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1) A Consent to a Search and Seizure Can Be Shown When Words Constituting Consent Are Given after Officers Allege They Have Possession of a Search Warrant; 2) The Right of Confrontation Is Not Violated When an Out of Court Confession of a Third Person Is Introduced at Trial and Implicates the Accused.

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE—RIGHT OF CONFRONTATION—1) A CONSENT TO A SEARCH AND SEIZURE CAN BE SHOWN WHEN WORDS CONSTITUTING CONSENT ARE GIVEN AFTER OFFICERS ALLEGE THEY HAVE POSSESSION OF A SEARCH WARRANT; 2) THE RIGHT OF CONFRONTATION IS NOT VIOLATED WHEN AN OUT OF COURT CONFESSION OF A THIRD PERSON IS INTRODUCED AT TRIAL AND IMPLICATES THE ACCUSED. *Hoover v. Beto*, 467 F.2d 516 (5th Cir. 1972).

Sam Hoover, an attorney, was found guilty in state court¹ of being an accomplice in a robbery. The United States court of appeals denied his petition for habeas corpus. In the rehearing, he asserts two claims of error: (1) That the court erred in refusing to sustain alleged violations of his fourth and fourteenth amendment rights to be free from unreasonable search and seizure; and (2) that his right to confrontation under the sixth and fourteenth amendments was infringed when the state court admitted into evidence the oral confession of the alleged principal which also implicated Hoover. Accompanied by a warrant (allegedly invalid under standards prescribed in *Aguilar v. Texas*²) police officers went to Hoover's home and upon announcing their authority and possession of a warrant, Hoover told them that the search warrant was unnecessary and for them to commence their search. Hoover argues that because the warrant was later proven invalid, the prosecutor could not rely on his consent induced by the misrepresentation that the officers possessed a valid warrant. Pursuant to an established Texas exception to the hearsay rule which allows a principal's confession to prove the principal's guilt as a predicate to trying an accomplice, the principal's confession was received through testimony of a police officer.³ The confession also implicated Hoover, who now claims that no cross-examination could be maintained against the absent declarant, and thus his right of confrontation was violated. Held—1) Consent to a search and seizure can be shown, even though the alleged words of consent are given after officers present what on its face appears to be a valid search warrant. 2) The right to be confronted with witnesses is not necessarily abridged when an out of court confession of a third person is introduced and implicates the accused.⁴

While it is clear that one may waive, by voluntary consent, his fourth

¹ *Hoover v. State*, 390 S.W.2d 758 (Tex. Crim. App. 1965).

² 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). The court in the instant case further determined that the prosecution need not rely on Hoover's alleged consent, in that Hoover's trial was decided before *Aguilar*.

³ The confessor-declarant, at the time of Hoover's trial, was incarcerated in a Texas jail awaiting prosecution.

⁴ *Hoover v. Beto*, 467 F.2d 516 (5th Cir. 1972).

amendment protection against unreasonable search and seizure,⁵ cases are by no means in agreement as to what constitutes an unequivocal consent. In general, the determination of the validity of a waiver of fourth amendment rights by consent rests on an entirety of circumstances.⁶ In order to sustain the burden of proof on the issue of consent under the entirety of circumstances approach, the prosecution must: (1) Convince the court that the defendant's acts, by word or conduct give sufficient indication of actual consent to the search and not merely acquiescence to a claim of lawful authority;⁷ (2) If sufficient words or acts of consent are found by the court, it must then determine whether the consent was given under circumstances "free of duress and coercion."⁸

Although the Supreme Court has yet to formulate general constitutional standards governing state consent searches, it did hold in *Bumper v. North Carolina*⁹ that acquiescence cannot be construed as consent when the words allegedly constituting consent are given only after the official conducting the search asserts that he has a warrant. Such claim of authority is, in effect, an announcement that the occupant has no right to resist the search, and because of the coercive nature of the very existence of a search warrant, no consent is possible.¹⁰

⁵ See *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948); *Zap v. United States*, 328 U.S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477 (1946); *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921).

⁶ *United States v. Lewis*, 274 F. Supp. 184 (S.D.N.Y. 1967).

Among the factors that may be considered in determining the effectiveness and validity of a consent to search are whether at the time when it was given defendant was under arrest . . . whether he was overpowered by arresting officers, handcuffed, or similarly subjected to physical restraints . . . whether the keys to the premises searched had already been seized by the police from the defendant . . . whether the defendant employed evasive conduct or attempted to mislead police . . . and whether he denied guilt or the presence of any incriminatory objects in his premises

The presence of some or all of the aforementioned factors is not controlling, since . . . each case must "stand or fall on its own special facts"

Id. at 187.

⁷ See *Burg v. United States*, 332 F.2d 171 (8th Cir. 1964), *cert. denied*, 379 U.S. 883 (1964); *United States v. Page*, 302 F.2d 81 (9th Cir. 1962).

⁸ See *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Wren v. United States*, 352 F.2d 617 (10th Cir. 1965); *Channel v. United States*, 285 F.2d 217 (9th Cir. 1960); *United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966). Those circumstances that are primarily involved are consideration of the defendant's age, physical condition, intelligence, whether there were any threats of violence or use of force by the police officers, and whether there was any undue influence or pressure. See, e.g., *Henley v. State*, 228 So. 2d 602 (Miss. 1969); *State v. Young*, 425 S.W.2d 117 (Mo. 1968); *State v. Sisneros*, 446 P.2d 875 (N.M. 1968).

⁹ 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968).

¹⁰ *Id.* at 548, 88 S. Ct. at 1792, 20 L. Ed. 2d at 802.

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that State does not even attempt to rely

Although recognizing the "acquiescence as opposed to voluntary consent" concept, the majority of the court in the instant case rejected the "presumption of involuntariness by the existence of a warrant" approach of *Bumper* as applied to the facts in *Hoover*, and in essence, held that the decision in *Bumper* did not have any far reaching effects relating to "consent" questions. The court viewed *Bumper* as decided by looking to the entirety of circumstances and its application was limited to those circumstances.

The majority announced that the facts in *Bumper* and the facts in *Hoover* were clearly distinguishable. In *Bumper* incriminating evidence was seized from the house of defendant's grandmother, an elderly woman "of patently limited education"¹¹ who was neither a suspect at the time nor an eventual defendant. When officers arrived at her home and announced they had a search warrant, she replied, "Go ahead." The warrant, of which there was considerable question as to its actual existence, was neither read by nor to the defendant's grandmother. In *Hoover* the defendant was also the individual who gave "consent." Rather than being one "of patently limited education," Hoover was an experienced criminal attorney. When officers presented the warrant, Hoover told them that the search warrant was unnecessary, for them to come in and look wherever they pleased.¹²

The majority concedes that under the circumstances of *Bumper*, consent could not be shown; however Hoover's consent, or lack thereof, because not significantly similar in circumstances to that of *Bumper*, must rest upon the established Texas determination of consent as recognized in *Stanford v. State*:¹³

This court has frequently held that when a party was advised that officers had a warrant to search the premises the mere statement of the party that it was all right to go ahead was not regarded as a waiver of the right to question the regularity of the warrant nor of consent to search. On the other hand, where the party tells the officer that a warrant to search is unnecessary, and no issue is made on the question, consent is shown. The question turns on the point as to whether the party really gives consent for the search, or merely acquiesces in the officer pursuing his legal rights under a valid warrant.¹⁴

upon the validity of the warrant or fails to show that there was, in fact any warrant at all.

When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

¹¹ *Hoover v. Beto*, 467 F.2d 516, 522 (5th Cir. 1972).

¹² *Hoover v. Beto*, 306 F. Supp. 980, 986 (S.D. Tex. 1969).

¹³ 145 Tex. Crim. 306, 167 S.W.2d 517 (1942).

¹⁴ *Id.* at 309, 167 S.W.2d at 519 (citations omitted).

In applying the Texas test, the majority determined the existence of consent to search on the words chosen by the person to be searched, a pre-*Bumper* method of determination consistent with the view of looking to the entirety of circumstances. The majority arrived at the conclusion that there was a valid consent, *irrespective* of the existence of the warrant since there was no affirmative evidence in the record to show that Hoover's utterances were anything but voluntary.¹⁵

The dissenting opinion asserted that no such limitation of *Bumper* was intended by the Supreme Court. The dissent applied the holding in *Bumper* as absolute, that "one cannot consent to a search in the face of a seemingly valid search warrant."¹⁶ To buttress its argument the dissent noted the preciseness of the Supreme Court in framing the issue in *Bumper*: "The issue presented is whether a search can be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant."¹⁷ Likewise, the dissent looked to the holding in *Bumper* which they determined to be equally as precise: "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit lawful coercion. Where there is coercion there cannot be consent."¹⁸

The dissent concluded by observing the majority's suggestion that because Hoover was a lawyer he knew of his rights. The dissent dismissed this argument by viewing the knowledge of a lawyer to be that of knowing that a policeman bearing a search warrant has not only a right but a duty to enter the premises and conduct a search regardless of whether the occupant consents or not. Thus, without knowledge of

¹⁵ *Hoover v. Beto*, 467 F.2d 516, 520 (5th Cir. 1972).

¹⁶ *Id.* at 545.

¹⁷ *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 1791, 20 L. Ed. 2d 797, 802 (1968).

¹⁸ *Id.* at 550, 88 S. Ct. at 1792, 20 L. Ed. 2d at 803. In further support of the dissent's opinion, reliance was placed on cases cited approvingly in *Bumper*. *Meno v. State*, 164 N.E. 93, 96 (Ind. 1925) (emphasis added):

One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request, *no matter what the language used in such acquiescence, is but showing a regard for the supremacy of the law.*

The presentation of a search warrant to those in charge at the place to be searched, by one authorized to serve it, is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law. (Omission by the court.)

Naples v. Maxwell, 271 F. Supp. 850, 856 (S.D. Ohio 1967):

[T]he question of consent cannot arise in the absence of a plain and clear showing that the individual being subjected to the search has refused to recognize that the search warrant is valid and binding. Stated otherwise, unless an accused, after being served with a search warrant, unequivocally states that he believes that the search warrant is unlawful and illegal, he cannot consent to the subsequent search.

the contents of the affidavit, "Hoover's legal training commanded his acquiescence."¹⁹

It is difficult to rationalize the majority holding in light of *Bumper*. Nowhere in *Bumper* does the Supreme Court state that only in the peculiar set of facts before them is the existence of a search warrant coercive. It is not likely that the Supreme Court desired to limit the applicability of its holding in *Bumper* to cases involving an alleged consent given by one not a suspect or to one who is "patently limited in education." In light of the unequivocal language of *Bumper*, the only logical conclusion is that a search warrant is coercive per se and defeats the ability to consent to a search and seizure.²⁰

As to the right of an individual regarding confrontation, it is a fundamental rule of law that the accused has the right to be confronted with those who testify against him. This right is secured by the sixth amendment.²¹

After *Pointer v. Texas*²² held that the confrontation clause was applicable to the states through the fourteenth amendment, there followed a series of decisions finding violation of the clause on constitutional grounds.²³ Although *Pointer* acknowledged the viability of a few standard and theretofore approved exceptions admitting statements that were otherwise hearsay,²⁴ it failed to announce any principles insuring adequate safeguards should the hearsay be admitted. In *California v. Green*²⁵ and *Dutton v. Evans*,²⁶ however, limiting principles were finally established. In *Green* the court held that the admission of hearsay is not constitutionally objectionable if the declarant is subject to cross-examination at the trial, or if, when he is unavailable to testify, he was subjected to cross-examination at the time the declaration was made. In *Dutton* there was strong implication that the clause's apparent absolute command that defendants be able to confront witnesses does not require cross-examination of declarants, where the policies underlying the con-

¹⁹ *Hoover v. Beto*, 467 F.2d 516, 547 (5th Cir. 1972).

²⁰ Furthermore, the court ignored an applicable piece of judicial philosophy which, had the majority applied it, would have provided the basis for a different holding without resorting to an analysis of *Bumper*. *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1944): "[N]o sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room, and find contraband in it, . . . the search, accompanied by a denial of guilt, do not show consent."

²¹ U.S. CONST. AMEND. VI.

²² 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

²³ See, e.g., *Roberts v. Russell*, 392 U.S. 293, 88 S. Ct. 1921, 20 L. Ed. 2d 1100 (1968); *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965).

²⁴ See *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (approving admission of dying declarations and testimony at a former trial by a now deceased witness).

²⁵ 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

²⁶ 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970).

frontation clause are otherwise sufficiently protected. The question that will obviously arise, then, is does the particular exception in question conform to the statements in the confrontation clause; if not, does it otherwise protect the policy considerations inherent to the clause?

The court in the instant case was faced with determining the applicability of a well established Texas exception to the hearsay rule in light of the confrontation clause:

The Texas rule permitting introduction of a principal's oral confession at the trial of the accomplice does not violate the Sixth Amendment. The question before us, however, is whether the Sixth Amendment made obligatory on the States by the Fourteenth Amendment, is violated by introduction of a principal's confession which also implicates the accomplice.²⁷

An exception to this general rule obtains where an accomplice is being tried separately from his principal.²⁸ When the declarant does not testify, relevant Supreme Court decisions reveal that hearsay evidence as to what he has said is inadmissible unless (1) the declarant is legitimately unavailable,²⁹ and (2) there are strong indicia evincing the truth of the matter asserted.³⁰ The exception to the instant case seemingly does not bind itself to this Supreme Court test on admissibility of declarant's testimony. The court in *Brownney v. State*³¹ speculated as to what gave rise to the exception in question, and said:

If the rule permitting the introduction of the principal's confession on the trial of the accomplice to establish the principal's guilt grew out of the fact of the incompetency of the convicted principal to testify as a witness, or his nonavailability . . . then no reason appears for applying the rule.³²

Whatever the reasons giving rise to the Texas exception, such exception applies only where the person whose confession is sought to be used is named in the indictment as a principal.³³ Statements in the confession which might relate solely to the guilt of the accomplice and which throw no light on the principal's guilt should be excluded.³⁴ It

²⁷ *Hoover v. Beto*, 467 F.2d 516, 528 (5th Cir. 1972).

²⁸ *Schepps v. State*, 432 S.W.2d 926 (Tex. Crim. App. 1968). "This exception is apparently bottomed on the fact that the State has the burden of proving the guilt of the principal in such case and, therefore, any testimony which would be admissible to show the guilt of the principal, if he were on trial is admissible on the trial of the accomplice for the purpose of showing the guilt of the principal." *Id.* at 940.

²⁹ W. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 253, at 608 (2d ed. E. Cleary 1972). The usual exceptions involving unavailability are dying declarations, statements of pedigree and family history, and former testimony.

³⁰ *Semerjian, Right of Confrontation*, 55 A.B.A.J. 152 (1969).

³¹ 128 Tex. Crim. 81, 79 S.W.2d 311 (1934).

³² *Id.* at 87, 79 S.W.2d at 314.

³³ *Smith v. State*, 91 Tex. Crim. 15, 237 S.W. 265 (1922).

³⁴ *See Id.*; *Hoyt v. State*, 88 Tex. Crim. 612, 228 S.W. 936 (1921).

has been held that if such deletions render the confession incomplete or fragmentary, then the confession in its entirety is admissible. In all cases, however, where the principal's confession is received into evidence, the trial court is required to guard the rights of the accomplice on trial by limiting in its charge the purpose of the confession to establish the principal's guilt alone, which is a necessary requisite to trying one as an accomplice.³⁵

The majority in the instant case prefaced its discussion on the constitutional validity of the Texas rule by noting that the court had approved confessions which were otherwise admissible, where reference to co-defendants had been removed. They stated further, that even in the face of Supreme Court decisions to the contrary, the same result is achievable when, rather than deleting the statement, they are subject to limiting instructions by the trial court to regard the entire confession only as evidence against the confessor-declarant.³⁶ In *Bruton v. United States*,³⁷ two defendants, Bruton and Evans, were jointly tried for violation of postal laws. The oral confession of Evans was introduced by way of testimony from a postal inspector. The confession incriminated Bruton as well. The jury was instructed to consider the confession only with respect to Evans and to disregard all references to Bruton. The Court said that "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction;³⁸ because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evan's confession in this joint trial violated petitioner's right of cross-examination secured by the confrontation clause of the sixth amendment."³⁹ The court in the instant case distinguished *Bruton* by stating:

Trial of principals and accomplices is inherently different from a trial of co-conspirators or co-defendants. While co-conspirators are coequals in crime as a matter of substantive criminal law, principals and accomplices are not.⁴⁰

The justification for the court's holding that Hoover's sixth amendment right was protected by virtue of the trial court's limiting instructions was that the court found that none of the jurors, when subjected to voir dire examination expressed reservation about following the trial court's instructions, hence those limiting instructions would cure any possible

³⁵ *Smith v. State*, 91 Tex. Crim. 15, 237 S.W. 265 (1922).

³⁶ *Hoover v. Beto*, 467 F.2d 516, 530 (5th Cir. 1972).

³⁷ 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

³⁸ *Id.* at 129, 88 S. Ct. at 1624, 20 L. Ed. 2d at 481.

³⁹ *Id.* at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479.

⁴⁰ *Hoover v. Beto*, 467 F.2d 516, 530 (5th Cir. 1972).

adverse effect due to the admission of the principal's oral confession.⁴¹ Thus, the court determined that while limiting instructions in joint trials will not cure the taint of the incriminating statement made by a co-defendant, instructions cure any such taint involving separate trials of principal and accomplice.

The majority looked for support for validating the Texas exception to *California v. Green*⁴² and *Dutton v. Evans*.⁴³ In *Green*, the Supreme Court, in an opinion by Justice White enunciated a rather different view of the relation between confrontation and cross-examination than had been developed by the Court previously. Justice White stated:

The issue before us is . . . whether a defendant's constitutional right "to be confronted with the witness against him" is necessarily inconsistent with a State's decision to change its hearsay rules to reflect the minority view described above. 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 existing exceptions as they existed historically at common law.⁴⁴

In *Dutton* the Court upheld the admission of the witness' hearsay testimony as to a statement made to him by one of the alleged accomplices of the defendant. Justice Stewart stated that "[t]his Court has never indicated that the limited contours of the hearsay exception . . . are required by the Sixth Amendment's Confrontation Clause."⁴⁵ Instead, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."⁴⁶ Thus, we have in *Dutton* a decision holding that hearsay evidence may be admissible even though there was no cross-examination when the statement was made and the declarant did not appear at trial.

The majority looked to this in rationalizing its decision in *Hoover* by stating that "it is obvious that if the framers of the Constitution had desired to protect the right of 'cross-examination' rather than 'confrontation' the Sixth Amendment would be drafted to that effect."⁴⁷ Rather, since the policy underlying the confrontation clause is now

⁴¹ *Id.* at 530.

⁴² 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

⁴³ 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970).

⁴⁴ *California v. Green*, 399 U.S. 149, 155, 90 S. Ct. 1930, 1933, 26 L. Ed. 2d 489, 495 (1970).

⁴⁵ *Dutton v. Evans*, 400 U.S. 74, 82, 91 S. Ct. 210, 216, 27 L. Ed. 2d 213, 223 (1970).

⁴⁶ *Id.* at 89, 91 S. Ct. at 220, 27 L. Ed. 2d at 227.

⁴⁷ *Hoover v. Beto*, 467 F.2d 516, 532 (5th Cir. 1972).

clearly set forth in *Dutton* the 'satisfactory basis' is not violated where there are adequate substitutes for cross-examination.⁴⁸ The majority determined that the "satisfactory basis" is afforded by "presumed trustworthiness which results from common sense recognition of basic characteristics of human nature underlying most exceptions to the hearsay rule."⁴⁹ "Voluntariness is the first and foremost safeguard and 'indicia of reliability' of a confession But voluntariness alone is not enough to establish the competency and trustworthiness of the evidence. The confession must also be corroborated."⁵⁰ The majority concluded by noting that the evidence of Hoover's guilt was so overwhelming, separate and apart from the confession of the principal, that any violation of rights regarding the admission of the hearsay was harmless error.⁵¹

The dissent is in complete disharmony with the majority in regard to Hoover's right of confrontation. It boldly states that "applying the Texas rule so as to admit confessions of an available witness violates the constitution although it is admitted solely to prove that he [the witness present but not testifying] committed the adjunct crime."⁵² The view that the dissent adopts is, that if the declarant is available he must testify, or the hearsay is inadmissible. If the declarant is legitimately unavailable, there must be strong indicia of reliability before hearsay may be introduced against the defendant. The indicia of reliability are not met by introducing a confession that was neither given nor acknowledged under oath, even if it is wholly voluntary.⁵³

The dissent urges that the law cannot permit the jury to hear a principal's reference to the accomplice, even if it would render the confession fragmentary. Where the majority disavows the applicability of *Bruton* because of distinctions in the substantive law, the dissent finds that "[the principal's] statements were no less damaging because he was

⁴⁸ *Id.* at 532.

⁴⁹ *Hoover v. Beto*, 467 F.2d 516, 533 (5th Cir. 1972).

⁵⁰ *Id.* at 533. At Hoover's trial, the principal's confession was corroborated by testimony of other witnesses and by introduction of physical evidence which the majority found "would tend to establish the trustworthiness of the statement" and thus afford the satisfactory basis. *Id.* at 534.

⁵¹ *Hoover v. Beto*, 467 F.2d 516, 537 (5th Cir. 1972).

⁵² *Id.* at 551.

⁵³ *Id.* at 553 (dissenting opinion). To support this, the dissent adopts the sweeping statement of *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed. 2d 489, 497 (1970):

Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of the truth;" (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding in assessing his credibility.

It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections. But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of its lost protection.