The Burger Court Opinion Writing Database

California v. Green

399 U.S. 149 (1970)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

No. 387 - California v. Green

From: The Chief Justice

Circulated: JUN 5 1970

Recirculated: _____

MR. CHIEF JUSTICE BURGER, concurring.

I join fully in Justice White's opinion for the Court. I add this comment only to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice. If new standards and procedures are tried in one State their success or failure will be a guide to others and to the Congress.

Here, California, by statute, recently adopted a rule of evidence[1] that, as Justice White observes, has long been advocated by leading commentators.[2] Two other States, Kentucky and Wisconsin,[3] have within the past year embraced similar doctrines in judicial decisions. None of these States have yet had sufficient experience with their changed laws to determine whether or not the modification was sound and wise. The California Supreme Court, however, struck down

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1/ Cal. Evid. Code § 1235 (West 1966).

2/ Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

3/ Gelhaar v. State, 41 Wis.2d 230, 163 N.W.2d 609 (1969), petition for certiorari pending, No. 389 Misc., 1969 Term.

June 8, 1970

Dear Byron:

Re: No. 387 - State of California v. John Anthony Green.

I agree.

Sincerely,

HLB

Mr. Justice White

cc: Conference

May 28, 1970

Dear Byron:

In No. 387 - California v. Green, please note that I join your opinion.

William O. Douglas

Mr. Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

June 3, 1970

Re: No. 387 - California v. Green

Dear Byron:

I think we should consider setting this case for reargument with Dutton next Term. As I see it, underlying both cases is the basic question as to the extent to which the prosecution is constitutionally restricted in using hearsay evidence in criminal trials. At least Green also involves the related question as to how constitutional "confrontation" affects any right there may be to cross-examination.

While I think you have in Green very skillfully avoided foreclosing consideration of the more basic problems in Dutton, it seems to me unfortunate that you have had to write in Green with Dutton still in prospect.

While these are both state cases, the problems are of equal concern in federal criminal trials as indeed is evidenced by the circumstance that the Solicitor General sua sponte filed an amicus brief in Green. It seems to me desirable that he should also have that opportunity in Dutton and, further, that it would be well to invite him to argue orally in both cases.

It seems to me that the far-reaching character of these problems argues strongly for having Green and Dutton considered and decided together, and that these considerations should outweigh the natural desire not to put over for reargument next Term any more cases than we have to.

Sincerely,

J.M.H.

Mr. Justice White
CC: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 387.—October Term, 1969

From: Harlan, J.

Circulated: JUN 10 1970

Recirculated:

State of California, Petitioner, *v.* John Anthony Green. } On Writ of Certiorari to the Supreme Court of California.

[June —, 1970]

Mr. Justice Harlan, concurring.

The Court today holds that the Confrontation Clause of the Sixth Amendment does not preclude the introduction of an out-of-court declaration, taken under oath and subject to cross-examination, to prove the truth of the matters asserted therein, when the declarant is an available witness at trial. With this I agree.[1]

The California decision that we today reverse demonstrates, however, the need to approach this case more broadly than the Court has seen fit to do, and to confront squarely the Confrontation Clause because the holding of the California Supreme Court is the result of an understandable misconception, as I see things, of numerous decisions of this Court, old and recent, that have indiscriminately equated "confrontation" with "cross-examination."[2] See *Bruton* v. *United States*, 391 U. S. 123

[1] The Court declines to consider the admissibility of Porter's out-of-court declaration to Officer Wade and remands for a determination as to whether it was properly admissible under California law. I consider this in Part IV, *infra*.

[2] While this broad problem that lies beneath the surface of today's case would, in my view, have been more appropriately considered in a more conventional hearsay setting, where the maker of extrajudicial statement is not present at trial, it has been briefed and argued by both sides, and I reach it now, notwithstanding the pendency of No. 21, *Dutton* v. *Evans*, on our docket. *Dutton*

p. 1-4, 6-9, 12-15

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

From: Harlan, J.

Circulated:

Recirculated: JUN 22 1970

SUPREME COURT OF THE UNITED STATES

No. 387.—October Term, 1969

State of California, Petitioner, *v.* John Anthony Green. } On Writ of Certiorari to the Supreme Court of California.

[June 23, 1970]

Mr. Justice Harlan, concurring.

The precise holding of the Court today is that the Confrontation Clause of the Sixth Amendment does not preclude the introduction of an out-of-court declaration, taken under oath and subject to cross-examination, to prove the truth of the matters asserted therein, when the declarant is available for being a witness at trial. With this I agree.[1]

The California decision that we today reverse demonstrates, however, the need to approach this case more broadly than the Court has seen fit to do, and to confront squarely the Confrontation Clause because the holding of the California Supreme Court is the result of an understandable misconception, as I see things, of numerous decisions of this Court, old and recent, that have indiscriminately equated "confrontation" with "cross-examination."[2] See *Bruton* v. *United States*, 391 U. S. 123

[1] The Court declines to consider the admissibility of Porter's out-of-court declaration to Officer Wade and remands for a determination as to whether it was properly admissible under California law. I consider this in Part IV, *infra*.

[2] While this broad problem that lies beneath the surface of today's case would, in my view, have been more appropriately considered in a more conventional hearsay setting, where the maker of extrajudicial statement is not present at trial, it has been briefed and argued by both sides, and I reach it now, notwithstanding the pendency of No. 21, *Dutton* v. *Evans*, on our docket. *Dutton*

Circulated
6-11-70

SUPREME COURT OF THE UNITED STATES

No. 387.—October Term, 1969

State of California, Petitioner, *v.* John Anthony Green. } On Writ of Certiorari to the Supreme Court of California.

[June —, 1970]

Mr. Justice Brennan, dissenting.

Respondent was convicted of violating California Health and Safety Code § 11532 which prohibits furnishing narcotics to a minor. The only issue at his trial was whether he had in fact furnished Porter, a minor, with marihuana. On the testimony given directly during respondent's trial, he could not have been constitutionally convicted, for there would have been insufficient evidence to sustain a finding of guilt. The State presented three witnesses to prove respondent's guilt: Porter and Police Officers Wade and Dominquez. As the Court states, Porter testified that "he was uncertain how he obtained the marihuana, primarily because he was at the time on 'acid' (LSD), which he had taken 20 minutes before respondent phoned. Porter claimed that he was unable to remember the events which followed the phone call, and that the drugs he had taken prevented his distinguishing fact from fantasy." *Ante,* at 3. Police Officer Wade had no personal knowledge of the facts of the alleged offense; he was able only to report the content of an extrajudicial statement which Porter had made to him. Officer Dominquez testified about an incident wholly separate from the alleged offense; his testimony was consistent with the defense account of the facts.[1]

[1] See *People* v. *Green,* 75 Cal. Rptr. 782, —, 451 P. 2d 422, 424 (1969).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1970

387 - California v. Green

Dear Byron,

Subject to our conversation this morning, I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Dougla
Mr. Justice Harlan
Mr. Justice Brennar
Mr. Justice Steva
Mr. Justice Forta
Mr. Justice Marsh

From: White, J.

Circulated: 5-28-7

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 387.—October Term, 1969

State of California, Petitioner, *v.* John Anthony Green. | On Writ of Certiorari to the Supreme Court of California.

[June —, 1970]

Mr. Justice White delivered the opinion of the Court.

Section 1235 of the California Evidence Code, effective as of January 1, 1967, provides that "evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with § 770."[1] In *People* v. *Johnson,* 68 Cal. 2d 646, 441 P. 2d 111 (1968), cert. denied, 393 U. S. 1051 (1969), the California Supreme Court held that prior statements of a witness which were not subject to cross-examination when originally made, could not be introduced under this section to prove the charges against a defendant without violating the defendant's right of confrontation guaranteed by the Sixth Amendment and made applicable to the States by the Fourteenth Amendment. In the case now before us the California Supreme Court applied the same ban to a prior statement of a witness made at a preliminary hearing, under oath and subject to full cross-examination by an adequately counseled defendant. We reverse on two grounds, one of which also rejects the holding in *People* v. *Johnson.*

[1] Cal. Evid. Code § 1235 (West 1966). Section 770 merely requires that the witness be given an opportunity to explain or deny the prior statement at some point in the trial. See Cal. Evid. Code § 770 (West 1966); *People* v. *Johnson,* 68 Cal. 2d 646, 650 n. 2, 441 P. 2d 111, 114 n. 2 (1968), cert. denied, 393 U. S. 1051 (1969).

June 3, 1970

Re: No. 387 - California v. Green

Dear John:

The question of the relationship between Dutton and Green was surfaced in conference. I thought the decision was to go ahead with Green.

To me, the Green issue is sufficiently distinct from that in Dutton to warrant our disposing of Green separately, one way or the other. But if you and others would rather not vote on the case without reargument, it should, of course, go over.

The issue of the admissibility of previous inconsistent statements of a witness actually testifying in court has a history of its own and has characteristically been dealt with in evidence codes separately from the problem of out-of-court statements by declarants who do not appear in court. Actually, the presently circulating proposed rules of evidence for the federal courts do not consider prior inconsistent statements of witnesses to be hearsay at all; they are admissible but not as an exception to the hearsay rule.

The California legislature has addressed itself specially to the problem of prior inconsistent statements. It is that statute which the Supreme Court of California thought it was required to strike down by reason of our decisions under the Confrontation Clause. The State is trying criminal cases every day; I would prefer not to postpone for another six months advising the State whether or not the Confrontation Clause bars using a witness's prior inconsistent statements.

Besides, Dutton itself presents the co-conspirator exception to the hearsay rule; it will be quite unnecessary in disposing of that case to reach confrontation issues posed by other exceptions.

Of course, if a majority of the Court were to agree with you that cross-examination is a due process rather than a confrontation issue, the present circulation would represent a minority view. Also, even if the general approach in the present circulation commands a court, which it has not yet done (Bill Douglas and Potter Stewart have joined), there may still be sufficient disagreement to counsel resolution by a full court.

But as far as the Dutton case is concerned, I don't think the issue there is sufficient reason for holding over Green.

Sincerely,

B.R.W.

Mr. Justice Harlan

cc: The Conference

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 3, 4, 18, 21

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

From: White, J.

Circulated: _____

Recirculated: 6-18-70

SUPREME COURT OF THE UNITED STATES

No. 387.—October Term, 1969

State of California, Petitioner, *v.* John Anthony Green. } On Writ of Certiorari to the Supreme Court of California.

[June —, 1970]

Mr. Justice White delivered the opinion of the Court.

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[1] Cal. Evid. Code § 1235 (West 1966). Section 770 merely requires that the witness be given an opportunity to explain or deny the prior statement at some point in the trial. See Cal. Evid. Code § 770 (West 1966); *People* v. *Johnson*, 68 Cal. 2d 646, 650 n. 2, 441 P. 2d 111, 114 n. 2 (1968), cert. denied, 393 U. S. 1051 (1969).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 24, 1970

MEMORANDUM FOR THE CONFERENCE

With respect to the two cases held for California v. Green, No. 387, I would deny No. 389 Misc., Gelhaar v. Wisconsin, and would vacate and remand No. 1545 Misc., Gutierrez v. California, for reconsideration in the light of Green. The latter case presents in a somewhat different context the situation of a witness claiming on the stand that he cannot remember the critical events but conceding that his prior recorded statement was made and that he told the truth at that time. Of course, we could grant the case or hold it for Dutton v. Evans, No. 21.

There are three cases held for Williams v. Florida, No. 927. No. 664, Dunn v. Louisiana, is a five-man jury case. It is an appeal and I would dismiss it. No. 906 Misc., Hearns v. Florida, and No. 908 Misc., Morgan v. Florida, are six-man jury cases from Florida and I suggest that they be denied.

B.R.W.