unresolved by prior decisions.

States, 355 U.S. 184 (1957), puts the defendant through two trials: one in which he is "implicitly acquitted" of murder and convicted of manslaughter and a second, as a result of a successful appeal, on the manslaughter charge again. Both trials are final determinations of different charges.

[44] The characteristics of double jeopardy set forth or clarified by Chief Justice Burger in *Price*, do not prohibit the imposition of a greater penalty for the same offense upon subsequent retrial after appeal. North Carolina v. Pearce, 395 U.S. at 719 (1969) held:

> Long established constitutional doctrine makes clear that... the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction.

That case held, however, that a greater sentence cannot be used to punish the defendant for appealing and getting the first conviction overturned.

A case similar to *Pearce* was decided one week before Price v. Georgia, 398 U.S. 323 (1970). In Moon v. Maryland, 398 U.S. 319 (1970), the Court held that Pearce was to be retroactively applied. Justice Douglas dissented to the holding in *Moon* and to the *Pearce* doctrine.

> He [the defendant] risks the maximum permissible punishment when first tried. That risk having been faced once need not be faced again. 398 U.S. at 321, quoting 395 U.S. 711, 726–27.

Moon and *Pearce* concern the amount of punishment; *Price* concerns the crime to be punished. It may be however, that this distinction is only one of form, not substance in its application. Harsher sentences may be assessed on reconviction because the defendant could not be tried on a greater charge.

RIGHT TO CONFRONTATION

Illinois v. Allen, 397 U.S. 337 (1970)

In *Illinois v. Allen*[1] the Court held that a defendant who, despite admonition from the bench, engages in conduct so disruptive as to frustrate the ordinary course of his trial, may be held to have lost his constitutional right to confront the witnesses against him.[2]

William Allen was convicted for armed robbery

[1] 397 U.S. 337 (1970). This decision was subjected to extensive analysis by the attorneys for the State of Illinois in, Flaum & Thompson, *The Case of The Disruptive Defendant: Illinois v. Allen*, 61 J. CRIM. L. C. & P. S. 327 (1970).

[2] U.S. CONST. amend. VI, "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him..."

in state court and sentenced to serve 10 to 30 years in the penitentiary. The conviction was affirmed[3] and the Supreme Court denied *certiorari*.[4] A petition for writ of habeas corpus was filed in federal district court alleging that the defendant's sixth amendment rights had been violated by his removal from the courtroom during trial, despite the fact that the expulsion was a result of the defendant's disruptive conduct. The district court dismissed the petition, but the Court of Appeals for the Seventh Circuit reversed,[5] holding that a criminal defendant had an unqualified right to be present at every stage of his trial.[6] The Supreme Court granted *certiorari*[7] and reversed the decision, holding that a trial judge, in the valid exercise of his discretion, commits no constitutional violation by expelling a disruptive defendant.

Mr. Justice Black, speaking for a unanimous Court, conceded that the right of an accused to be present at all stages of his trial was a constitutional guarantee made obligatory on the states by the fourteenth amendment.[8] The notion, however, that the guarantee of confrontation in the sixth amendment was absolute and unqualified had been previously rejected.[9] Therefore, the guarantee could be lost by misconduct.[10]

Recognizing the Seventh Circuit's adherence to the doctrine demanding the indulgence of every reasonable presumption against the loss of constitutional rights,[11] the Court intimated that the precedents cited by the court of appeals did not squarely face the issue, but rather concerned situations in which the denial of the right to confrontation was more technical than discretionary.[12] In reaching its conclusion the Court avoided the concept of waiver based on voluntary absence[13] and centered on the disastrous consequences to the administration of justice that could result by permitting an unqualified sixth amendment right:

> [I]f our courts are to remain what the founders intended, the citadels of justice, their proceedings cannot and must not be infected with . . . scurrilous, abusive language and conduct . . .[14]

Pursuing the principle, the Court outlined three constitutionally permissible alternatives for dealing with an obstreperous defendant:

1. Binding and gagging him.
2. Citing him for contempt.
3. Removing him from the courtroom.[15]

Notwithstanding the constitutional sanctity of the right to confrontation,[16] the discretionary right of a trial judge to go forward with the proceedings where a defendant voluntarily absents himself is well established.[17] However, minimal authority exists for extending the voluntary absence theory to the defendant who, warned that repetition of his misconduct will result in expulsion, continues the disruption and is expelled as a con-

[3] People v Allen, 37 Ill. 2d. 167, 226 N.E. 2d 1 (1967)

[4] 389 U.S. 907 (1967)

[5] United States *ex rel.* Allen v Illinois, 413 F. 2d 232 (7th Cir. 1969) (2–1 decision).

[6] *Id.* at 234.

[7] 396 U.S. 955 (1969).

[8] 397 U.S. at 338 (1970). The right of the accused to be present at every stage of his trial was constitutionally sanctioned in Lewis v United States, 146 U.S. 370 (1892), and made applicable to state prosecutions in Pointer v Texas 380 U.S. 400 (1965).

[9] Diaz v United States, 223 U.S. 442 (1912).

[10] 397 U.S. at 342 (1970) citing Mr. Justice Cardozo's opinion in Snyder v Massachusetts, 291 U.S. 97 (1938). *Cf.* F. R. CRIM. P. 43:

> [I]n prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.

[11] Johnson v Zerbst, 304 U.S. 458, 464 (1968)

[12] United States *ex rel.* Allen v Illinois, 413 F.2d at 235 (1969). *See* Hopt v Utah, 110 U.S. 574 (1884) (challenged jurors were tried for bias while the accused was not present); Shields v United States, 273 U.S. 583 (1927) (court sent in instruction to the jury without consulting the defendant or his attorney).

[13] Voluntary absence would result from a repetition of misconduct subsequent to a warning that continued misconduct would merit expulsion. Thus, the voluntariness of repeating the disruption makes the resulting absence the product of a voluntary act. See notes 20–22 *infra*.

[14] 397 U.S. at 346 (1970).

[15] *Id.* at 344.

[16] Engendered by well-founded anxiety about a criminal defendant's ability to contend with unchallenged evidence against him, the right to confrontation was carried forward as a part of the common law and absorbed into the Constitution. *See* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, A STUDY IN CONSTITUTIONAL DEVELOPMENT 104 (1951). The rationale supporting the right rests in the necessity to subject adverse testimony to cross-examination. *See* 5 J. WIGMORE, EVIDENCE §1395 (3rd ed. 1940). This rationale is premised on the belief that defense counsel cannot adequately impeach the credibility of an adverse witness without the assistance of the accused. *See, e.g.*, Pointer v Texas, 380 U.S. 400 (1965); Turner v Louisiana, 379 U.S. 466 (1964); *In Re* Oliver, 333 U.S. 257 (1947); Kirby v United States, 174 U.S. 47 (1898); Lewis v United States, 146 U.S. 370 (1892).

[17] *See, e.g.*, Parker v United States, 184 F.2d 488 (4th Cir. 1950); Berness v State, 83 So.2d 607 (Ala. 1953), noted 9 ALA. L. REV. 96 (1956); State v McGinnis, 12 Idaho 336, 85 P. 1089 (1906); Cox v Hand, 185 Kan. 780, 347 P. 2d 265 (1959); State v Thompson, 56 N.D. 716, 219 N.W. 218 (1928); *Ex parte* Cassas, 112 Tex. Crim. 100, 13 S W.2d 869 (1929); State v Aikers, 87 Utah 507, 51 P.2d 1052 (1935); State v Smith, 183 Wash. 136, 48 P.2d 58 (1935). State v Biller, 262 Wis. 472, 55 N.W. 2d 414 (1952).

sequence of his voluntary act.[18] This theory is supported by the rationale in *United States v. Davis*,[19] decided without reference to the sixth amendment, and *People v. DeSimone*,[20] where the Supreme Court of Illinois held that the constitutional right to confrontation[21] could be waived.[22]

In its avoidence of the waiver theory or any other doctrinal mechanism, the Court gave the trial judge a wide latitude of discretion. This discretion is tempered, however, by the requirement that the defendant be re-admitted upon his expression of willingness to conform with proper standards of behavior.[23] Although failing to suggest a system for applying the removal, restraint, and contempt sanctions, the Court noted that binding and gagging would be a last resort where absolutely necessary to keep the defendant present, but did not attempt to envision a situation in which this might be done.[24] Several disadvantages attach to binding and gagging that do not attach to removal or contempt.

The first disadvantage is the effect that the sight of a shackled defendant would have on a jury's presumption of his innocence.[25] Although some courts have recommended that an insulating instruction be given for the defendant's protection,[26] the bound defendant would, nevertheless, be a continuing physical influence. Secondly, the presence of a manacled defendant has a demeaning effect upon the dignity and decorum of the judicial process.[27] Finally, binding and gagging, by its very purpose, destroys the efficacy of the right it is invoked to protect. Since the right of confrontation is given the criminal defendant in order to allow him to consult with counsel for the purpose of effective cross-examination, it is anomalous to bind and gag him to preserve it. With the possible exception of identification, the presence of the defendant then seems more ceremonial than effective.

Under certain circumstances the efficiency of the judge's summary contempt powers would also be subject to several limitations. A defendant intent upon disrupting his trial for publicity purposes may not feel compelled to alter his conduct under threat of a contempt citation.[28] Likewise, imprisoning an unruly defendant for contumacious conduct and suspending his trial in the interim may serve as a tactical advantage to the defendant who might profit by the subsequent unavailability of an adverse witness.[29] Also, certain defendants, especially those facing capital or other severe punishment, may not be restrained by the contempt power.

In contrast to the use of restraints or contempt, removing an obstreperous defendant offers him neither tactical advantage nor publicity, nor does it force the court to proceed with the spectacle of a

[18] This theory was relied upon by the Supreme Court of Illinois in the original disposition of Allen's appeal. People v Allen, 37 Ill.2d 167, 226 N.E.2d 1 (1967).

[19] 25 Fed. Cas. 773, 774 (C.C.S.D. N.Y. 1869); The right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance. . . . It does not lie in his mouth to complain of the order which was made necessary by his own misconduct, and which he could at any time have terminated by signifying the willingness to avoid creating [a] disturbance.

[20] 9 Ill. 2d 522, 533, 138 N.E.2d 556, 562 (1956): It is obvious from the record that defendant's removal was necessary to prevent such misconduct as would obstruct the work of the court; such misconduct was in turn, effective as a waiver of the defendant's right to be present. The right to appear and defend is not given to a defendant to prevent his trial either by voluntary absence, or by wrongfully obstructing its progress.

This proposition is supported in dicta in Sahlinger v People, 102 Ill. 241, 246 (1882). For comparative purposes, *see* Regina v Berry, 104 L.T.J. 110 (Northhampton Assizes 1897), noted, 11 HARV. L. REV. 409 (1898).

[21] ILL. CONST. art. II, § 9.

[22] *See* Murray, *The Power to Expel a Criminal Defendant from His Own Trial: A Comparative View.* 36 U. COLO. L. REV. 174, 175 (1964).

[23] 397 U.S. at 346.

[24] *Id.* at 344.

[25] *See* Comment, *Handcuffing the Defendant During the Trial*, 8 St. LOUIS U. L. J. 401 (1968).

[26] Rich v United States 261 F.2d 536, 538 (4th Cir. 1958); State v Sawyer, 60 Wash.2d 83, 85, 371 P.2d 932, 933 (1962).

[27] 397 U.S. at 350 (Brennan, J., concurring): In particular shackling and gagging is surely the least acceptable of these. It offends not only judicial dignity and decorum, but also that respect for the individual which the lifeblood of the law.

[28] In United States v. Dellinger, No. 69 CR 180 (N.D. Ill.), a mistrial was declared with respect to defendant Seale and he was summarily sentenced on sixteen separate specifications of contempt. Because the trial judge was bound by the Seventh Circuit's decision in *Allen*, the Supreme Court not having reversed at the time of trial, Seale could not be removed. Thus, when warning of future contempt citations and binding and gagging proved ineffective to halt the disruption, the court had no alternative but to declare a mistrial and utilize the summary contempt power under F.R.CRIM.P. 42(a) in order to insure a fair trial for the remaining codefendants. While summary punishment has been held the appropriate remedy for extreme cases such as Seale's, *e.g.*, Sacher v. United States 343 U.S. 1 (1952), it appears that the Supreme Court, in retaining binding and contempt as proper measures for dealing with a disruptive defendant, clearly anticipated Seale's forthcoming appeal. Since removal is a more effective expedient, it appears that the Seale situation, although quite proper under the circumstances, will remain an orphan in the law.

[29] 397 U.S. at 345 (1970).