The Second Circuit Review: IX. Evidence: Introduction

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IX. Evidence

Introduction

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The past year's developments in the law of evidence have been characterized by a hardening attitude toward criminal defendants. The United States Supreme Court's evidentiary rulings during the term covered by the Second Circuit Review (1971-72) manifested this trend (although not uniformly1). For example, police stop-and-frisk authority was broadened (and with it the use of evidence obtained therefrom);2 the scope of the immunity from criminal prosecution required to be granted by a governmental body before self-incriminatory statements can be compelled from a witness was narrowed;3 the right to have counsel at line-ups was limited to post-indictment or post-charge line-ups (with a consequent broadening of the use of counselless identification evidence);4 the preliminary burden of proof on

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3 Kastigar v. United States, 406 U.S. 441 (1972) (the privilege against self-incrimination may be overcome by a grant of immunity from use of the testimony and fruits thereof, rather than from prosecution for the transaction—resolving earlier ambiguity in favor of the narrower immunity). Some federal decisions in New York had been to the contrary. See, e.g., In re Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971).

the government to initially prove the voluntariness of confessions was fixed at "preponderance of the evidence" rather than "beyond a reasonable doubt"; and the "harmlessness" of evidentiary constitutional error was made easier to find. Taken together with the possibility of the implementation of non-unanimous verdicts in criminal cases, also approved as constitutional by the Supreme Court during the term, these developments will have far-reaching effects.

The above-noted trend was not confined to Supreme Court decisions. Redrafts of the proposed Federal Rules of Evidence during the period broadened the permissible use of prior convictions for impeachment purposes and of governmental privileges covering secret information and in to counsel at preliminary hearing not retroactive. Cf. Neil v. Biggers, 41 U.S.L.W. 4064 (U.S. Dec. 6, 1972) (totality of circumstances and exigencies makes suggestive identification admissible).

Lego v. Twomey, 404 U.S. 477 (1972) (also deciding that it is not constitutionally required that the jury pass on voluntariness after the judge has determined the confession to be voluntary).


The proposed Federal Rules of Evidence [hereinafter cited as Rule 609] have been approved by the Supreme Court (41 U.S.L.W. 4021 (U.S. Nov. 21, 1972)) and transmitted to Congress. Under the enabling statute pursuant to which the rules were drafted, 28 U.S.C. § 2072 (1970), they become effective ninety days after such transmission to Congress or as the Court provides, unless vetoed by Congress. The Court has fixed an effective date of July 1, 1973. Several bills in Congress are seeking additional reviewing time. See, e.g., 119 Cong. Rec. 52241 (daily ed. Feb. 2, 1973). The Senate and House, as of this writing, have not yet agreed on a bill. The questions raised in Congress focus upon what is considered to be the undue breadth of the governmental privilege, the narrowness of personal privileges, and the scope of the rulemaking powers of the Supreme Court under the Constitution and the enabling statute. (Compare Justice Douglas' dissent to approval of the proposed Rules, 41 U.S.L.W. 4021 (U.S. Nov. 21, 1972)).

Compare Rule 609 as it appeared in drafts of March, 1969, March, 1971, and Oct., 1971, with the current draft. The changes deleted (1) an exemption for convictions entered on nolo contendere pleas; and (2) the judge's power to exclude otherwise permitted convictions if in a particular case he found that prejudice outweighed probativity. In addition, the changes (3) allowed use of convictions in earlier life (which would have been regarded as too stale under older drafts) if the person had any other later convictions, the penal consequences of which extended into the ten-year period immediately preceding the trial at which the witness was to testify; and (4) partially abrogated the notion that a pardon or annulment based on rehabilitation prevents use of the conviction, where there has been a subsequent conviction belying the rehabilitation.

These and the other changes discussed in the text were primarily the result of a specter raised by Senator McClellan of the Senate Judiciary's Subcommittee on Criminal Laws and Procedure and by the Justice Department. This specter was the threat of Congressional intervention in the rulemaking function, assumed to be in the Supreme Court and its appointed
formers’ identities.11

Abroad, the Eleventh Report (Evidence) of the Criminal Law Revision Committee of Great Britain,12 prepared during this period, recommended that an accused’s silence in the stationhouse or in court be permitted to be taken as evidence against him; that warnings given a suspect by police be curtailed; that the “fruit of the poisonous tree” doctrine, rendering evidence derived from a coerced confession inadmissible, be abolished; that spousal privilege and corroboration requirements be narrowed;13 and that unsworn out-of-court statements (oral or written) of individuals, whether they are present in court or not, be accepted as affirmative evidence, provided that certain requirements of basic fairness are met.14 The Report, which mirrors
drafters. See note 8 supra. Much of the history of these pressures is not recorded. But see 117 Cong. Rec. 15193 daily ed. Sept. 28, 1971. See also D.C. Code § 14-305 (1970 amend.), a congressional “overruling,” for the District of Columbia, of Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), a case granting judges in the District a power similar to that itemized at (2) supra this note and purposely deleted in the new draft. The Second Circuit grants the judge such a power. See note 34 and accompanying text.

10 Compare Rule 509 in drafts of March, 1969, March, 1971, and Oct., 1971, with the current draft. The changes added a category of “official information” to the privileged matters, which formerly included only military and state secrets. The changes also provided for hearings secret from the attorneys and parties for determining privilege, and eased the government’s burden in establishing privilege.

11 Compare Rule 510 in drafts of March, 1969, March, 1971, and Oct., 1971, with the current draft. The changes (1) expanded the privilege to cover informants to legislative organs as well as law enforcement officials, (2) required only that the information furnished by the informer “relate” to “possible” law violations rather than “reveal a violation,” (3) provided for hearings secret from the attorneys and parties for determining privilege, and (4) reduced the court’s power to reveal showings.

12 CMND. No. 4991 (1972).

13 See the narrowing of spousal privilege in Rule 505.

14 Additional recommendations include:

(1) broadening the acceptable forms of and occasions for lay and expert opinion testimony (in a fashion very similar to Article VII of the Rules);

(2) increasing receptivity of children’s testimony (as under Article VI of the Rules);

(3) abolishing the rule requiring early showing of a prior inconsistent writing (as under Rule 613);

(4) reformulating the rules regarding character and “other wrongdoing” evidence for substantive and credibility purposes (somewhat along the lines of Rules 404, 405, 406, 608 and 609, but insulating the accused from such impeachment unless he similarly impeaches other witnesses);

(5) restricting the self-incrimination privilege to incrimination under domestic law (perhaps somewhat counter to the American trend which expanded the privilege to cover incrimination under state or federal law, see Murphy v. Waterfront Comm’n of N.Y., 378 U.S. 52 (1964)); and

(6) placing only the production burden, and not the persuasion burden, on the accused in connection with certain affirmative defenses.

CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT (EVIDENCE), CMND. NO. 4991 (1972).
some developments already enacted on the civil side, has not yet been acted upon.

While these British proposals have an impact on American ears similar to what would be the case if the Archbishop of Canterbury declared there is no God, it should be noted that some of the British proposals have counterparts in this country. The proposed Federal Rules of Evidence broaden traditional exceptions to the hearsay rule, provide a catch-all exception allowing evidence having "comparable circumstantial guarantees of trustworthiness," and allow former inconsistent statements of witnesses to be used not merely for impeachment purposes, as formerly, but substantively as well. The United States Supreme Court has approved the latter approach as constitutional not only by adopting the proposed rules, but also in cases involving a similar provision of the new California Evidence Code.

The cases selected by the editors for inclusion in the current Second Circuit Review, United States v. Taylor, United States v. Aaron, and United States v. Mele, taken together, show that the Second Circuit is not wholeheartedly in accord with the trend. Further, in United States v.

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1. Civil Evidence Act 1968, c.64.
4. Rules 803(24) and 804(b)(6).
5. Rule 801(d)(1). There is a question whether this opens the way to use of Miranda-violating statements substantively, where the accused makes an inconsistent statement on the stand. See Harris v. New York, 401 U.S. 222 (1970).
7. There was no dearth of evidence decisions by the Second Circuit, and the editors' task of choosing was difficult. For example, to name just a few the editors were confronted with, in addition to those mentioned elsewhere in this introduction, there were United States v. Marquez, 462 F.2d 28 (2d Cir. 1972) (declaration against penal interests); United States v. Grant, 462 F.2d 28 (2d Cir. 1972) (co-conspirator's statement, wiretap); United States v. Ellis, 461 F.2d 962 (2d Cir. 1972) (statement adopted by witness at trial not hearsay); United States v. Brown, 456 F. 2d 293 (2d Cir.), cert. denied, 407 U.S. 910 (1972) (defendant's introduction of evidence in his own defense is waiver of review of sufficiency of Government's case); United States v. Blackwood, 456 F.2d 526 (2d Cir. 1972) (illegally seized tapes may be used for impeachment); United States v. Cafaro, 455 F.2d 323 (2d Cir. 1972) (to apply co-conspirator exception to hearsay rule, conspiracy must be found by "fair preponderance of the evidence"); United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972) (admissibility of statements made after conspiracy's object fulfilled); Estate of Carter v. Commissioner, 453 F.2d 61 (2d Cir. 1971) (hearsay exception for state of mind); United States v. Augello, 452 F.2d 1135 (2d Cir. 1971) (admissibility of evidence of defendant's bad character); United States v. Ferrara, 451 F.2d 91 (2d Cir. 1971), cert. denied, 405 U.S. 1032 (1972) (submission of undisputed facts to jury); United States v. Seewald, 450 F.2d 1159 (2d Cir. 1971), cert. denied, 405 U.S. 978 (1972) (scope of privilege against self incrimination).
8. 464 F.2d 240 (2d Cir. 1972).
9. 457 F.2d 865 (2d Cir. 1972).
10. 462 F.2d 918 (2d Cir. 1972).
Cunningham, decided during the term covered by the Review, the Second Circuit expressly rejected the Federal Evidence Rules' position that a witness' former inconsistent statements may be used substantively. Lest it be thought that the Second Circuit is a conservative court in these matters, it should be remembered that the same court has, in the past, pioneered use of out-of-court statements against the accused where such were surrounded by what were thought to be adequate safeguards (i.e., in certain circumstances where the statement was made before a grand jury—the so-called "DeSisto rule," which essentially established a new exception to the hearsay rule). In March, 1972, also during the relevant term, the Second Circuit again, in United States v. Briggs, affirmed its adherence to Cunningham and the limits marked out by the DeSisto line of cases, by stating that "[t]his case affords another illustration of how dangerous such a rule [Rule 801(d)(1)] would be." In People ex rel Mancusi v. Stubbs, also decided during the Review period, the Second Circuit strongly insisted on the need for confrontation. It refused to admit into evidence against the accused a transcript of a government witness' testimony at a previous trial, because the government had not taken sufficient pains to attempt to bring the witness from a foreign country for in-person testimony in the present trial. The Supreme Court reversed, holding that sufficient unavailability was established to admit the transcript. The Second Circuit has also rejected the broad admissibility of prior convictions for impeachment purposes permitted by the proposed Federal Rules of Evidence. Thus, the Second Circuit has recognized the judge's power, expressly removed by the current draft of the Federal Rules of Evidence, to exclude the use of otherwise permitted convictions where the danger of undue prejudice outweighs the probative value of such evidence, a power that is especially pertinent where the witness is the criminal defendant.

25 446 F.2d 194 (2d Cir. 1971).
26 Rule 801(d)(1). The Second Circuit also seemed to reject the position of Rule 607 that a party may freely impeach his own witness. 446 F.2d at 197.
28 457 F.2d 908 (2d Cir. 1972).
30 United States v. Briggs, 457 F.2d at 910 n.3. Again, as in many of the other decisions on this question (see notes 25, 27, 29 supra), Chief Judge Friendly wrote for the court. Compare Judge Friendly's opinion with the somewhat more receptive attitude toward Rule 801(d)(1) expressed by Judge Bartels in United States v. Insana, 423 F.2d at 1169.
31 442 F.2d 561 (2d Cir. 1971), rev'd, 404 U.S. 1014 (1972).
32 404 U.S. 1014 (1972). Cf. United States ex rel Rosenberg v. Mancusi, 445 F.2d 613 (2d Cir. 1971), cert. denied, 405 U.S. 956 (1972), also decided during the 1971-72 term (refusals to admit in evidence against the accused out-of-court statements of a non-testifying co-defendant.)
33 See note 9 supra.
34 See United States v. Puco, 453 F.2d 539 (2d Cir. 1971) (decided during the term under
Surveying other courts around the country, the trend in the law of evidence against the accused is manifest, although there are contrary trends which may prove to be encouraging to defense counsel. For example, barriers to the use of various forms of scientific evidence seem to be lowering in both civil and criminal cases, including spectography for voice identification and lie detector evidence, although one progressive decision opening the way for greater use of lie detectors has been reversed.

The trend noted in this introduction is, in some degree, a trend toward greater admissibility of evidence, as well as an attempt (however wise or unwise) to do something about crime. Both undercurrents have existed for some time. A trend toward greater admissibility exists on the civil side, as well, where it cannot be said to redound to the benefit only of plaintiffs or only of defendants. The proposed Federal Rules of Evidence, mirroring certain pioneering decisions, have whittled down many impediments to admissibility, such as incompetencies, privileges, and restrictions relating to: (1) the form and content of expert testimony; (2) who is an expert and when he may testify; (3) impeachment; (4) character evidence; (5) the scope of cross-examination; (6) the use of hearsay; and (7) the use of writings and modern forms of recording and copying, including tapes, re-

discussion); and United States v. DiLorenzo, 429 F.2d 216 (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971). These rulings are consistent with the skepticism expressed in some Second Circuit opinions (notably by Judge Friendly) about the jury's ability to apply the lawyer's finely wrought distinction between the use of evidence for substantive and for impeachment purposes. See, e.g., United States v. DeSisto, 329 F.2d at 933.


The Rules have incorporated pioneering views of certain decisions (e.g., United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968); Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y. 1963); Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961); McMillen Feed Co. v. Harlow, 405 S.W.2d 123, (Texas 1966)) all attempting to liberate the hearsay rule by allowing exceptions to be made on the basis of trustworthiness and necessity. Conversely, even in this pre-adoption period, decisions have often cited the Rule for the proposition of liberalized admission (see, e.g., Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971) (spontaneous exclamation approached on basis of necessity and trustworthiness); Psaty v. United States, 442 F.2d 1154 (3d Cir. 1971) (presumptions); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971) (experts)).

Rule 601 and 610.

Rules, Art. V.

Rules, Art. XII.

Rules, Art. VI; particularly Rule 607.

Rules 404-06, 608-09.

Rule 611(b).

Rules, Art. VIII.
cords, photostatic copies, and computer materials,\textsuperscript{46} to name just a few. Some of the changes in evidentiary precepts have been retrogressive; others have been progressive. However, as lawyers and social scholars concerned with the output of our judicial system, we are obliged to recognize these changes.

\textsuperscript{46} Rules, Arts. IX and X.