

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 862

September Term, 1994

En banc

JERRY S. TYLER

v.

STATE OF MARYLAND

Wilner, C.J.,
Moylan,
Bishop,
Alpert,
Wenner,
Fischer,
Cathell,
Harrell,
Murphy,
Hollander,

JJ.

**Dissenting Opinion by Davis, J.,
in which Bloom, J. joins**

Filed: June 30, 1995

I dissent from that portion of this Court's opinion holding that the testimony given at Eiland's December 1993 trial was admissible against Tyler. I fully concur with the dissenting opinion of Judge Salmon. I write separately to articulate my particularized concern that the admission of Eiland's prior testimony violated Tyler's Sixth Amendment right to confrontation.

Commentators have long associated the Confrontation Clause with the notorious abuses at the trial of Sir Walter Raleigh in 1603. As one commentator explained:

The chief evidence against Raleigh was a sworn statement of Lord Cobham, a statement made to royal commissioners who interrogated Cobham in the tower where he was jailed. The accusatory statement may have been coerced; its reliability was certainly undercut because Cobham retracted the statement and then recalled the retraction. Even though Raleigh demanded that Cobham be produced, Cobham was never called as a witness.

Roger W. Kirst, *The Procedural Dimension of the Confrontation Doctrine*, 66 NEB. L. REV. 485, 490 (1987). See also Graham C. Lily, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 208-212 (1984). On the strength of Cobham's dubious statement, Raleigh was convicted of treason and executed.

Although the historical association between the Confrontation Clause and Raleigh's "trial by affidavit" may be little more than

a romantic myth,¹ the story dramatically illustrates the abuses that once prevailed in English criminal trials:

At the time of Raleigh's trial . . . the depositions of absent persons were read as the usual course of evidence which had prevailed for centuries in State prosecutions; this mode of proof constituted the general rule, and the oral examination of witnesses was the exception, which was in practice sometimes allowed, but was as often refused, and never permitted but by the consent of counsel for the prosecution.

5 D. JARDINE, HISTORICAL CRIMINAL TRIALS 514 (1832). See also 5 JOHN H. WIGMORE, EVIDENCE § 1364, at 12-28 (Chadbourn Rev. 1974) (discussing the history of the rule against hearsay).

At the outset, I think it essential to note that the prior testimony at issue here was presumptively unreliable. In *Douglas v. Alabama*, 380 U.S. 415, 419 (1965), the Supreme Court held that a defendant's inability to cross-examine an accomplice, with regard to the accomplice's alleged confession, plainly denied the defendant his right of confrontation.

This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, *the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.*

¹ See, e.g., Kenneth W. Graham, Jr., *The Right to Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. LAW BULL. 99, 100 n.4 (1972); ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* 73 (1992).

Lee v. Illinois, 476 U.S. 530, 541 (1986) (emphasis added). Over the years since *Douglas*, the Court "has spoken with one voice" in declaring that such statements are "presumptively unreliable." *Id.* See also *Wilson v. State*, 334 Md. 313, 334-35 (1994).

Prior to the decision in *Nance v. State*, 93 Md. App. 475 (1992), *aff'd*, 331 Md. 549 (1993), the prior testimony of a witness was not admissible as substantive evidence in Maryland, unless the declarant was unavailable and the statements were made at previous proceedings against the same defendant, wherein the accused had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. See, e.g., *State v. Breeden*, 333 Md. 212, 222 (1993); *Crawford v. State*, 282 Md. 210, 214-15 (1978). See also MD. RULE 5-804(b)(1). The majority correctly observes that Eiland's testimony was not admissible under the exception for former testimony. Tyler had no opportunity to cross-examine Eiland during the December 1993 trial, and the State was not positioned to serve as Tyler's surrogate. Because the testimony at issue here was presumptively (and perhaps notoriously) unreliable, we should not be eager to conclude that Eiland was available for cross-examination. In the absence of a *meaningful* opportunity for effective cross-examination, the very nature of Eiland's prior testimony demands that it be excluded.

I do not agree with the majority's conclusion that Eiland was "available" as required by the *Nance* exception to the rule against hearsay. See *Nance*, 331 Md. at 571 (holding that prior inconsistent testimony is not admissible unless the declarant is "present as a witness at trial to be tested by cross-examination"). Whether Eiland was "available" for the purposes of the Confrontation Clause, of course, is another matter entirely. The Supreme Court has recognized that hearsay rules and the Confrontation Clause are "designed to protect similar values," but the Court has "been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements." *Wilson*, 334 Md. at 322 (quoting *Idaho v. Wright*, 497 U.S. 805, 814 (1990)). Properly understood, the Confrontation Clause is neither "a minor adjunct of evidence law," nor "a mere vestigial appendix of the hearsay doctrine." Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 575, 622 (1988). Even if Eiland was sufficiently "available" to satisfy the mandates of *Nance*, the Confrontation Clause may require that his prior testimony be excluded.

Although the Supreme Court has often noted that the Confrontation Clause was intended to advance "the accuracy of the truth-determining process in criminal trials," *Dutton v. Evans*, 400 U.S. 74, 89 (1970), the fundamental purpose of the right to

confrontation runs much deeper. In *Faretta v. California*, 422 U.S. 806 (1975), the Court explained:

The Sixth Amendment includes a compact statement of the rights necessary to a full defense [T]hese rights are basic to our adversary system of criminal justice The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice.

Id. at 818. In other words, "[t]he right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee*, 476 U.S. at 540. See also *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (noting that a fair trial requires an "adversarial testing" of the State's evidence).

The right to a fundamentally fair trial requires that the accused be permitted to press a full, vigorous, and adversarial defense. As one commentator has noted, "[T]he adversary system's real genius . . . lies in the use and perfection of cross-examination." Richard G. Singer, *Forensic Misconduct by Federal Prosecutors - And How It Grew*, 20 ALA. L. REV. 227, 268 (1968). See also MODEL CODE OF EVIDENCE ch. VI, introductory note (1942) (the opportunity for cross-examination "is the very heart of an adversary theory of litigation"). Accordingly, both courts and commentators have concluded that "[t]he main and essential purpose

of confrontation is to *secure for the opponent the opportunity of cross-examination.*" 5 WIGMORE § 1395, at 150. See also *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (quoting Wigmore with approval). In Wigmore's words:

The opponent demands cross-examination, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 WIGMORE § 1395, at 150. In addition, the Confrontation Clause compels a witness

to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895). See also *California v. Green*, 399 U.S. 149, 157-58 (1970); *Davis*, 415 U.S. at 316. The combined effect of the various aspects of confrontation - physical presence, oath, cross-examination, and observation of the witness' demeanor, "serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

During trial, the immediate goal of most cross-examination is to produce more information about the witness, including information about "prior statements, inconsistent facts, ability to

observe and recollect, bias and prejudice, lack of truth and veracity." Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145, 151 (1993). Thus, the widely acknowledged purpose of cross-examination is "to test and challenge the evidence in front of the jury so that the jury will have all the information necessary to best assess what weight the evidence should be given." Jonakait, *supra*, 35 UCLA L. REV. at 587-88 (footnote omitted). Although the scope of cross-examination is generally limited to those subjects raised on direct examination, within that limit the defendant should be free to cross-examine "in order to elucidate, modify, explain, contradict, or rebut testimony given in chief." *Smallwood v. State*, 320 Md. 300, 307 (1990). In the context of the case at hand, the immediate purpose of the right to confrontation is to furnish the jury with "a satisfactory basis for evaluating the truth" of the prior statements. *Green*, 399 U.S. at 161.

It is true that the Confrontation Clause guarantees nothing more than "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam). It is equally true that the mere presence of the witness in the courtroom will not suffice. See *Simmons v. State*, 333 Md. 547, 559 (1994) (witness who is physically seated on the stand but refuses to take an oath or

answer any questions at all is not available). As the Supreme Court explained in *Fensterer*, 474 U.S. at 22, "the Confrontation Clause is generally satisfied when the defense is given a *full and fair opportunity*" to probe the testimony of the witness (emphasis added). When the defendant's opportunity for cross-examination has been neither full nor fair, the right to confrontation has not been satisfied.

In *Douglas*, 380 U.S. 415, the Supreme Court held that a witness is not available for full and effective cross-examination when he or she refuses to testify, regardless of whether the refusal to testify is predicated on privilege or punished as contempt. In that case, Douglas and a second man named Loyd were tried separately on charges of assault with intent to murder. The Court explained:

Loyd was tried first and was found guilty. The State then called Loyd as a witness at petitioner's trial. . . . Loyd gave his name and address but, invoking the privilege [against self-incrimination], refused to answer any questions concerning the alleged crime. The trial judge ruled that Loyd could not rely on the privilege because of his conviction, and ordered him to answer, but Loyd persisted in his refusal.

Id. at 416. Under the guise of refreshing Loyd's recollection, the State then read into evidence the entire contents of a lengthy confession allegedly signed by Loyd, which named Douglas as the person who shot the victim. Loyd did not acknowledge making those statements. *Id.* at 419.

Under the circumstances, the Court concluded, "petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.* The Court emphasized:

We need not decide whether Loyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding petitioner's claim under the Confrontation Clause that no suggestion is made that Loyd's refusal to answer was procured by the petitioner

Id. at 420 (emphasis added).

Although recent Supreme Court decisions have read the right to confrontation more narrowly than earlier cases,² the Court has never retreated from the central holding of *Douglas*. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court held that out-of-court statements were not admissible as substantive evidence unless the prosecution can either "produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65. The Court characterized this principle as a "rule of necessity." In *United States v. Inadi*, 475 U.S. 387 (1986), the Court mitigated the strict holding of *Roberts*, and concluded that the rule of necessity did not apply to hearsay statements made by a co-conspirator during the course of the

² See Jonakait, *supra*, 35 UCLA L. REV. 557; Swift, *supra*, 22 CAP. U. L. REV. 145; Barbara Rook Snyder, Defining the Contours of Unavailability and Reliability for the Confrontation Clause, 22 CAP. U. L. REV. 189 (1993).

conspiracy.³ *Id.* at 394-96. The Court emphasized, however, that the *Roberts* rule of necessity still applied to cases involving prior testimony. *Id.* at 393-95.

Under current Confrontation Clause doctrine, the prior testimony of a witness is not admissible as substantive evidence unless one of two tests is satisfied. When the declarant is unavailable for cross-examination, the second prong of the *Roberts* test requires a showing that the testimony is "reliable," which may be satisfied if evidence falls within a "firmly-rooted" hearsay exception, or if there are other "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 65-66. If the prior testimony is unreliable, as it was in the present case, then the testimony cannot be admitted unless the witness takes the stand, and the defendant is afforded a full and fair opportunity for effective cross-examination. See *Douglas*, 380 U.S. at 419.

³ The Court explained that because co-conspirator statements

are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. . . . Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand.

Inadi, 475 U.S. at 395. Thus, the Court concluded that co-conspirator statements are "better" and more probative than live testimony. *Id.*

The Supreme Court's cases involving memory loss have not altered those principles. The Court's decision in *Green*, 399 U.S. 149, for example, clearly illustrates the sort of trial performance that is necessary to satisfy the requirements of the Confrontation Clause. The key witness in that case, Porter, was arrested for selling marijuana to an undercover officer. While in police custody, Porter named Green as his supplier. Porter later testified at a preliminary hearing, and again identified Green as his supplier. During the hearing, Porter was cross-examined extensively by Green's attorney – the same attorney who represented Green at his subsequent trial. *Id.* at 151.

At trial, Porter was again the State's chief witness, but he proved to be evasive and uncooperative. Porter admitted that Green had phoned him, and that the two discussed selling some "stuff." Porter also admitted that he obtained twenty-nine plastic "baggies" of marijuana shortly thereafter. He explained, however, that he had taken LSD just prior to the phone call, and could not remember how he obtained the drugs. *Id.* at 151-52.

At various points during Porter's direct examination, the prosecution read excerpts from a transcript of Porter's previous testimony.⁴ With his memory thereby "refreshed," Porter "guessed" that he had obtained the marijuana from the backyard of a home

⁴ At the time of Green's trial, § 1235 of the California Evidence Code provided that prior inconsistent statements were not barred by the rule against hearsay. *Green*, 399 U.S. at 150.

owned by Green's parents. On cross-examination, however, Porter indicated that the out-of-court statements merely refreshed his memory of the testimony he had previously given, rather than his memory of the events themselves. He continued to assert that he did not remember how he obtained the marijuana. Later in the trial, Porter's prior statements to police were also admitted as substantive evidence. *Id.* at 152.⁵

In holding that Green had an adequate opportunity to cross-examine Porter regarding his former testimony, the Supreme Court emphasized that Porter acknowledged making the prior statements, and that Porter's prior statements were inconsistent with his trial testimony. The Court observed:

If the witness admits the prior statement is his, or if there is other evidence to show the statement is his . . . the jury can be confident that it has before it two conflicting statements by the same witness. Thus . . . *the witness must now affirm, deny or qualify the truth of the prior statement under the penalty of perjury*

Id. at 158-59 (emphasis added). The Court explained further:

The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, *thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement.* The jury is alerted by the inconsistency in the stories, and its

⁵ The Court declined to decide whether the Confrontation Clause was violated by the admission of those statements. The Court noted that the issue had not been decided below, and that neither party had addressed the issue on appeal. *Id.* at 168-70.

attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story.

Id. at 160 (emphasis added). In short, the obvious inconsistency between Porter's trial testimony and his prior testimony required that Porter explain the discrepancy and the reasons for his memory loss.⁶

A pair of inconsistent statements are "[m]utually repugnant or contradictory," and so are contrary to one another that both

⁶ The result in *Nance* rested on a similar trial performance:

All three witnesses were extensively cross-examined by the defense at trial. They were eager to offer testimony that attenuated any link between Petitioners and the crime. They were afforded an ample opportunity to explain or deny the inconsistencies between their trial testimony and their prior statements to police and the grand jury. This they did in a number of ways. They testified that police had misinterpreted their prior remarks, falsely recorded them, or elicited them by coercion. Harris and McCormick also suggested that heroin intoxication had eradicated their memories.

Nance, 331 Md. at 573.

Moreover, the above-quoted passage from *Nance* highlights the contrast between the nature of the witnesses; i.e., in *Nance* the Court was confronted with the so-called "turncoat witness." In no sense can Eiland be considered a "turncoat witness," the State never having any legitimate reason to consider Eiland's testimony as a part of its arsenal to be used at trial against Tyler. In other words, Eiland could not be viewed as a "turncoat witness" because he was never a witness the State had a right to count on.

statements cannot be true. BLACK'S LAW DICTIONARY at 766 (6th ed. 1990). By that definition, as well as the analysis in *Green*, Eiland's trial performance was not inconsistent with his prior testimony. Unlike Porter, Eiland did not relate two conflicting stories regarding the events surrounding the death of Jay Bias. He did not acknowledge making the prior statements, and neither affirmed nor denied the truth of those statements. As I noted earlier, the purpose of cross-examination in the present case was to furnish the jury with "a satisfactory basis for evaluating the truth" of Eiland's prior testimony. See *Green*, 399 U.S. at 161. There was nothing at all in Eiland's performance that might aid the jury with that task.

Justice Harlan, concurring with the result in *Green*, argued that the Confrontation Clause is satisfied by the physical presence of the witness in court. *Green*, 399 U.S. at 172 (Harlan, J., concurring). In *United States v. Owens*, 484 U.S. 554, 559 (1988), the Court endorsed Justice Harlan's concurrence, but did so purely as dicta. As I explain below, the prosecution in *Owens* did more than simply produce the witness, and the defendant did, in fact, have a meaningful opportunity to probe the witness' out-of-court statement. The Court's decision in *Owens* cannot and should not be read as standing for the radical proposition that the right to confrontation is satisfied when the witness takes the stand and answers a few collateral questions, but refuses to testify further.

In *Fensterer*, 474 U.S. at 22, the Court determined that the Confrontation Clause was not violated when an expert witness testified as to what opinion he formed, but could not recall which one of three methods he used to reach that conclusion. The Court said:

The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Id. at 21-22. In *Owens*, 484 U.S. 554, the Court quoted *Fensterer* with approval, and added that a full and fair opportunity for effective cross-examination

is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attention, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, *Evidence* § 995, pp. 931-932 (J. Chadbourn rev. 1970)) the very fact that he has a bad memory.

Id. at 559.

In *Owens*, a man named Foster had been brutally beaten with a metal pipe. He sustained a fractured skull and his memory was seriously impaired. When Mansfield, an FBI agent, first attempted to interview Foster, the latter was unable to remember the details

of the assault. During a second interview, Foster named Owens as his assailant, and identified him from an array of photographs. *Id.* at 556. The Supreme Court's description of Foster's trial performance is instructive in its analysis:

At trial, Foster recounted his activities just before the attack, and described feeling the blows to his head and seeing blood on the floor. He testified that he clearly remembered identifying respondent as his assailant during his May 5th interview with Mansfield. *On cross-examination, he admitted that he could not remember seeing the assailant.* He also admitted that, although there was evidence that he had received numerous visitors in the hospital, he was unable to remember any of them except Mansfield, and could not remember whether any of these visitors had suggested that respondent was the assailant.

Id. (emphasis added). Thus, the jury had an opportunity to assess Foster's recollection of the beating, the circumstances surrounding Foster's identification of Owens, the extent of Foster's memory loss, and his general demeanor during cross-examination. In the instant case, by contrast, the jury had no opportunity to test Eiland's credibility or the truth of his prior testimony. If "the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination," *Owens*, 484 U.S. at 559, then Tyler was not afforded a "full and fair" opportunity to cross-examine Eiland.

The majority suggests that there is no "principled distinction" between a witness who cannot remember and one who refuses to testify. To the contrary, in *Owens*, the Supreme Court

both recognized and explained that distinction. Because Foster testified at trial and was "subject to cross-examination," the Court concluded that his prior identification of Owens was not barred by the rule against hearsay. *Id.* at 561-62. See FED. R. EVID. 801(d)(1)(c) (excluding certain prior statements of identification from the definition of hearsay). In reaching that conclusion, the Court underscored the difference between a witness who refuses to testify and one who claims a memory loss:

Just as with the constitutional prohibition . . . assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the witness' assertion of memory loss – which, as discussed earlier, is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement.

Owens, 484 U.S. at 561-62 (emphasis added). *Accord Nance*, 331 Md. at 573 (quoting the preceding language from *Owens* with approval). See also *Fensterer*, 474 U.S. at 19 ("Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory.").

As in both *Owens* and *Nance*, the statement "I don't remember" is a statement the truth of which can be tested during cross-examination. The defendant can probe the reasons for the memory loss, the extent of the memory loss, and the declarant's ability to recall the circumstances under which the prior statement was made. The responses to those questions, and the declarant's demeanor

while answering, will afford the jury some basis for assessing the truth of the prior statement. The jury may also assess whether the memory loss is genuine or purposely evasive. As the Court explained in *Owens*, 484 U.S. at 560:

The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons, as is demonstrated by defense counsel's summation in this very case, which emphasized Foster's memory loss and argued that his identification of respondent was the result of the suggestions of people who visited him in the hospital.

By comparison, a witness who persistently states "I can't answer that question" has not made a statement the truth of which can be tested. The statement is a blank, a cipher, a smooth stone wall, a sheer cliff with no footholds for climbing. The defendant may as well confront a mannequin, for all that the process will gain him. The statement itself says nothing about the witness's ability to recall and relate the events at issue. It says nothing about the credibility of the witness, the truth of the prior statement, or the circumstances under which that statement was made. For the defendant, the statement "I can't answer that question" is more damaging than mere silence. It invites the jury to speculate on the possibility that the defendant has threatened the witness, or has otherwise procured the refusal to testify.⁷ In

⁷ There are other reasons why a witness might refuse to testify. In *Carlos v. Wyrick*, 753 F.2d 691, 692 (8th Cir. 1985), for example, the witness was a contract killer who apparently was

the absence of hard evidence, such speculation would be both improper and highly prejudicial.

II

The application of these principles to the case at hand is illustrated by a pair of decisions from state and federal courts. In each case, one or more witnesses refused to testify without asserting a valid privilege, and the reviewing court concluded that admission of the witness's out-of-court statements was reversible error.

In *Mayes v. Sowders*, 621 F.2d 850 (6th Cir. 1980), the defendant was convicted on two counts of robbery and two counts of murder. Mayes confessed to his participation in the robbery with his cousin, Leslie Beecham, but denied doing the actual shooting or stabbing. *Id.* at 851-52. Beecham also admitted his involvement in the robberies, but claimed that Mayes had done the killings. The shirt that Beecham wore during the second robbery had traces of human blood on it, but Mayes's clothing did not. Beecham pled guilty to both the robberies and the murders, and his sentencing was deferred until after Mayes's trial. *Id.* at 853.

At trial, the prosecution called Beecham as a witness. Beecham "gave his name and address, answered two questions put to him by the prosecutor in the negative, and thereafter refused to

attempting to protect an unknown accomplice. See section III, *infra* (discussing *Carlos* in more detail).

testify further," despite a citation for contempt. The prosecution then called a police officer, who testified as to the "prior inconsistent statements" made by Beecham. *Id.* at 853.

On appeal from a writ of habeas corpus, the Sixth Circuit concluded:

A witness is not available for full and effective cross examination when he or she refuses to testify. . . . This is equally true whether the refusal to testify is predicated on privilege or is punishable as contempt, so long as the refusal is not procured by the defendant.

Id. at 856 (citing *Douglas*, 380 U.S. 415). As in the present case, the Sixth Circuit stressed that Beecham's prior statements to police were unreliable:

Beecham's statement that Mayes killed the gas station attendant was not corroborated by Mayes' own confession, or any other evidence in the case. The oral statement was made during a custodial interrogation of Beecham, *after Beecham had been shown Mayes' statement that Beecham had been the guilty party.* The statement was self-serving.

Id. at 856 (emphasis added) (footnote omitted). Accordingly, the court concluded that the defendant did not have a full and effective opportunity to cross-examine Beecham, and that the introduction of Beecham's statements violated the defendant's Sixth Amendment right of confrontation. *Id.*

In *People v. Rios*, 210 Cal. Rptr. 271 (Cal. Ct. App. 1985), the performance of two trial witnesses was remarkably similar to Eiland's performance. Rios was convicted of a murder that occurred

during the course of a burglary. A prosecution witness, Torres, told a police detective that Rios admitted killing the victim. A second man, Carillo, told police that Rios had approached him just prior to the crime. Rios spoke about "doing a job," and he asked Carillo for a gun. Carillo gave him a .25 caliber automatic pistol. Five minutes later, Carillo heard a gunshot nearby. The victim died of a .25 caliber gunshot wound to the chest. The murder weapon was not recovered. *Id.* at 275-76.

Torres had been called to testify during a preliminary hearing, refused to answer, and was sentenced to six months' incarceration for contempt. At the time of trial he was still incarcerated. He informed the trial court that he would again refuse to answer, even though he had no privilege and could face further contempt charges. Carillo had not testified previously, and was granted full immunity from prosecution for the burglary and murder. *Id.* at 276.

At trial, Torres and Carillo both took the stand and refused to testify. Each gave his name, and Carillo added his age. In response to further questions, both witnesses stated repeatedly, "I refuse to answer that question," "I refuse to answer that question," "I refuse to answer any question." *Id.* at 276-77 n.2. After extensive argument by counsel, the trial judge ruled that the testimony given by each witness was an "implied denial" of their earlier statements to police, and that the out-of-court statements were admissible as substantive evidence under a California rule

pertaining to prior inconsistent statements.⁸ *Id.* at 276. Accordingly, a police detective was permitted to testify regarding the prior statements that Torres and Carillo had made to police.

On appeal, Rios challenged the admission of those statements, and the California Court of Appeals reversed. The court concluded that "the admission of a prior statement made by a witness who stonewalls at trial and refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness." *Id.* at 279 (footnote omitted). The court also concluded that the witness's trial testimony was not "inconsistent" with the out-of-court statements. *Id.* at 278-79. In each instance, the court explained, "there is simply no 'statement' in the record which is inconsistent, or for that matter consistent, with prior statements; there is no 'express testimony' at all from which to infer or deduce implied inconsistency." *Id.* The court concluded: "[w]here, as here, the witnesses give no testimony, there is no evidence to support a finding of inconsistency." *Id.* The court explained that Rios was given no "meaningful opportunity" to cross-examine the witnesses:

Observing the demeanor of a totally
recalcitrant witness when questioned about

⁸ Section 1235 of the California Evidence Code provided, in part: "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" See *Rios*, 210 Cal. Rptr. at 278 n.3.

matters he refuses to answer "is as meaningless as attempting to gain information as to the truth of unknown facts from his responses. Even *California v. Green's* holding rests on the assumption that meaningful trial confrontation will provide `most of the lost protections [of contemporaneous cross-examination]'" There was no evidence from which the jury could evaluate the circumstances surrounding the making of the previous statements by Torres and Carillo; no way to test the truth of the statement itself.

Id. at 280 (quoting *People v. Simmons*, 177 Cal. Rptr. 17 (Cal. Ct. App. 1981) (quoting *Green*, 399 U.S. at 158)). The situation presented here compels the same conclusion. Because Tyler had no meaningful opportunity to test the truth of Eiland's prior statements, the admission of those statements violated his right to confrontation.

III

I find further support for that conclusion in a plethora of cases dealing with a closely analogous situation. When a prosecution witness who testifies on direct examination subsequently refuses to answer certain questions on cross-examination, a clear majority of state and federal courts have concluded that the defendant's right of confrontation may be violated if the trial court refused to strike relevant portions of the witness's direct testimony. As Wigmore explained:

Where the witness, after his examination in chief on the stand, has *refused* to submit to cross-examination, the opportunity of thus probing and testing his statements has

substantially failed, and his direct testimony should be struck out.

5 WIGMORE § 1391(2), at 137. In *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963), *cert. denied*, 375 U.S. 822 (1963), the Second Circuit articulated the test to be used in determining whether the Confrontation Clause has been violated by the trial court's failure to strike the relevant direct testimony:

Where the privilege has been invoked as to the purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. . . . On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony

Id. at 611. The court noted that a distinction must be drawn between questions that "bear only on the credibility of the witness," and those which address the substance of the testimony given during direct examination. In the latter situation, the direct testimony "should be stricken in whole or in part." *Id.* See also *U.S. v. Zapata*, 871 F.2d 616, 623 (7th Cir. 1989) ("When a witness' refusal to answer prevents [a] defendant from directly assailing the truth of the witness' testimony, the court should strike at least the relevant portion of the testimony.").

The test announced in *Cardillo* has been followed by nearly all federal circuits and the courts of most states.⁹ *Cardillo* and its progeny generally involve a witness who asserts a valid privilege against self-incrimination. As in *Douglas* and *Mayes*, however, courts have emphasized that the assertion of a valid privilege is unnecessary. It makes no difference "whether the

⁹ See, e.g., *Turner v. Fair*, 617 F.2d 7, 10 (1st Cir. 1980); *United States v. Newman*, 490 F.2d 139, 145 (3rd Cir. 1974); *United States v. Smith*, 342 F.2d 525, 527 (4th Cir.), cert. denied, 381 U.S. 913 (1965); *Fountain v. United States*, 384 F.2d 624, 628 (5th Cir. 1968); *United States v. Stephens*, 492 F.2d 1367, 1374-75 (6th Cir.), cert. denied, 419 U.S. 852 (1974); *United States v. Zapata*, 871 F.2d 616, 624 (7th Cir. 1989); *Smith v. United States*, 331 F.2d 265, 276-78 (8th Cir.), cert. denied, 379 U.S. 824 (1964); *United States v. Norman*, 402 F.2d 73 (9th Cir. 1968), cert. denied sub nom. *United States v. Marshall*, 397 U.S. 938 (1970); *United States v. Nunez*, 668 F.2d 1116, 1121-22 (10th Cir. 1981); *United States v. Hirst*, 668 F.2d 1180, 1183 (11th Cir. 1982); *Jackson v. State*, 695 P.2d 227 (Alaska Ct. App. 1985); *State v. Dunlap*, 608 P.2d 41 (Ariz. 1980); *Robertson v. State*, 765 S.W.2d 936 (Ark. 1989); *People v. Coca*, 564 P.2d 431 (Colo. Ct. App. 1977); *State v. Roma*, 505 A.2d 717 (Conn. 1986); *Johnson v. United States*, 418 A.2d 136 (D.C. 1980); *Kelly v. State*, 425 So.2d 81 (Fla. Dist. Ct. App. 1982), cert. denied, 434 So.2d 889 (Fla. 1983); *Smith v. State*, 168 S.E.2d 587 (Ga. 1969), cert. denied, 396 U.S. 1045 (1970); *People v. Harris*, 526 N.E.2d 335 (Ill.), cert. denied, 488 U.S. 902 (1988); *In the Interest of J.D.S.*, 436 N.W.2d 342 (Iowa 1989); *State v. Montanez*, 523 P.2d 410 (Kan. 1974); *Thomas v. State*, 63 Md. App. 337 (1985); *Commonwealth v. Funches*, 397 N.E.2d 1097 (Mass. 1979); *People v. Fuzi*, 323 N.W.2d 354 (Mich. Ct. App. 1982); *State v. Spencer*, 248 N.W.2d 915 (Minn. 1976); *State v. Brown*, 549 S.W.2d 336 (Mo. 1977); *State v. Bittner*, 196 N.W.2d 186 (Neb.), cert. denied, 409 U.S. 875 (1972); *State v. Rogers*, 453 P.2d 593 (New Mex. Ct. App. 1969); *People v. Chin*, 490 N.E.2d 505 (N.Y. 1986); *State v. Ray*, 444 S.E.2d 918 (N.C. 1994); *Commonwealth v. Learn*, 335 A.2d 417 (Pa. Sup. Ct. 1975); *State v. Iron Thunder*, 272 N.W.2d 299 (S.D. 1978); *Decker v. State*, 734 S.W.2d 393 (Tex. Ct. App. 1987); *State v. Pickens*, 615 P.2d 537 (Wash. Ct. App. 1980). See also 5 WIGMORE § 1391(2) and cases cited therein.

refusal to testify is predicated on privilege or is punishable as contempt, so long as the refusal is not procured by the defendant." See *Mayes*, 621 F.2d at 856.

In *Klein v. Harris*, 667 F.2d 274 (2nd Cir. 1981), a witness named Rabinowitz testified that he and Klein had gone to the victim's house together and that Rabinowitz held the victim while Klein stabbed her. After he left the stand, Rabinowitz admitted to defense counsel that he lied on the stand under pressure from the assistant district attorney. He also admitted that he, not Klein, had actually killed the victim. The defense recalled Rabinowitz to the stand, but Rabinowitz invoked the privilege against self-incrimination and refused to answer further questions. *Id.* at 279-80.

The Second Circuit held that Rabinowitz's original testimony resulted in a testimonial waiver of his fifth amendment privilege, and that Rabinowitz should have been ordered to testify under penalty of contempt. *Id.* at 288-89. The court concluded:

If the witness thereafter continues to refuse to testify, and if the refusal precludes the defendant from testing the truth of the witness' prior testimony, the trial judge must strike the prior testimony. . . . The failure of the trial judge to take such corrective action deprives the defendant of his sixth amendment right of confrontation.

Id. at 289 (citations omitted).

The Eighth Circuit reached a similar conclusion in *Carlos v. Wyrick*, 753 F.2d 691 (8th Cir. 1985). McGuire, a prosecution

witness, testified that Carlos had hired him to carry out a contract killing. McGuire also stated that he was accompanied by an unidentified companion. On cross-examination, defense counsel attempted to question McGuire about the identity of his companion. *Id.* at 692. McGuire did not invoke the privilege against self-incrimination, but repeatedly stated "I would rather not answer that." See *Carlos v. Wyrick*, 589 F. Supp. 974, 977-78 (W.D. Mo. 1984) (discussing the facts of the case in greater detail). The Eighth Circuit concluded that McGuire's refusal to answer questions bearing directly on the circumstances surrounding the murder deprived Carlos of his right of confrontation, and that McGuire's testimony concerning events at the time and place of the murder should have been stricken. *Carlos*, 753 F.2d at 693.

In *Thomas v. State*, 63 Md. App. 337 (1985), we endorsed and applied the *Cardillo* test. As in *Cardillo*, a witness offered by the State asserted his fifth amendment privilege on cross-examination. Judge Karwacki, writing for this Court, explained that the defendant's right to confrontation had not been violated because the questions that the witness refused to answer were directed to purely collateral matters, including the credibility of the witness. *Id.* at 345-46.

In the instant case, Eiland's testimony was anything but collateral - it went to the very heart of the State's case against Tyler. Had Eiland simply repeated his prior testimony on direct examination, but refused to answer questions during cross-

examination, the test we applied in *Thomas* would compel the conclusion that his direct testimony should be stricken. I see no principled reason why his self-serving, presumptively unreliable testimony from the earlier trial should be accorded more deference. Indeed, Eiland's personal stake in the outcome of the earlier trial suggests that his testimony from that trial should be treated with less.

Although *Cardillo*, *Klein*, *Carlos* and *Thomas* do not involve the precise situation presented here, they provide forceful support to the conclusion that Tyler's right to confrontation was violated by the admission of Eiland's prior testimony. In each of those cases, the critical witness gave testimony at trial, *in the presence of the jury* that was charged with the task of deciding the defendant's fate. Thus, the jury had an opportunity to observe the demeanor of the witness, and had some basis for evaluating the truth of the testimony given. In the present case, of course, the jury had nothing from which it could evaluate Eiland's credibility or test the truth of his prior testimony. It could neither observe Eiland's demeanor, nor was there any opportunity for counsel to probe questions of bias, motive, the ability to observe or recollect, or inconsistencies. Moreover, *Cardillo*, *Klein*, *Carlos* and *Thomas* all demonstrate that the willingness of the witness to answer questions on direct examination is not sufficient to satisfy the defendant's right to confrontation. Something more is required.

IV

I disagree with the majority's assertion that Tyler failed to preserve the issue for appellate review by failing to make some attempt at cross-examining Eiland *after* the introduction of his prior testimony. One must consider the events that transpired before the testimony was introduced. On March 3, the State and the trial judge made extensive efforts to question Eiland, to no avail. Eiland was held in contempt and spent the next eighteen days in jail. On March 21, the State and the judge again attempted to question Eiland, again to no avail. Defense counsel then questioned Eiland, and received two replies of "I can't answer." Immediately before the prior testimony was introduced, *the trial judge determined that Eiland was unavailable* and ruled that Eiland's trial testimony was admissible under the exception for Former Testimony. The trial judge did not rule that the prior testimony was admissible under *Nance*; indeed, such a ruling would have been inconsistent with his conclusion that Eiland was not available. Under those circumstances, I think it unreasonable to conclude that Tyler was required to ask questions of an "unavailable" witness. Tyler properly objected to the admission of the testimony. Nothing further was required.

I also disagree with the majority's assertion that Tyler somehow "procured" Eiland's refusal to testify. The majority offers three distinct theories by which the trial judge *might* have reached that conclusion:

- 1) Because Tyler and Eiland were "fast friends," Eiland "might have resorted to any reasonable measure, short of convicting himself, to keep from damaging testimonially his erstwhile friend."
- 2) The alleged intimidation of Eiland might have been orchestrated by Tyler, or by his "supporters," "friends," or "adherents."
- 3) Tyler "strenuously" requested a trial severance, and "strenuously" objected to the continuance and other efforts designed to compel Eiland's testimony.

At the outset, the State is in complete control of the prosecution's case under our adversarial system; to somehow attribute to the appellant the ability to orchestrate the intricate scheme proposed by the majority loses sight of the fact that it was the State that made the decision to call a witness that it never had reason to believe would be other than hostile - a decision which put into motion the sequence of events culminating in the improper admission of the transcript of Eiland's trial testimony. The majority's thesis appears to proceed on a curious theory of the State's entitlement to the co-defendant's testimony. Absent procurement of wrongdoing by appellant or some other act on his part to impede the search for the truth, no such entitlement exists.

With regard to the first two theories, the pertinent evidentiary rules provide that a litigant may not *procure* the unavailability of a witness, or otherwise prevent a witness from

testifying. See LYNN MCLAIN, 6 MARYLAND EVIDENCE 445; MD. RULE 5-804(A). Thus, Tyler is simply not responsible for the conduct of his "friends," "supporters," or "adherents" unless he somehow "procured" their conduct. Whether Tyler himself persuaded, induced, prevailed upon, coerced, or otherwise caused his friends, adherents or supporters to do anything at all is a question of *fact*, to be determined by the trial judge. Judge Ahalt made no such finding, and it is impermissible for this court to speculate on the mere possibility that such a finding might have been made.

The degree of speculation involved is readily apparent from the majority's opinion. At some points, the majority theorizes that Eiland and Tyler were in cahoots, and that the two men conspired in a clever gambit to win a joint acquittal. At other points, the majority suggests that Tyler, through his supporters, may have threatened Eiland's life. We may, of course, uphold the trial court's ruling on *legal* grounds other than those relied upon by the judge. We may not uphold the trial court's ruling on the basis of speculation, when the necessary factual findings were not made.

The majority's suggestion that Tyler's trial tactics somehow contributed to Eiland's unavailability is equally untenable. The majority refers to this theory as "at least a modest additional makeweight," apparently in acknowledgement that this hypothesis is added as a "filler" without any independent merit or worth. It is axiomatic that no criminal defendant should be penalized for merely

requesting relief, even when the request borders on being frivolous. In *Johnson v. State*, 274 Md. 536 (1975), the defendant pled not guilty to all charges. A jury thereafter convicted Johnson of burglary, and the judge sentenced Johnson to twelve years. During the sentencing hearing, the trial judge told Johnson that "if you had come in here with a plea of guilty . . . you probably would have gotten a modest sentence." *Id.* at 543. The Court of Appeals vacated the sentence, and explained its decision as follows:

[A] price may not be exacted nor a penalty imposed for *exercising the fundamental and constitutional right* or requiring the State to prove, at trial, the guilt of the petitioner as charged. This is as unallowable a circumstance as would be the imposition of a more severe penalty because a defendant asserted his right to counsel or insisted on a jury rather than a court trial.

Id. (Emphasis added).

A similar principle applies to the case at hand. Tyler had a right to *request* a trial severance, and a right to request that his trial be completed swiftly, without the delay of an eighteen day continuance. Such requests are routinely made in criminal cases. They are also routinely denied, even when the request is made with great vigor. At best, the majority effectively suggests that Tyler must somehow be blamed or punished simply for making those requests. At worst, the majority effectively suggests that Tyler's guilt may be inferred from his decision to put forward a vigorous defense. Tyler did not *grant* his own motion for severance. The

trial court granted the motion, and Tyler cannot be penalized for the court's decision.

With respect to the majority's "Alternative Rationale," it posits that, reduced to its singular significance, the prior testimony of Eiland is but an "identification of the shooter," sanctioned by *Nance, Bedford v. State*, 293 Md. 172 (1982) and other authorities which hold that an extrajudicial identification may be received as substantive evidence under certain conditions. Citing *Neil v. Biggers*, 409 U.S. 188 (1972), the majority correctly points out that "[i]n *Nance*, the identification in issue did not involve the classical weighing of reliability factors versus the risk of misidentification."

To be sure, we are not here so much concerned with the lighting at the time of the crime, the opportunity to observe and other factors which could result in misidentification. We are, in the case *sub judice*, concerned with something far more sinister than an eyewitness's innocent – but mistaken – identification of the criminal agent. We are here concerned with the whole cloth of a co-defendant's testimony calculated to achieve a singular purpose – his acquittal.

This is not such a case as that presented when there is an attempt by a witness to a crime, ostensibly in aid of an investigation, to make an identification of the perpetrator in furtherance of the apprehension and prosecution of a suspect and the witness subsequently recants. The theory in such cases is that

there is inherent trustworthiness in the initial identification prior to the intervention of some impediment, be it memory loss, intimidation, or other forces. At no point in time could Eiland's testimony be viewed as reliable. Could Eiland have been expected to testify any differently than he did regardless to whether he was in fact the shooter? Therein lies the inherent unreliability of his prior testimony and the reason why prior decisions allowing extra judicial identifications, where there is no other hearsay exception, require "the identifying victims or eyewitnesses [to be] present and subject to cross examination," *Johnson v. State*, 237 Md. 283 (1965). In fact, the common thread running through virtually all of the identification decisions is that the witness could be tested as to why he or she was unable to identify the defendant at trial. [For in-depth discussion, see *Smith and Samuels v. State*, 6 Md. App. 59 (1968)].

The salient distinction in the case *sub judice* is that there never was a reliable, trustworthy identification that Eiland recanted. At all times, the testimony in question was calculated, not to further a homicide investigation, but to facilitate the acquittal of an accomplice. To reiterate the obvious, *Nance* addresses the problem of a "Turncoat Witness." One cannot be a turncoat when he was never cast in the role of a witness for the prosecution in the first instance. I believe the majority, to use its words, has indeed "prob[ed] the outer limits of a principle's

logic," both as to the primary thesis and the Alternative Rationale.

V

Had both Eiland and Tyler been acquitted, given the evidence before the jury, it would have indeed been a miscarriage of justice. The overwhelming evidence was that only the two defendants were within the vehicle from which the shots were fired; hence, at least one of the two was necessarily guilty. Accordingly, the trial judge expressed his desire to discover a way "where substantial justice [could] be done for the community."¹⁰ In our appellate review of the lower court proceedings, we must not allow the facts of a given case to cause us to fashion a rule of law that will result in "substantial [in]justice" when applied to subsequent cases. In crafting the rules of constitutional criminal procedure, we must not permit our decision to be fact-driven and we must be cognizant that oftentimes it is the culpable [or more culpable] member of a criminal enterprise who, by his own devices or fortuitously, winds up pointing his finger at his co-defendant. Bearing that in mind, we must be vigilant that we maintain a system of criminal justice "in which the perception as well as the reality

¹⁰ This case was widely reported in the news media because of the notoriety of the circumstances surrounding the death of the victim's brother.

of fairness prevails" for all criminal defendants, regardless of the outcome in any one case. See *Lee*, 476 U.S. at 540.

The grave importance of our task is underscored by the facts of *Klein*, 667 F.2d 274. In that case, the defendant was convicted of second degree murder on the testimony of a witness who later admitted that he, and not the defendant, had actually killed the victim. *Id.* at 279-80. The majority's ruling may one day lead to a similar result. Assume, for a moment, that Tyler had pulled the trigger, and that Eiland was unaware of Tyler's intentions until the fatal shot was fired. Assume further that Tyler had been tried first, and that he had been acquitted after shifting all blame on Eiland. If Tyler refuses to testify at Eiland's trial, should the transcript of Tyler's earlier testimony be admitted against Eiland? The majority's decision effectively undermines a fundamental right designed to facilitate the search for truth. The net result is the creation of a mechanism whereby a wily killer might succeed in transferring blame onto the shoulders of an unwary subject.

There is a second and perhaps more common scenario by which a substantial injustice might be done. One culpable, but not the master mind during a criminal event, might be convicted of the more serious crime than any act that he or she actually committed. Hence, assume that an unplanned murder occurs during the course of a robbery. The triggerman, who acted with malice aforethought, is tried first, and shifts all blame for the killing to his accomplice. The accomplice - guilty only because of criminal

responsibility imputed by felony murder – might then be convicted of second or even first degree murder, on the strength of the real killer's prior testimony. Effective cross-examination is the only means by which the accomplice can parry such a thrust. *Compare Mayes*, 621 F.2d 850 (wherein two robbers each accused the other of killing the victims). The possibility that a defendant might be convicted of a crime that he or she did not commit must not be taken lightly.

For the reasons set forth above, I am not persuaded that Tyler had a full, fair, and meaningful opportunity for effective cross-examination, and, consequently, I conclude that the admission of Eiland's prior testimony violated Tyler's right to confrontation, under both the Sixth Amendment and Article 21 of the Maryland Declaration of Rights. Because the error was undoubtedly prejudicial, I would reverse Tyler's convictions and remand for a new trial. A jury could well find the evidence of the shots having been fired from a vehicle occupied by two men, only one of whom had a motive to kill Bias, sufficient to convict Tyler at a retrial.