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Procedural Due Process and the Rules of Evidence—Federal Impeachment of the Voucher Rules—Welcome v. Vincent, 549 F.2d 853 (2d Cir.), cert. denied, 97 S. Ct. 2960 (1977)

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RECENT DEVELOPMENTS

PROCEDURAL DUE PROCESS AND THE RULES OF EVIDENCE—FEDERAL IMPEACHMENT OF THE VOUCHER RULE—*Welcome v. Vincent*, 549 F.2d 853 (2d Cir.), *cert. denied*, 97 S. Ct. 2960 (1977).

Appellant, Ernest Welcome, was convicted in a New York state supreme court on charges of murdering two real estate brokers in their Bronx office. Before indicting Welcome, the State tried another party, Albert Cunningham, for the same offenses. Cunningham had admitted his participation in the crimes to police, giving an accurate account of the date, time, and location of the shootings. After a separate evidentiary hearing, the state court held that his confession to police had been voluntary and thus was admissible against him. Nevertheless, the charges against Cunningham were dropped in mid-trial.[1] At his trial, Welcome called Cunningham as a defense witness. On direct examination he testified that he and two men named Branch and Green had committed the crimes of which Welcome was accused, but on cross-examination Cunningham denied having had anything to do with the murders. When Welcome's counsel attempted to impeach this repudiation by introducing Cunningham's confession as a prior inconsistent statement, the trial court barred the testimony on the ground that the witness had not explicitly implicated the defendant and, therefore, under New York's voucher rule could not be impeached by the party that had called him to the stand.[2]

1. The Bronx District Attorney later explained at Welcome's trial that the charges against Cunningham were dropped because the effect of his withdrawal from a drug addiction, the results of a lie detector test, and further investigations all had cast doubt on the reliability of his confession to police. Nevertheless, as the court of appeals took pains to point out, this explanation did not account for Cunningham's ability to describe in detail a crime in which he had supposedly not taken part. Moreover, it did not speak to the question of why the prosecutor initially had relied on the confession to the extent of indicting Cunningham, arguing for admission of his confession in a separate proceeding, and bringing him to trial a second time after the first trial ended in a mistrial. Welcome v. Vincent, 549 F.2d 853, 855 (2d Cir.), *cert. denied*, 97 S. Ct. 2960 (1977).

2. The common law rule prohibits a party from impeaching his own witness, *i.e.*, from attacking the witness' credibility, on the assumption that the party calling the witness vouches for his trustworthiness. The prohibition applies to attacks by introducing prior inconsistent statements as well as by showing bias and bad character. It persists in every jurisdiction except California and Kansas, but has been abandoned altogether by federal courts. CAL. EVID. CODE § 785 (West 1966); KAN. STAT. ANN. § 60-420 (1976); FED. R. EVID. 607. *See also* WASHINGTON PROPOSED RULES OF EVIDENCE 607 (1977), adopting the federal rule verbatim. However, even in those jurisdictions retaining the rule, its impact on the use of prior inconsistent statements has been

Welcome appealed the ruling. He also sought a new trial when a witness for the prosecution later changed his story. When his request was denied, he took a second appeal. The New York Court of Appeals affirmed the conviction and dismissed the appeal from the motion for a new trial.[3] Welcome thereupon petitioned for a writ of habeas corpus[4] in the federal district court for the southern district of New York. The district court rejected his argument that the state's refusal to permit cross-examination of Cunningham as to his confession and, alternatively, its refusal to grant him a new trial in the face of another witness' recantation each constituted a deprivation of his fourteenth amendment due process right to a fundamentally fair trial.[5] The Court of Appeals for the Second Circuit reversed.[6] *Held:* When another person, present on the witness stand, has previously confessed

curbed to some extent by statute or decision. *See* C. MCCORMICK, EVIDENCE § 38 (2d ed. 1972). *See generally* 3A J. WIGMORE, EVIDENCE §§ 896–918 (Chadbourn rev. 1970); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 607[01] (1977 & Cum. Supp. Dec. 1977).

The New York rule in effect at the time of Welcome's trial, in March 1970, permitted the use of prior inconsistent statements for purposes of impeachment, regardless of the identity of the impeaching party, on the condition that they be in a subscribed writing or made under oath. N.Y. Code Crim. Proc. Amendments of 1937, ch. 307, § 2, 1937 N.Y. Laws 836. The current version, N.Y. CRIM. PROC. LAW § 60.35 (McKinney 1971), imposes the additional requirement that the testimony tend to disprove the calling party's position with respect to a "material issue of the case." Because Cunningham's confession did not conform to either requirement, Welcome was precluded by statute from introducing the inconsistent out-of-court statement to impeach Cunningham's repudiation—in spite of the fact that his repudiation destroyed Welcome's efforts to establish his innocence by showing that Cunningham had committed the crime. For reasons which are not apparent from the second circuit court's opinion, the trial court seems to have excluded the confession on the basis of the strict common law rule instead of the statute. Welcome v. Vincent, 549 F.2d 853, 856 (2d Cir.), *cert. denied,* 97 S. Ct. 2960 (1977). But regardless of the propriety of this reasoning, the result reached was clearly correct under the existing statute and would not have been altered by the rule presently in effect.

3. People v. Welcome, 37 N.Y.2d 811, 338 N.E.2d 328, 375 N.Y.S.2d 573 (1975), *aff'g* 46 A.D.2d 860, 361 N.Y.S.2d 378 (1974), 39 A.D.2d 841, 331 N.Y.S.2d 995 (1972) (mem.), *and* 39 A.D.2d 840, 331 N.Y.S.2d 994 (1972) (mem.).

4. The writ, which has been defined by statute at 28 U.S.C. §§ 2241–2255 (1970), lies to redress physical restraints imposed on a federal or state prisoner by a court or other authority in violation of the Constitution, laws, or treaties of the United States. *See Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038 (1970). Welcome petitioned under 28 U.S.C. § 2254 (1970), the provision which extends the writ specifically to state prisoners and enumerates various conditions placed on its availability.

5. Welcome v. Vincent, 418 F. Supp. 1088 (S.D.N.Y. 1976), *rev'd,* 549 F.2d 853 (2d Cir.), *cert. denied,* 97 S. Ct. 2960 (1977).

6. The court of appeals did not reach the recantation issue because it found the denial of cross-examination a sufficient basis for reversal. Welcome v. Vincent, 549 F.2d 853, 856 (2d Cir.), *cert. denied,* 97 S. Ct. 2960 (1977).

that he, rather than the defendant on trial, has committed the crime, to restrict examination of such a witness so that his prior confession may not be proven is to deny the defendant a fair trial under the fourteenth amendment due process clause, at least when the confession, though retracted, has some semblance of reliability. *Welcome v. Vincent,* 549 F.2d 853 (2d Cir.), *cert. denied,* 97 S. Ct. 2960 (1977).

That New York was held to have violated Welcome's due process rights by applying its voucher rule in such a way as to preclude him from establishing his innocence marks a significant departure from the long standing practice of immunizing state rules of evidence from close constitutional scrutiny. Traditionally, federal courts have interpreted the fourteenth amendment to allow the states broad discretion in formulating and implementing local rules of evidence.[7] When measuring the facial constitutionality of these state procedural rules, federal courts have been especially careful to avoid comparisons with the generally more liberal evidentiary rules applied in federal courts.[8] Furthermore, a general reluctance to second-guess the interlocutory evidentiary rulings of trial judges[9] and a particular sensitivity to the restraints which the federal system imposes on review of state court procedures[10] have for the most part dissuaded the federal judiciary

7. Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Maness v. Wainwright, 512 F.2d 88, 92 (5th Cir. 1975), *cert. dismissed,* 97 S. Ct. 1593 (1977); Manning v. Rose, 507 F.2d 889 (6th Cir. 1974). *See* Note, *Chambers v. Mississippi: Due Process and the Rules of Evidence,* 35 U. PITT. L. REV. 725, 735–36 (1974).

8. Maness v. Wainwright, 512 F.2d 88, 92 (5th Cir. 1975), *cert. dismissed,* 97 S. Ct. 1593 (1977) (state evidentiary rules need not be mirror images of evidentiary rules applied in the federal courts in order to pass constitutional muster).

9. *See* Davis v. Alaska, 415 U.S. 308, 321 (1974) (Rehnquist, J., dissenting) (extent of ruling's prejudice to accused's defense cannot be readily grasped from a cold factual record); United States v. Valdes, 545 F.2d 957 (5th Cir. 1977) (in general, admissibility of evidence is within trial court's discretion). *See generally* C. WRIGHT & K. GRAHAM, JR., 21 FEDERAL PRACTICE AND PROCEDURE *Evidence* § 5053, at 264 n.40 (1977).

10. Mr. Justice Harlan has characterized these restraints as follows:

> [O]ur Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness "implicit in the concept of ordered liberty." . . .
>
> It is too often forgotten in these times that the American federal system is itself constitutionally ordained, that it embodies values profoundly making for lasting liberties in this country, and that its legitimate requirements demand continuing solid recognition in all phases of the work of this Court.

Pointer v. Texas, 380 U.S. 400, 409 (1965) (Harlan, J., concurring) (upholding a due process challenge to a state court's denial of the right to cross-examine a prosecution witness who was unavailable at trial but whose prior testimony against the defendant was nevertheless admitted into evidence).

from interfering with a state court's ruling on the admissibility of a particular item of evidence.[11]

This deferential federal posture has substantially relieved state courts from having to consider the constitutional implications of their evidentiary rulings. As a result, they have been known to sustain antiquated and unrealistic rules which thwart the efforts of criminal defendants to introduce evidence highly relevant to the issue of their innocence.[12] Perhaps in the interests of consistency and predictability,[13] these courts have excluded potentially crucial information without considering the countervailing interests of the accused. In short, they have failed to consider whether, on a particular occasion, providing an accused with an opportunity to present a full defense might better serve the ends of justice than enforcing rules which, like the voucher rule, exist for no good reason[14] or which, like the hearsay rule, generally fulfill a valid purpose but in certain situations unnecessarily obstruct the fact-finding process.[15]

11. *See* Lipinski v. New York, 557 F.2d 289, 292 (2d Cir. 1977) (federal courts consciously refrain from "abrasive disruptions of state procedures").

12. *See, e.g.,* Chambers v. State, 252 So. 2d 217 (Miss. 1971), *rev'd,* Chambers v. Mississippi, 410 U.S. 284 (1973) (combined effect of voucher rule and refusal to recognize penal interest exception to hearsay rule was to exclude witness' out-of-court confession to crime for which defendant was on trial); People v. Spriggs, 33 Cal. Rptr. 732 (Dist. Ct. App. 1963), *vacated,* 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964) (exclusion of hearsay declaration against penal interest prevented defendant on trial for possession of heroin from showing that his companion had told police that the narcotics were hers).

13. *See* C. McCORMICK, *supra* note 2, at 755; 62 ILL. B.J. 158, 159 (1973) (flexibility in the application of evidentiary rules occurs at the expense of consistency and predictability).

14. Although the voucher rule may at one time have served a valid purpose, it has no place in modern criminal trials. Uncertain of its origin, commentators variously attribute the rule to the medieval practice of trial by compurgation, the decisory oath of the Roman law, and the transition from the inquisitorial to the adversarial system of justice. *E.g.,* Comment, *Impeaching One's Own Witness,* 49 VA. L. REV. 996, 996 (1963). Since none of these types of proceedings relied on the testimony of impartial witnesses to resolve disputes, the rule's innate capacity to stifle the fact-finding process remained dormant until the advent of the adversary system. But in today's system of criminal justice, dependent as it is on those individuals who by pure chance happen to have knowledge of events relevant to a defendant's guilt or innocence, it seems irrational to predicate cross-examination on the identity of the party calling the witness. *See* Chambers v. Mississippi, 410 U.S. 284, 297–98 (1973); Lipinski v. New York, 557 F.2d 289, 294 (2d Cir. 1977); E. MORGAN, BASIC PROBLEMS OF EVIDENCE 70–71 (1962) (rule "has no place in any rational system of investigation in modern society"). The federal courts have abandoned the rule for this reason. *See* FED. R. EVID. 607, Advisory Committee's Note.

15. *See, e.g.,* People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964) (Traynor, J.). Defendant, on trial for possession of heroin, was not permitted to introduce his companion's declaration to police that the narcotics belonged to her —in spite of the fact that the evidence on the issue of possession was conflicting.

Five years ago in *Chambers v. Mississippi*,[16] however, the Supreme Court laid the groundwork for a potentially wide reaching fourteenth amendment due process restriction on the exercise of this local prerogative.[17] Reversing a murder conviction, the Court held that the cumulative effect of a Mississippi trial court's application of the state's voucher and hearsay rules had been to deprive the accused of a fundamentally fair trial.[18] The decision marked the first invalidation on procedural due process grounds of a state court's exclusion of evidence offered by the defense.[19] Abandoning the accepted practice of deferring to the trial court's wisdom,[20] the Court independently weighed the competing state and individual interests.[21] The impor-

The Supreme Court of California vacated his conviction and ordered a new trial on the ground that excluding the hearsay, in this instance found inherently trustworthy because against penal interest, had prejudiced the defendant's ability to negate the prosecution's contradictory evidence.

16. 410 U.S. 284 (1973).

17. Commentators quickly appreciated the broad implications of the decision. *See, e.g.*, Comment, *Impeaching the Credibility of a Hearsay Declarant: The Foundation Prerequisite*, 22 U.C.L.A. L. REV. 452, 472–75 (1974); Note, *supra* note 7; 62 ILL. B.J. 158 (1973).

18. When the defendant attempted to impeach his own witness' testimony repudiating an out-of-court confession to the crime for which the defendant was on trial, the Mississippi court applied its voucher rule to prohibit the examination. When the defendant next offered third-party testimony of similar self-accusatory declarations made by the witness, the court rejected the evidence as inadmissible hearsay because Mississippi provided no exception for declarations against penal interest. 410 U.S. at 291–94 (1973).

19. The case should be distinguished from earlier decisions holding entire state procedural rules unconstitutional. *See, e.g.*, Washington v. Texas, 388 U.S. 14 (1967) (state rule which prevented persons charged as principals or accomplices in same crime from testifying on each other's behalf, but which did not prevent them from testifying on behalf of the prosecution, violated defendant's 14th amendment due process right to compulsory process). In addition, *Chambers* should not be confused with the recent series of Supreme Court decisions commencing with Pointer v. Texas, 380 U.S. 400 (1965), and culminating with Dutton v. Evans, 400 U.S. 74 (1970), all of which dealt with the constitutional limitations on the introduction of hearsay by the prosecution in state criminal trials. The confrontation clause arguments advanced in those cases, based on an accused's right to confront the witnesses called by the prosecution to testify against the defendant, are analytically unsuited to cases like *Welcome* and *Chambers* in which the defendant is the party seeking to adduce particular testimony.

20. *See* note 7 and accompanying text *supra*.

21. Before balancing the competing claims, the Court separately evaluated the constitutional authority supporting each. It characterized Chambers' interest in presenting strongly exculpatory evidence as "the right to a fair opportunity to defend against the State's accusation," derived from the "rights to confront and cross-examine witnesses and to call witnesses in one's own behalf." 410 U.S. at 294 (1973). So described, his position gained support from such well-respected cases as Washington v. Texas, 388 U.S. 14 (1967) (sixth amendment right to compulsory process, incorporated into 14th amendment due process clause, required that state defendant be allowed to subpoena alleged co-conspirator to testify in his behalf); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment right to confront and cross-examine adverse witnesses made obligatory on states by 14th amendment); and *In re* Oliver, 333 U.S.

tance of providing the criminal defendant with an opportunity to present strongly exculpatory testimony, coupled with the paucity of reasons for upholding the application of either Mississippi rule, tipped the scales heavily in Chambers' favor.[22] At the same time, the Court did not go so far as to hold either the voucher rule or the failure to recognize an exception to the hearsay rule unconstitutional per se.[23] Instead, it confined its decision to the particular facts and circumstances of the case[24] and provided no guidance as to what other kinds of rulings might warrant a similar balancing of adversarial interests.[25] Thus, the decision left unsettled the extent to which the federal judiciary might subject local rules of evidence to constitutional scrutiny.

Absent a clear mandate from the Supreme Court, lower federal courts reviewing state court decisions have read *Chambers* narrowly.[26] They have not interpreted the decision to authorize a broad-based examination of the constitutionality of previously respected state rules. To the contrary, they have been reluctant to look beyond

257 (1948) (basic elements of due process—reasonable notice and right to be heard —guaranteed the defendant an opportunity to examine the witnesses against him and to offer testimony on his own behalf in Michigan grand jury proceeding). In contrast, the *Chambers* Court was unimpressed with the rationalizations for the state rules. With regard to the voucher rule, the Court found the historical presumption responsible for its institution wholly inappropriate to the realities of modern criminal process. 410 U.S. at 296. As for the state's refusal to admit declarations against penal interest, the circumstances in which the statements were uttered provided sufficient assurance of their reliability to satisfy the purpose of the hearsay rule, *viz.*, to keep unreliable evidence from the trier of fact. *Id.* at 298–300.

22. 410 U.S. at 296. The Court later employed a similar balancing test in Davis v. Alaska, 415 U.S. 308 (1974), another case involving a state court's exclusion of important defense evidence in violation of the sixth amendment confrontation clause and the 14th amendment due process clause. *Cf.* Chesney v. Robinson, 403 F. Supp. 306 (D. Conn. 1975), *aff'd mem.*, 538 F.2d 308 (2d Cir. 1976) (state's interest in maintaining secrecy of grand jury proceedings did not outweigh importance of accused's right to examine star prosecution witness).

23. *See* 62 ILL. B.J. 158, 159 (1973).

24. The opinion of the Court concludes as follows: "In reaching this judgment, we establish no new principles of constitutional law. . . . Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." 410 U.S. at 302–03.

25. *See* 62 ILL. B.J. 158, 159 (1973) ("The Supreme Court clearly failed to set out any guidelines to aid in determining those circumstances in which a court will be permitted to scrutinize the bases of a state's rules of evidence in order to determine if those rules may be suspended.").

26. *See, e.g.*, Maness v. Wainwright, 512 F.2d 88 (5th Cir. 1975), *cert. dismissed*, 97 S. Ct. 1593 (1977); Welcome v. Vincent, 418 F. Supp. 1088 (S.D.N.Y. 1976); Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976). *But cf.* Motes v. Leeke, 423 F. Supp. 919 (D.S.C. 1976) (in holding constitutional a state court's exclusion of a prosecution witness' prior inconsistent statement, the district court did not follow *Chambers;* but it suggested that *Chambers* was not confined to its facts). *See also* 62 ILL. B.J. 158, 159 (1973) (Supreme Court does not sit to review individual records but to enunciate broad principles of constitutional law).

the decision's self-limiting language. Furthermore, they have required that excluded testimony possess a high degree of reliability in order to support an asserted denial of due process.[27] Consequently, the reformation of various state rules of evidence has largely failed to take place. Against this background, *Welcome v. Vincent* represents a major federal incursion into an area historically reserved to the states.

By upholding Welcome's due process attack on his state court conviction, the Court of Appeals for the Second Circuit became the first federal court to follow *Chambers* in holding unconstitutional a state court's application of its rules of evidence to exclude defense testimony.[28] At the same time, the appellate court did not rely directly on *Chambers* to reach its result.[29] Although both cases involved attempts by a defendant to examine at trial a witness whom he had called to the stand and who had confessed to the crime out of court, *Chambers* was found not to control for the following two reasons: First, the Supreme Court had limited the case to its facts and circumstances; and second, the holding in *Chambers* rested on the combined impact on Chambers' defense of restricted examination and excluded hearsay. The latter element was absent from *Welcome*. Thus, the court of appeals confronted the novel issue of whether the single restriction common to the two cases by itself constituted a denial of due process.

To resolve this question, the court evaluated the competing individual and state interests in somewhat the same fashion as had the

27. *See, e.g.,* Maness v. Wainwright, 512 F.2d 88 (5th Cir. 1975), *cert. dismissed,* 97 S. Ct. 1593 (1977); Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976). In neither case was *Chambers* found to provide enough authority to upset the enforcement of voucher rules in situations arguably just as compelling.

Some state courts have not read *Chambers* so narrowly. *See, e.g.,* Kreisher v. State, 303 A.2d 651 (Del. 1973) (hearsay rule may not be blindly applied to prevent defendant from developing defense of entrapment); State v. Dickinson, 282 So. 2d 456 (La. 1973) (cumulative effect of several erroneous trial court rulings denied defendant 14th amendment due process right to fair trial); Commonwealth v. Hackett, 225 Pa. Super. Ct. 22, 307 A.2d 337 (1973) (under *Chambers,* exclusion of trustworthy exculpatory declarations against penal interest is a denial of due process). *But see* State v. Gardner, 13 Wn. App. 194, 534 P.2d 140 (1975) (*Chambers* mandates admissions of declarations against penal interest *only* in exceptional circumstances to prevent manifest injustice).

28. Shortly after *Welcome* was decided, the Nebraska federal district court also chose to follow *Chambers* in a similar factual situation. Steinmark v. Parratt, 427 F. Supp. 931 (D. Neb. 1977) (where state court refused to allow defendant to discredit testimony of police informer by impeachment and third-party testimony, district court, citing *Chambers,* held that the combination of rulings frustrated defendant's efforts to develop his theory of defense and thereby deprived him of due process).

29. 549 F.2d at 857.

Supreme Court in *Chambers*.[30] First, it focused on the nature of the right asserted by Welcome and the extent of its impairment. Identifying Welcome's interest in fully examining Cunningham as part of a criminal defendant's due process right of cross-examination,[31] the court found support for his position in recent Supreme Court opinions emphasizing the vital importance of that right.[32] As in *Chambers*, the court did not conclude that the voucher rule was facially invalid: the defendant's due process protection was not compromised by his summoning Cunningham to the stand and thus being technically responsible for the damaging testimony given against him. The court of appeals did conclude, however, that the trial court's application of New York's voucher rule had significantly infringed upon Welcome's right of confrontation by frustrating his ability to defend himself.[33] By refusing to permit him to question Cunningham about his confession, the trial court prevented the jury from hearing information bearing directly on the crucial question before it—whether to credit Cunningham's admission on direct examination in spite of his subsequent repudiation when cross-examined by the prosecution and, thus, to exonerate Welcome.[34] Because the only other exculpatory evidence that Welcome could adduce was alibi testimony by his girlfriend and two of his mother's acquaintances,[35] the rule's application was found to have irreparably prejudiced his defense.[36]

Having established the legitimacy of Welcome's asserted right of cross-examination and its significant diminution, the court next considered the two countervailing state arguments. It found preposterous

30. *See* notes 21 & 22 and accompanying text *supra*.

31. 549 F.2d at 857. The right to cross-examine witnesses has not received as much attention in this context as it has in situations in which the criminal defendant seeks to question a witness called by the prosecution, *see, e.g.*, Davis v. Alaska, 415 U.S. 308 (1974); California v. Green, 399 U.S. 149 (1970), or where the prosecution under an existing exception introduces hearsay testimony which by its very nature is not susceptible to cross-examination, *see, e.g.*, Dutton v. Evans, 400 U.S. 74 (1970); Barber v. Page, 390 U.S. 719 (1968).

32. The court of appeals at this point quoted from *Chambers* as follows:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Bruton v. United States*, 391 U.S. 123, 135–137 (1968). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

410 U.S. at 295, *quoted in Welcome*, 549 F.2d at 857.

33. 549 F.2d at 856.

34. *Id.* at 857.

35. *Id.* at 856.

36. *Id.* at 857.

the notion that so substantial a right might be subordinated to a state's interest in administering its rules of evidence with technical precision.[37] In addition, the court took issue with the district court's determination that *Chambers* required the out-of-court confession of a witness to bear " 'persuasive indications' [*sic*] of reliability and 'trustworthiness.' "[38] The court found that *Chambers* contained no such consideration of trustworthiness with respect to the admissibility of confessions for purposes of impeachment.[39] With so little to commend the state's position, the court had no difficulty in holding that the restriction imposed on Welcome had deprived him of his fourteenth amendment right to a fundamentally fair trial.

Welcome is immediately significant because it expands the due process protection against unjustifiable evidentiary rulings originally made available to state criminal defendants by *Chambers*.[40] Its refusal to presume New York's voucher rule constitutional on its face and its concomitant willingness to measure the impact of the rule on a particular individual's defense manifest a unique federal awareness of the special plight of a criminal accused in rebutting the state's charges. More importantly, although the court of appeals disavowed "any attempt to 'constitutionalize' the law of evidence pertaining to the use of prior statements of a witness" except on the narrow issue involved,[41] it nevertheless established for the first time a lenient test by which an

37. *Id.* at 858. *Cf.* Ladd, *Impeachment of One's Own Witness—New Developments,* 4 U. CHI. L. REV. 69, 87–88 (1936) (where legitimate basis exists for admitting prior inconsistent statements to impeach in-court witness, danger that jury will use statements as substantive evidence does not justify their technical exclusion).

38. 549 F.2d at 858 (quoting Welcome v. Vincent, 418 F. Supp. 1088, 1092 (1976) and *Chambers,* 410 U.S. at 302).

39. Rejecting the district court's view of *Chambers,* the court of appeals declared:

> [W]e think that *Chambers* does not require that the confession be so reliable as to support a conviction or even to warrant trial of the confessor. The assessment of trustworthiness in *Chambers* appeared only in the context of the Supreme Court's discussion of the hearsay testimony that the defendant there sought to introduce . . . . The *Chambers* Court did not consider the issue of trustworthiness at all in relation to the restricted questioning of [the confessor].

549 F.2d at 858.

The court's analysis of the *Chambers* reasoning is helpful in clarifying the actual basis for the Supreme Court's decision which, as the commentators have noted, is not free from ambiguity. *See* Natali, Green, Dutton *and* Chambers: *Three Cases in Search of a Theory,* 7 RUT.-CAM. L.J. 43 (1975); Comment, Chambers v. Mississippi: *The Limits of Due Process—The "Voucher" Rule and the Exception for Hearsay Declarations Against Interest,* 4 N.Y.U. REV. L. & SOC. CHANGE 191 (1974); 62 ILL. B.J. 158, 159 (1973). *See also* Imwinkelried, Chambers v. Mississippi, 410 U.S. 284 (1973)—*The Constitutional Right to Present Defense Evidence,* 62 MIL. L. REV. 225 (1974).

40. *See* Lipinski v. New York, 557 F.2d 289, 292 (2d Cir. 1977).

41. 549 F.2d at 859.

accused may successfully challenge the application of state rules of evidence to limit the accused's examination of his own witness. He must simply demonstrate that the state has imposed a "significant restriction" on his ability to examine his own witness and that the offered testimony bears "some semblance of reliability."[42] With respect to the first requirement, the number of inhibiting rulings is inconsequential. Rather, the actual amount of harm inflicted determines whether a trial has been fundamentally fair. Hence, had other proof of Cunningham's culpability been available to Welcome, *i.e.*, proof that would have been as persuasive as the excluded confession, the court of appeals would presumably not have found "significant" the restriction imposed by the voucher rule. As for the reliability threshhold, requiring a mere "semblance" represents a significant relaxation of the rigid standard of trustworthiness previously thought to be required.[43] Given the ease with which Cunningham's confession met this test,[44] it remains to be seen whether the requisite degree of persuasiveness will remain so minimal. In any event, the mere fact that the court articulated a standard for attacking state rules of evidence in and of itself increases a defendant's chances of presenting a case unimpaired by rules ill-adapted to the realities of the criminal courtroom.

The due process restriction which *Welcome* imposes on the application of state rules of evidence may in the long run have an even greater impact on the common law of evidence than it has already had on the procedural due process aspects of constitutional law. State trial courts are likely to be significantly influenced by the court of appeals' extension of the *Chambers* reasoning to evaluation of the constitutionality of a given evidentiary rule as applied in a particular trial situation. Henceforth, it may be legitimately maintained that decisions such as *Chambers* and *Welcome* decrease the likelihood that a state rule unsupported by rational policy considerations will be able to survive a confrontation with a criminal defendant's compelling interest in presenting reliable evidence of his innocence. Rather than continually risk reversal by the federal judiciary[45] or require trial judges to assess the constitutionality of each evidentiary ruling adverse to a defend-

42. *Id.*
43. *Id.* at 858 (conclusion of district court).
44. *Id.*
45. If the court of appeals' response to its own decision is indicative of the use which the federal courts are likely to make of the *Welcome* test, the risk appears substantial. Within a short while after deciding *Welcome*, the court of appeals again

ant,[46] the states may instead decide to reevaluate the cogency of their rules of evidence on the assumption that they would likely receive "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules."[47] This self-imposed reform would be especially likely to abolish those repeatedly criticized rules which, like the voucher rule, are notable for the dearth of logical reasons justifying their existence. In brief, it does not seem unreasonable to anticipate that *Welcome*'s expansion of *Chambers* may provide the states with a powerful incentive for reformulating their rules of evidence to make them better comport with the realities of modern criminal trial practice.

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scrutinized the constitutionality of a particular application of New York's voucher rule in Lipinski v. New York, 557 F.2d 289 (2d Cir. 1977), a case presenting far less compelling reasons for reversal than those advanced in *Welcome*. In *Lipinski*, the petitioner had been convicted of attempted petty larceny, a misdemeanor under New York law, and the testimony which the rule had prevented him from introducing can at best be described as marginally detrimental to the state's case. Nevertheless, the court took on the task of weighing the conflicting individual and state interests before holding in the state's favor. In the process, it discredited every conceivable justification for retaining what it styled "one of those atavisms that no quantity of reasoned criticism seems able to destroy." *Id.* at 293. Moreover, only after finding that the ruling under consideration did not seriously impair the defendant's ability to present an effective defense, *id.* at 294, did the court reject the habeas petition. Thus, those state courts that have viewed *Chambers* as an exceptional case involving manifest injustice, *see* State v. Gardner, 13 Wn. App. 194, 534 P.2d 140 (1975), might be well advised to reconsider whether in less importunate cases their rulings will yet be immune from due process invalidation.

An additional reason for expecting more rigorous federal scrutiny is the ready availability of the federal habeas corpus proceeding for reviewing allegedly unconstitutional state trial court evidentiary rulings. In addition to *Welcome* and *Lipinski*, see, *e.g.*, Chesney v. Robinson, 538 F.2d 308 (2d Cir. 1976), *aff'g* 403 F. Supp. 306 (D. Conn. 1975); Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975); Motes v. Leeke, 423 F. Supp. 919 (D.S.C. 1976). *See generally Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

46. Although the case-by-case approach has been advocated in the context of Supreme Court review, *see* Dutton v. Evans, 400 U.S. 74, 93 (1970) (Harlan, J., concurring), its workability in general is questionable in day-to-day trial court proceedings where considerations of judicial economy and predictability are paramount. *See* FED. R. EVID. Art. VIII, Advisory Committee's Introductory Note on the Hearsay Problem; Graham, *The Relationship Among Federal Rules of Evidence 607, 801(d)(1)(A), and 403: A Reply to* Weinstein's Evidence, 55 TEX. L. REV. 573, 578 (1977) ("process of balancing is at best extremely difficult and is unlikely to lead to uniform, predictable results").

47. Chambers v. Mississippi, 410 U.S. at 302–03. This seems to be precisely the step taken by the Pennsylvania bench in Commonwealth v. Hackett, 225 Pa. Super. Ct. 22, 307 A.2d 334 (1973) (adoption of declaration against penal interest exception to the hearsay rule). *See* 79 DICK. L. REV. 189, 194–96 (1974); note 27 *supra*.