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courts a greater degree of latitude than the rather
limited provisions of the statute provide.

Although *Younger* and its companions constitute
a fairly complete statement of the Court's views on
the equitable powers of federal courts in the area of
state criminal proceedings, several questions re-
main to be answered before the picture is com-
pleted: the question of exhaustion of state remedies,
the time sequence of federal intervention and the
danger of irreparable injury, the extent to which
federal courts may intervene in criminal law
administration which does not involve pending
proceedings, the exact requisites of standing to
challenge a statute as unconstitutionally broad,
and the related question of the point at which
"state proceedings" begin.71 But whatever the

71 Although the Court in *Younger* and *Boyle*
dismissed plaintiffs for lack of controversy, it announced
no guidelines to determine when a petitioner was sufi-
ciently threatened with prosecution to have standing to
challenge a statute and yet not in the position of having
had "state proceedings" commenced against him so as
to preclude relief under *Younger*. At some time the
Court may be called upon to decide the point at which
criminal proceedings have begun within the terms of
*Younger*. Possible points of beginning could be:
issuance of an arrest warrant, actual custody, convening
of a grand jury, or return of an indictment. *But see*
Hartsville Theatres Inc. v. Fox, 324 F. Supp. 258
(D.S.C. 1971), decided the same day as *Younger* (Feb.
23, 1971) where the court decided that for purposes of
the anti-injunction statute *(see note 13, supra for text)*
criminal proceedings begin with an arrest. *Id.* at 262.

There also exists within the *Younger* decision the possi-
bility of an unseemly race to the courthouse: state
officials rushing to commence state proceedings to pre-
clude federal intervention, while the prospective de-
fendant rushes to the federal court to invoke that
court's equitable powers.

**CONFRONTATION**

**Dutton v. Evans, 400 U.S. 74 (1970)**

In *Dutton v. Evans*4 the Supreme Court upheld
a state statutory exception to the hearsay rule2
against the claim that it contravened the sixth
amendment's confrontation clause.3 In reaching
its decision the Court substantially reformulated
the standard under which the confrontation clause
is applied.

In *Dutton*, defendant Evans and two others,
Williams and Truett, were charged with the murder
of three police officers. Evans and Williams were
indicted and tried separately; Truett, however,
was granted immunity from prosecution in return
for his testimony. Evans was convicted by a jury,
and the Supreme Court of Georgia affirmed.4 The
federal district court denied a writ of habeas
corpus; but the Court of Appeals for the Fifth
Circuit reversed, holding that Evans had been
denied the right to confront a witness against him.5

Evans alleged that the trial court erred by
admitting hearsay testimony by Shaw who at trial
related a statement purportedly made to him by
Williams while both were incarcerated for unre-
lated crimes. According to Shaw, Williams re-
ponded to an inquiry about the outcome of
William's arraignment by remarking, "If it hadn't
been for that dirty son-of-a-bitch Alex Evans, we
wouldn't be in this now." Shaw's report of this
statement was admitted at Evans' trial under a
statutory exception6 to the hearsay rule, resembling
the common law co-conspirator exception. Evans
contended that the application of the Georgia
exception to Shaw's testimony violated his sixth
amendment right to confront the real witness
against him—Williams, declarant of the incrimi-
ating statement.

At common law statements by one co-con-
spirator were admissible against another despite
the hearsay rule, provided that the statements
were made during the conspiracy.7 In Georgia,

5 *Evans v. Dutton*, 400 F.2d 826, 831-32 (5th Cir.
1968).
6 *See note 2 supra.*
7 If two persons are engaged in a conspiracy, the
statements of one may be used against the other not-
withstanding the witness's availability or the failure
to have him cross-examined. The test of trustworthiness
is that "What one of the conspirators admits while
the plot is afoot about the plan...is said by one who
has special knowledge and generally is against the
however, the comparable statutory hearsay exception was construed to include, in addition, statements made after the conspiracy had terminated and during the period when the conspirators were concealing their guilt.8 Thus in Dutton, Williams' statement was admissible against the defendant because it was made during the concealment phase.

The defendant argued that because the Georgia exception, as applied in Dutton, exceeded the scope of the comparable federal,9 or common law, co-conspirator exception, it violated the sixth amendment confrontation requirement. The argument relied on Supreme Court decisions in which the Court expressed the confrontation requirement in terms of the hearsay rule and its traditional exceptions.

Defining it in these terms, the defendant argued, restricted exceptions to the confrontation requirement to traditional hearsay exceptions.

Dean Wigmore contended that the confrontation clause was merely a general endorsement of the hearsay principle by the framers of the Constitution.10 In his view the opportunity to cross-examine adverse witnesses was the raison d'etre of both doctrines. Confrontation,11 or the opportunity to declarant's interest.” McCormick, Evidence § 244, at 522 (2d ed. 1954).


9 Fed. R. Crim. P. 26 provides:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

10 See, e.g., Salinger v. United States, 272 U.S. 542, 548 (1926) where the Supreme Court said:

The right of confrontation did not originate with the sixth amendment, but was a common law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.

See also note 8 infra. 11 5 Wigmore, Evidence § 1397, at 130–31 (3d ed. 1940) [hereinafter cited as Wigmore].

12 The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.

**Pointer v. Texas**, applying the confrontation clause to the states through the fourteenth amendment, the Court refused to admit testimony recorded at a preliminary hearing where the defendant, lacking counsel, did not have an adequate opportunity to cross-examine. The Court held this denial to be a deprivation of defendant's confrontation right. Similarly, in **Barber v. Page** the Court ruled previously recorded testimony inadmissible where the prosecution had not made a good faith effort to secure the presence of the originator in court. In **Barber** the originator of the testimony was incarcerated in a federal prison in another jurisdiction. According to the traditional hearsay exception, unavailability was satisfied where the witness was beyond the court's power to compel attendance. But the Supreme Court ruled that this availability test was outmoded by the increasing cooperation between the federal government and the states. The Court held that the confrontation clause required the prosecution to explore new avenues of federal-state cooperation to make the witness available for trial.

Relying on these decisions, the fifth circuit in **Evans v. Dutton** stated:

> The Supreme Court has now made clear that the rationale of hearsay exceptions in criminal cases must be continually scrutinized and re-evaluated. . . . We therefore think it clear that, if an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation.

The court concluded that the justifications for the Georgia co-conspirator exception did not satisfy the confrontation clause.

Reversing, the Supreme Court asserted that the fifth circuit's approach, seeking "salient and cogent reasons," was unsound. The Court was disturbed that this approach, essentially equating the hearsay rule with the confrontation clause, would "require a constitutional reassessment of every established hearsay exception, federal or state. . . ." The Court conceded that the confrontation clause and the hearsay rule "stem from the same roots," but it declined to equate the two. The Court's alternative, however, carefully avoided clarifying the relationship between the hearsay rule and the sixth amendment. "We confine ourselves, instead, to deciding the case before us."  

The Court first dismissed the defendant's contention that the Georgia hearsay exception violated the confrontation clause because its application in **Dutton** exceeded the scope of the comparable federal, or common law, co-conspirator exception.

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21 Id. at 723.

22 Mr. Justice Marshall, speaking for the Court in **Barber**, noted that "[t]he right of confrontation may not be dispensed with so easily." 390 U.S. at 724. He suggested that under 28 U.S.C. §2241(c)(5) the federal courts had power to issue writs of habeas corpus ad testificandum at the request of state prosecution authorities, in order to provide the state with a federally incarcerated witness.

Id. at 723 and n. 4.

23 400 F.2d 826 (5th Cir. 1968).

24 Id. at 830.

25 400 U.S. at 80.
Speaking for the Court, Mr. Justice Stewart denied that the federal rule of evidence defined the parameters of the confrontation requirement. He clarified that the limited contours of the federal co-conspirator exception “have simply been defined by the Court in the exercise of its rule-making power in the area of the federal law of evidence.” Thus the Court assured that state evidentiary rules would not per se violate the sixth amendment for failing to coincide with the federal or traditional hearsay exceptions.

The Court then considered whether the admission of Shaw’s hearsay testimony violated the confrontation standard. Contending that it did, the defendant relied on a series of recent Supreme Court decisions finding confrontation violations. In each of these decisions the Court had found either an inadequate opportunity to cross-examine or an untapped availability of the witness to testify. The declarant in Dutton was not cross-examined about his incriminating statement when it was made or at defendant’s trial, nor was he examined about his incriminating statement when he has “since become convinced’ that Dean Wigmore was correct in linking the confrontation clause’s vitality. Shifting from his opinion last term in Green v. California, he has “since become convinced’ that Dean Wigmore was correct in linking the confrontation clause with the principles of the hearsay rule. But he warned, “however natural the shift may be, once it is made it carries the seeds of great mischief for enlightened development in the law of evidence.” Harlan conceived the confrontation clause as

Interest” — textbook tests for the reliability of hearsay.

Justice Marshall, dissenting, reasserted the primacy of cross-examination in the confrontation requirement. For him Douglas v. Alabama was controlling. In Douglas a confession by an alleged accomplice implicating the defendant was introduced at the defendant’s trial. Although the accomplice was called to testify, he invoked the fifth amendment privilege against compulsory self-incrimination. The Court held the implicating statement inadmissible as violating defendant’s confrontation right. The Court found that the accomplice’s refusal to testify defeated defendant’s right to cross-examine and to test the statement’s truth. Similarly in Dutton, argued Justice Marshall, the defendant was deprived of his right to cross-examine the declarant Williams. According to Marshall, Williams was not only available, but no attempt had been made to call him to testify.

Justice Marshall also criticized the Court’s reformulation of the confrontation standard:

I am troubled by the fact that the plurality for reversal, unable when all is said to place this case beyond the principled reach of our prior decisions, shifts its ground and begins a hunt for whatever “indicia of reliability” may cling to Williams’ remark, as told by Shaw.

He questioned whether the confrontation clause had any “vitality” independent of the hearsay rule if the Court so readily found indicia of trustworthiness.

Justice Harlan, concurring, was not concerned about the confrontation clause’s vitality. Shifting from his opinion last term in Green v. California, he has “since become convinced’ that Dean Wigmore was correct in linking the confrontation clause with the principles of the hearsay rule. But he warned, “however natural the shift may be, once it is made it carries the seeds of great mischief for enlightened development in the law of evidence.” Harlan conceived the confrontation clause as