the *Escobedo* decision.[62] *Miranda* controls those cases in which the trial[63] or retrial[64] began after June 13, 1966.[65]

## VI

## EVIDENCE

### *A. Constitutional Requirements*

#### *1. Prior Inconsistent Statements*

*People v. Johnson.*[1] The court held that the admission as substantive evidence in a criminal trial of prior inconsistent statements of a witness not made in the accused's presence violated the latter's sixth amendment right to confrontation.[2] In so doing, the court added its own significant contribution to the constitutionalization of the hearsay rule[3] begun in *Pointer v. Texas.*[4]

The defendant's wife and 15-year old daughter testified before a grand jury that the defendant had sexual intercourse with the daughter. Testifying at a subsequent trial for incest, the wife and daughter repudiated their grant jury statements, and explained them as resulting from anger, fear, and jealousy—as well as the district attorney's coaching.[5]

Over the defendant's objection, the trial court admitted the grand jury testimony, and also prior inconsistent statements of both witnesses to the police, to the district attorney's office, and to another witness.[6] Acting under the authority of section 1235 of the new Evidence Code,[7] the trial court instructed the jury to consider the

62. People v. Rivers, 66 Cal. 2d 1000, 429 P.2d 171, 59 Cal. Rptr. 851 (1967).

63. People v. Rollins, 65 Cal. 2d 681, 423 P.2d 221, 56 Cal. Rptr. 295 (1967).

64. People v. Doherty, 67 Cal. 2d 9, 429 P.2d 177, 59 Cal. Rptr. 857 (1967).

65. In People v. Feggans, 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967), the court established another rule of retroactivity. Defendants who were denied their right under Gilbert v. California, 388 U.S. 263 (1967), to the assistance of counsel at a police lineup can only raise that issue if the lineup, not their trial, occurred after June 12, 1967, the date of the United States Supreme Court's decision in Stovall v. Denno, 388 U.S. 292 (1967).

1. 68 A.C. 674, 441 P.2d 111, 68 Cal. Rptr. 599, *cert. denied sub nom.* California v. Johnson, 37 U.S.L.W. 3262 (Jan. 21, 1969).

2. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

3. *See generally* Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 U.C.L.A.L. REV. 366, 372 (1966).

4. 380 U.S. 400 (1965). *Pointer* applied the right to confrontation under the sixth amendment to the states.

5. 68 A.C. at 677-78, 441 P.2d at 113-14, 68 Cal. Rptr. at 601-02.

6. *Id.* at 678-79, 441 P.2d at 114, 68 Cal. Rptr. at 602.

7. CAL. EVID. CODE § 1235 (West 1966): "Evidence of a statement made by a witness is

grand jury testimony as substantive evidence against the accused, to be weighed along with the other evidence in determining guilt.[8] Defendant was found guilty.[9] The supreme court reversed, holding that the introduction against the defendant of the prior statements of his accusers, made out of his presence and without cross-examination, infringed his constitutional right to confrontation under the sixth amendment.[10]

Before the enactment of section 1235, prior inconsistent statements of witnesses were admissible only for the limited purpose of impeaching credibility.[11] Commentators have often criticized this limitation as applied to witnesses before the court and available for cross-examination.[12] They reason that the major objection to hearsay evidence—lack of opportunity for cross-examination—is not present since the witness could be cross-examined at the trial and thus the rule against hearsay need not be applied.[13] Adopting this reasoning, the Law Revision Commission drafted section 1235 which adopted the view that prior statements are admissible as substantive evidence but limits admission to prior *inconsistent* statements.[14] While some have suggested that characterizing evidence as "impeaching" or

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not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

8. 68 A.C. at 679, 441 P.2d at 115, 68 Cal. Rptr. at 603. The supreme court noted that the instruction, CALJIC No. 37 (rev.), was that used to instruct for the former testimony exception to the hearsay rule. *See* CAL. PEN. CODE § 686 (West 1957). No instruction was given in regard to the other inconsistent statements. The supreme court assumed that both types were intended by the court to be treated as substantive—not impeaching—evidence. 68 A.C. at 680 & n.4, 441 P.2d at 115 & n.4, 68 Cal. Rptr. at 603 & n.4.

9. People v. Johnson, 257 A.C.A. 655 (1967).

10. 68 A.C.at 688-89, 441 P.2d at 120-21, 68 Cal. Rptr. at 608-09.

11. *See, e.g.*, People v. Adams, 259 A.C.A. 119, 134-35 (1968); CALJIC No. 54-A; B. WITKIN, CALIFORNIA EVIDENCE §§ 537-38 (1966); McDonough, *The California Evidence Code: A Precis*, 18 HASTINGS L.J. 89, 111-12 (1966); Miller, *Beyond the Law of Evidence*, 40 S. CAL. L. REV. 1, 20 & n.166 (1967).

12. *See* authority cited 68 A.C. at 683, 441 P.2d at 117, 68 Cal. Rptr. at 605.

13. A number of distinguished jurists have also accepted this rationale. *See* United States v. De Sisto, 329 F.2d 929, 933-34 (2d Cir. 1964) (Friendly, J.); United States v. Allied Stevedoring Corp., 241 F.2d 925, 933 (2d Cir. 1957) (L. Hand, J.); People v. Gould, 54 Cal. 2d 621, 626, 7 Cal. Rptr. 273, 275, 354 P.2d 865, 867 (1960) (Traynor, J.), citing many of the same authorities repudiated in *Johnson*, saying: "[T]he principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination."

14. CAL. EVID. CODE § 1235 (West 1966) (comment of Law Revision Comm'n). *See* Miller, *Beyond the Law of Evidence*, 40 S. CAL. L. REV. 1, 19-20 (1967). Prior consistent statements are admissible as substantive evidence under CAL. EVID. CODE § 1236 (West 1966) but they too enter under circumstances that involve the credibility of the witness. *See* CAL. EVID. CODE § 791 (West 1966). Because of their admission against the accused rather than simply for impeachment of the witness, it seems clear that section 1236 suffers from the same constitutional defect as section 1235.

"substantive" will not substantially alter its effect on the jury,[15] the distinction is important where characterization of the evidence as impeaching may prevent the case from going to the jury for lack of sufficient substantive evidence.[16] Indeed, such would have been the case in *Johnson*.[17]

While the court's argument is replete with citations, it is essentially an opinion in search of authority. Lest its real support be overlooked, it is important to note that imprecision in the use of authority purporting to justify the result actually weakens the firm foundation upon which it rests.

This is true at each of the court's three levels of citations. First, while the United States Supreme Court has stressed the importance of defendant's right to confrontation, any suggestion that it has squarely decided[18] the present issue is misleading. Each of the cases cited in *Johnson* for the proposition that prior statements of a witness are inadmissible as substantive evidence can be distinguished from the present case on one of two grounds: Either the prior statements were unsworn,[19] or the witness was not present at trial for cross-examination.[20]

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15. *See, e.g.*, United States v. De Sisto, 329 F.2d 929 (2d Cir. 1964) (Friendly, J.).

16. *See* Ellis v. United States, 138 F.2d 612 (8th Cir. 1943); McDonough, *The California Evidence Code: A Précis*, 18 HASTINGS L.J. 89, 112 (1966); 78 HARV. L. REV. 887, 888 (1965).

17. *See* 68 A.C. at 689, 441 P.2d at 121, 65 Cal. Rptr. at 609.

18. Justice Mosk's opinion for the court states that the United States Supreme Court in Bridges v. Wixon, 326 U.S. 135, 153-54 (1945), "squarely stated that extrajudicial statements of a witness, while admissible for impeachment purposes, 'certainly would not be admissible in any criminal case as substantive evidence.' " 68 A.C. at 687, 441 P.2d at 419, 68 Cal. Rptr. at 607.

19. *See* Bridges v. Wixon, 326 U.S. 135, 155-56 (1945). The context of the Court's language was the requirement of federal due process, *see* 78 HARV. L. REV. 887, 889 (1965), not the sixth amendment's confrontation clause. The fact that the statements in *Bridges* were unsworn was the ground for distinguishing grand jury testimony in United States v. De Sisto 329 F.2d 929, 933-34 (2d Cir 1964), and apparently represents the limit of that case. *See* Taylor v. Baltimore & O.R.R., 344 F.2d 281 (2d Cir.. 1965); 1 GA. L. REV. 137, 141 n.13 (1966).

20. *See* Douglas v. Alabama, 380 U.S. 415, 416 (1965) (unavailable at trial because he invoked fifth amendment); Pointer v. Texas, 380 U.S. 400, 401 (1965) (transcript in lieu of witness); Willner v. Committee of Character, 373 U.S. 96 (1963) (in lieu of witness); Greene v. McElroy, 360 U.S. 474 (1959) (ex parte statements from unidentified informants in lieu of witnesses).

Nor do the more recent United States Supreme Court cases cited by the court, 68 A.C. at 688, 441 P.2d at 120, 68 Cal. Rptr. at 608, compel the conclusion in *Johnson*. They deal with situations where the witness was not before the court for cross-examination. *See* Barber v. Page, 390 U.S. 719 (1968); Bruton v. United States, 391 U.S. 123, especially at 128 n.3 (1968). Indeed, Justice Marshall's derogation of cross-examination in preliminary hearings and his emphasis on confrontation as a trial court right in Barber v. Page, 390 U.S. 719, 725 (1968), would seem to give the practice of allowing into evidence prior inconsistent statements when the witness is available at trial greater constitutional stature than allowing the admission of fully cross-examined former testimony from preliminary hearings when the witness is not available at trial. *See also* Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 744 (1965); Comment, *supra* note 3, at 372.

Second, the citation[21] to the practice of the majority of United States circuit courts of appeals barring admission of prior inconsistent statements where the defendant did not have an opportunity to cross-examine at the time such statements were made, is irrelevant to the constitutional question. The circuit courts of appeals decisions reflecting this position were not decided on constitutional grounds.[22] As the California court itself admitted, such cases imply a judgment as to the better practice—not a constitutional preclusion of a different legislative choice.[23]

Finally, the California cases and statutes cited did not deal with the *Johnson* situation, but rather with applicability of the "former testimony" exception to the hearsay rule.[24] The question there is whether testimony previously subjected to cross-examination can be entered into evidence in lieu of the witness testifying at the trial.[25]

To derogate the relevance or significance of the court's citations is not to reject its ultimate conclusion. Rather, it is to focus on a more basic and compelling rationale. A meaningful right to confrontation requires that a person cannot be convicted by ex parte

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21. 68 A.C. at 685, 441 P.2d at 118-19, 68 Cal. Rptr. at 606-07.

22. *See* cases cited *id*, especially Byrd v. United States, 342 F.2d 939, 940 n.2 (D.C. Cir. 1965): "This result was, of course, required under 14 D.C. Code § 102 (Supp. III, 1964)." This rule, relating to use of prior inconsistent statements, is consistent with FED. R. CIV. P. 26, for it merely codifies the established rule. Revision Notes, 14 D.C. Code § 102 (1967).

None of the cases above cited contained any discussion of the right to confrontation or any other constitutional ground. Valentine v. United States, 272 F.2d 777 (5th Cir. 1959), most closely approached an implied constitutional argument—federal due process—when it cited Bridges v. Wixon, 326 U.S. 135 (1945), to support its decision that unsworn prior testimony was inadmissible. *But see* Goings v. United States, 377 F.2d 753, 762 n.12 (8th Cir. 1967), cited by the *Johnson* court.

23. 68 A.C. at 686, 441 P.2d at 119, 68 Cal. Rptr. at 607. These cases imply simply a judgment that the established common law rules of hearsay ought to govern the federal courts. *See* FED. R. CRIM. P. 26: "The admissibility of evidence . . . shall be governed . . . by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience;" Comment, *supra* note 3, at 375 & n.47, 378.

On the other hand, the affirmative view that prior statements of witnesses should be admitted against an accused necessarily implies that such admission is constitutional.

24. Former CAL. PEN. CODE § 686(3) (West 1957); CAL. EVID. CODE § 1292 (West 1966). The reasoning that because Evidence Code section 1292 is limited to civil actions, so also should be section 1235, is, to say the least, farfetched. In section 1292, the accused is not a party at the prior proceeding and the witness never appears at his trial. Rather, the prior testimony is used in lieu of the witness without the accused ever personally confronting him. Clearly, the right to confront and cross-examine in a criminal case is a personal right. Kirby v. United States, 174 U.S. 47, 55 (1899). Therefore, section 1292 cannot substitute another's cross-examination at a prior proceeding for the right of the accused ever to cross-examine. Section 1235 preserves the right personally to cross-examine at the trial.

25. *See* People v. Hillery, 62 Cal. 2d 692, 401 P.2d 382, 44 Cal. Rptr. 30 (1965); People v. Dozier, 236 Cal. App. 2d 94, 45 Cal. Rptr. 770 (1965); People v. Redston, 139 Cal. App. 2d 485, 293 P.2d 880 (1956).

statements of his accusers. To avoid making the right a hollow formality, it is essential that all prior statements be subject to cross-examination at the time they are made.[26] In addition, as one court has noted, "most ex parte statements reflect the subjective interest and attitude of the examiner as well."[27] Taken together, these considerations indicate that admitting ex parte statements obtained without confrontation would undermine the constitutional adequacy of confrontation at trial. The consequence of this holding is that evidence against the accused will have to come from the witness stand[28] or, if prosecutors wish to use prior out of court statements as substantive evidence, defendants will have to have access to grand jury and interrogation rooms.[29]

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People v. Hillery, 62 Cal. 2d 692, 401 P.2d 382, 44 Cal. Rptr. 30 (1965), is strange support. It appears to turn not on the fact that there was no cross-examination by the defendant in the grand jury hearing but simply upon the fact that grand jury testimony was not within the ambit of the "exclusive" statute, former Penal Code § 686. *Id* at 708, 401 P. 2d at 392, 44 Cal. Rptr. at 40. Indeed, it is strange to use this case to support defendant's right to confrontation and cross-examination when in *Hillery* it was the defendant's witness' statement to the grand jury that was excluded. Certainly, the District Attorney had an opportunity closely to question the witness at the grand jury hearing. Regardless, the state cannot assert a constitutional right of confrontation.

26. *See* State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939); 78 HARV. L. REV. 887, 890 (1965).

The argument is that the power of cross-examination lies in striking while the iron is hot. However, this is not, as Justice Mosk suggests, because the statements will become resistent to change for, if we are talking of admitting prior *inconsistent* statements, the witness' statements have changed. Justice Mosk's argument is only applicable to prior consistent statements.

What is meant is the simple process of limiting and refining the statement through cross-examination so that it can be properly evaluated for its worth and limits. If the cross-examination is left until trial, the untested statement comes in as inconsistent with a witness' present testimony. What might have been a simple matter of elaboration or limitation—"Well, by sexual acts I only meant play not intercourse"—becomes an inconsistency over time, of independent value and impact that can convict the accused. This is the thrust of Justice Mosk's discussion of cross-examination immediately following direct examination. *See* 68 A.C. at 683-84, 441 P.2d at 117-18, 68 Cal. Rptr. at 605-06.

27. Goings v. United States, 377 F.2d 753, 762 n.13 (8th Cir. 1967). There the court cites the infamous INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962) which probably, more than any other single item, can claim much of the credit for justifying the decision in Miranda v. Arizona, 384 U.S. 436 (1966). *See id.* at 449-55.

With specific regard to *Johnson* itself, it should be noted that the wife and daughter both claimed that their prior testimony was the result of the district attorney's persuasian. See text accompanying note 6 *supra*.

28. *Cf.* Turner v. Louisiana, 379 U.S. 466, 472-73 (1965).

29. The court did not address itself to the question of the use of prior statements simply for impeachment of the witness. See also the specific reservation of such questions in Bruton v. United States, 391 U.S. 123, 128 n.3 (1968). However, "inconsistent" under section 1235 has been interpreted to include the situation where the witness refuses to talk or says he doesn't remember his prior statements. People v. Hopper, 259 A.C.A. Supp. 794, 796-97 & n.1 (1968). *But see* criticism, *id.* at 798 & n.3. If, in such a situation, statements damaging to the accused are admitted under the guise of impeaching the witness' silence, it would seem that this would

*2. Prior Convictions*

*People v. Coffey.*[1] The court held that the use of a constitutionally invalid prior conviction to impeach the credibility of an accused[2] as a witness constituted a denial of due process. It went on to set forth procedural guidelines for the trial courts' use in cases where the constitutional validity of a prior conviction is challenged.

Coffey was charged with several counts of felony assault on a police officer, and also with having suffered a prior felony conviction in Oklahoma.[3] Before trial, he moved to strike the prior conviction on the ground that he had been denied his constitutional right to the assistance of counsel during the proceedings which led to that conviction. This motion was denied by the trial court without a hearing on the constitutionality of the prior conviction. At trial, the prior was introduced for the purpose of impeaching Coffey's testimony, and he was subsequently convicted.

The supreme court ruled unanimously[4] that when a conviction is

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deny the defendant's right to confrontation. *See* the discussion of Delli Paoli v. United States, 352 U.S. 232 (1957), in Bruton v. United States, 391 U.S. 123 (1968); *cf.* Douglas v. Alabama, 380 U.S. 415, 419-20 (1965). *See also* C. MCCORMICK, EVIDENCE § 39, at 77 (1954), where the author pursuasively argues that the instruction to the jury to consider the evidence for impeachment only is a mere "verbal ritual."

1. 67 Cal. 2d 204, 430 P.2d 15, 60 Cal. Rptr. 457 (1967).

2. CAL. EVID. CODE § 788 (West 1966) expressly permits the introduction of prior felony convictions to impeach the testimony of a defendant. Because of the overwhelming prejudicial effect of allowing such information to reach the jury, many defendants refuse to testify at their trial. *See* MODEL CODE OF EVIDENCE rule 106(3), Comment (1942).

Abolition or modification of this type of impeachment has been urged by courts, commentators, and uniform legislation drafters. *See* People v. Granillo, 140 Cal. App. 707, 718, 36 P.2d 206, 211 (1934); B. WITKIN, CALIFORNIA EVIDENCE § 1243 (2d ed. 1966); Holbrook, *Witnesses*, 2 U.C.L.A. L. REV. 32 (1954); Comment, *Use of Bad Character and Prior Convictions to Impeach a Defendant-Witness*, 34 FORDHAM L. REV. 107 (1965); Comment, *Use of Prior Conviction and Reputation to Show Defendant's Bad Character*, 1 IDAHO L. REV. 90 (1964); 6 CALIFORNIA LAW REVISION COMM'N 141 (1964); UNIFORM RULE OF EVIDENCE 21 (1953). The California courts, however, are bound by the statute, and the legislature has recently rejected the progressive modifications proposed for the revised Evidence Code.

It should be noted that since Griffin v. California, 380 U.S. 609 (1965), the court and prosecutor can no longer make comments on a defendant's failure to testify as previously permitted by CAL. CONST. art. 1, § 13. Thus a defendant with a prior felony conviction does not face the harsh choice between having his prior record introduced if he testifies or having the prosecutor comment on his failure to testify if he keeps silent in order to keep out his earlier conviction.

3. Coffey had unsuccessfully attempted to vacate his prior Oklahoma conviction and sentence on the ground he was denied his right to counsel. Coffey v. State, 94 Okla. Crim. 327, 235 P.2d 546 (1951). The facts set forth in that opinion indicate a strong case for Coffey concerning the denial of his right to counsel.

4. Chief Justice Traynor dissented with Justice Peters on other aspects of the opinion. Although the court remanded the case for a determination of the constitutionality of Coffey's

found to be constitutionally invalid it may not be introduced to impeach a defendant's testimony. Holding that the trial court should have heard Coffey's motion to strike, it reversed the judgment and remanded the case for a determination of the constitutional validity of the prior conviction.

Noting that *Gideon v. Wainwright*,[5] establishing the defendant's right to counsel at trial, applies retroactively, and apparently recognizing that the introduction of a felony conviction to impeach a defendant's testimony can endanger[6] his right to a fair trial, the court ruled that the prior conviction should be reexamined in light of the *Gideon* decision. The court reached this conclusion through reliance upon the principle developed in "habitual criminal" proceedings,[7] that whenever more severe sanctions are made possible by the presence of prior convictions "it is imperative that the constitutional basis of such convictions be examined . . . ."[8]

The court stated that a defendant's motion to strike the prior conviction before trial is a proper method of challenging its constitutionality. However, it reaffirmed its holding in *People v. Merriam*[9] that to make a *Gideon* challenge one must clearly allege

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prior conviction, it did discuss the effect of the admission of an unconstitutional prior conviction upon the jury's decision in the instant case. It employed the "harmless error" test set forth in Chapman v. California, 386 U.S. 18, 23 (1967). Because the court felt the evidence was clearer on some counts than others, it concluded that even if the prior conviction were unconstitutional its admission would be "harmless error" for two counts. 67 Cal. 2d at 224, 430 P.2d at 28, 60 Cal. Rptr. at 470. Chief Justice Traynor, joined by Justice Peters dissented on this point. *Id.* at 225, 430 P.2d at 29, 60 Cal. Rptr. at 471.

5. 372 U.S. 335 (1963).

6. *See* MODEL CODE OF EVIDENCE rule 106(3), Comment (1942).

7. After a person has suffered a certain number of specified convictions he will be adjudged an habitual criminal under CAL. PEN. CODE § 644 (West 1955) and may be sentenced to life imprisonment.

8. 67 Cal. 2d at 215, 430 P.2d at 22, 60 Cal. Rptr. at 464. The court noted its decisions in *In re* Woods, 64 Cal. 2d 3, 409 P.2d 913, 48 Cal. Rptr. 689 (1966); *In re* Luce, 64 Cal. 2d 11, 409 P.2d 918, 48 Cal. Rptr. 694 (1966); and *In re* Tucker, 64 Cal. 2d 15, 409 P.2d 921, 48 Cal. Rptr. 697 (1966), which ordered trial courts to examine the constitutional validity of prior convictions in habitual criminal proceedings.

The court also restated the position it took in *In re* Woods, 64 Cal. 2d 3, 5, 409 P.2d 913, 915, 48 Cal. Rptr. 689, 691 (1966), that the fact a prior conviction occurred in a foreign jurisdiction does not preclude its being examined in a California trial. As in the earlier opinion, it recognized the great difficulty prosecutors would have in rebutting the defendant's evidence of the constitutional invalidity of foreign convictions, but found that difficulty a necessary burden if such convictions are to be used to determine penal sanctions. 67 Cal. 2d at 215, 430 P.2d at 22, 60 Cal. Rptr. at 464.

*Coffey* expressly modifies CAL. HEALTH AND SAFETY CODE § 11718 (West 1964), which states that in narcotic violation proceedings the striking of prior convictions can only occur upon motion of the prosecutor. 67 Cal. 2d at 215 n.11, 430 P.2d at 22 n.11, 60 Cal. Rptr. at 464 n.11.

9. 66 Cal. 2d 390, 397, 426 P.2d 161, 166, 58 Cal. Rptr. 1, 6 (1967).

that he was not represented by counsel and did not waive his right to be represented. The court followed[10] the United States Supreme Court's ruling in *Carnley v. Cochran*,[11] that once the challenge is raised, waiver may not be presumed from a silent record in the earlier case, since "courts indulge every reasonable presumption against waiver of fundamental constitutional rights."[12] The court found that under these standards Coffey had properly raised the issue.

To assist counsel and trial courts in the future, the court set forth procedural guidelines for dealing with constitutional challenges to prior convictions.[13] When a defendant moves to strike the prior or by denying its constitutional validity, the court is to hold a hearing outside the presence of the jury to determine its validity. At the hearing, the prosecutor has the burden of proving that such a conviction was in fact suffered. Once the conviction is shown, the defendant must produce evidence that the conviction was unconstitutional. The prosecutor then has the right to produce evidence in rebuttal.

The court is to make findings on the basis of the evidence produced as to the constitutionality of the prior conviction and is to strike it if necessary.

*Coffey* involved a situation in which the prior conviction was charged in the information. However, where no prior is charged, but the defense counsel knows that the defendant has suffered a prior conviction subject to a *Coffey* objection and intends to have him testify, he should take steps to preclude impeachment. One method of accomplishing this would be to seek a hearing on the admission of the prior in the judge's chambers after the prosecution rests and it is decided to have the defendant testify.[14]

Although the court made the unqualified statement[15] that the constitutional basis of the prior conviction must be examined before it can be used for impeachment purposes, it may be presumed[16] that the defendant's attack would be limited to alleging a violation of only those rules which have been given retroactive effect, such as that set forth in *Gideon*.[17] Under such a limitation, a defendant could not

10. 67 Cal. 2d at 217 n.14, 430 P.2d at 23 n.14, 60 Cal. Rptr. at 465 n.14.

11. 369 U.S. 506, 516 (1962).

12. *In re* Johnson, 62 Cal. 2d 325, 334, 398 P.2d 420, 426, 42 Cal. Rptr. 228, 234 (1965).

13. 67 Cal. 2d at 217-18, 430 P.2d at 24, 60 Cal. Rptr. at 466.

14. *See* E. HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 1.2 (1967).

15. See text accompanying note 8 *supra*.

16. The fact that the court felt obliged to note *Gideon*'s retroactive application supports this presumption. 67 Cal. 2d at 214, 430 P.2d at 22, 60 Cal. Rptr. at 464.

17. The rule of Jackson v. Denno, 378 U.S. 368 (1964), which involved the right of an accused to exclude an involuntary confession from his trial is also applied retroactively. *See* Linkletter v. Walker, 381 U.S. 618, 628 n.13 (1965).

invoke *Miranda v. Arizona*[18] to question the validity of his pre-*Miranda* conviction, because *Miranda* is not retroactively applied.[19]

It is arguable, however, that for the limited purpose of determining the validity of a prior in a *Coffey* situation, all constitutional decisions should be retroactively applied. It was the fear of numerous prisoners being released and retried on writs of habeas corpus which caused the United States Supreme Court to refuse to apply *Miranda* and *Escobedo v. Illinois*[20] retroactively in *Johnson v. New Jersey*.[21] However, to prohibit the prosecution from introducing a prior conviction which did not meet the *Miranda* standards for purposes of impeaching the defendant's testimony would not disrupt the administration of justice on the grand scale feared in *Johnson*. The burden would not be numerous releases and untriable new cases, but rather the mere exclusion of priors which the prosecution cannot show to have been constitutionally valid.

Accepting the more restrictive interpretation, however, *Coffey* leaves at least two important questions unanswered. First, will the court's holding be given retroactive effect so that a prisoner whose trial involved the use of constitutionally invalid priors can now successfully petition for a writ of habeas corpus on that ground? In *In re Woods*,[22] the petitioner challenged the finding that he was an habitual criminal. He argued that he had been unconstitutionally denied counsel at his earlier criminal trial. The state responded that he had waived his right to so object on habeas corpus, since he had admitted the priors at trial. However, the supreme court ruled that since *Gideon* was decided after the trial, "Neither petitioner nor his then counsel can be held accountable for failing to raise objections which could only be sustained by reference to cases yet to be determined."[23] By analogy to *Woods*, it appears that *Coffey* will be given retroactive effect. If both the prior conviction and the trial in which it was introduced for impeachment purposes occurred before *Gideon*, or another similar retroactive decision, then the later constitutional rule would invalidate both the prior and the trial in which it was used. Thus, a writ would be successful unless the state could show the impeachment to be harmless error.[24]

A second question is whether parties in civil actions will be able

18. 384 U.S. 436 (1966).
19. Johnson v. New Jersey, 384 U.S. 719 (1966).
20. 378 U.S. 478 (1964).
21. 384 U.S. 719 (1966).
22. 64 Cal. 2d 3, 409 P.2d 913, 48 Cal. Rptr. 689 (1966).
23. *Id.* at 7-8, 409 P.2d at 916, 48 Cal. Rptr. at 692.
24. See note 4 *supra*.

to object to the introduction of prior felony convictions to impeach their testimony or that of other witnesses on the ground that such convictions were unconstitutionally obtained. During discovery, trial lawyers often inquire into the criminal records of parties and witnesses, in the hope of finding a felony conviction which they can use for impeachment should that person testify at trial.[25] Appellate courts closely scrutinize the use of this device not only in criminal cases, but also in civil matters.[26] The *Coffey* court's unqualified statement[27] that, "[T]he use of a constitutionally invalid prior conviction to impeach testimonial credibility is improper, and that to allow such impeachment is error under California law" may be taken as raising the possibility that such an objection would be permitted in a civil action.[28]

### *B. Impeachment of One's Own Witness*

*People v. Stanley*.[1] This case illustrates a major change in the law of evidence accomplished by the adoption of the new evidence code. It demonstrates the application and significance of Evidence Code section 785 which permits a party to impeach his own witness.[2]

The defendant was charged with committing sodomy with two young boys—Steven, age 10, and Thomas, age 14. Steven was the sole witness for the prosecution. He testified in detail, often contradictorily, of the sexual offenses charged. He also told, over the defendant's objection, of other sexual misconduct of the accused with himself and others.

At the end of the prosecution's case-in-chief, the defendant moved to dismiss the charges involving Thomas since the prosecution had not called him as a witness. The court denied the motion and informed the defendant that he might call Thomas as his own witness, in which case he would be bound by Thomas' testimony.[3] The court also excluded as hearsay the defendant's proffered evidence of a taped

25. *See* background investigation questions eight and nine in 2 BENDER'S FORMS OF INTERROGATORIES 140-41 (1963) which are routine in any interrogatory or deposition.

26. *See* Pacific Ind. Co. v. Hargreaves, 36 Cal. App. 2d 338, 345, 98 P.2d 217, 221 (1939); Long v. Barbieri, 120 Cal. App. 207, 218, 7 P.2d 1082, 1087 (1932).

27. 67 Cal. 2d at 218, 430 P.2d at 25, 60 Cal. Rptr. at 467.

28. *Cf.* Macfarlane v. Department of Alcoholic Beverage Control, 51 Cal. 2d 84, 89, 330 P.2d 769, 772 (1958).

1. 67 Cal. 2d 812, 433 P.2d 913, 63 Cal. Rptr. 825 (1967).

2. CAL. EVID. CODE § 785 (West 1966).

3. 67 Cal. 2d at 815, 433 P.2d at 914-15, 63 Cal. Rptr. at 826-27. This ruling was consistent with the then effective CAL. CIV. PRO. CODE § 2049 (West 1957). For a history and explanation of the rule and its limits see 3 J. WIGMORE, EVIDENCE §§ 896-918 (1940).

conversation between Thomas and a private investigator in which Thomas stated that he and Steven had agreed to "get" the defendant. The trial court thus prevented the defendant from indirectly impeaching Steven by calling Thomas and confronting him with his prior inconsistent statements.

The supreme court reversed, holding that the trial court erred in admitting evidence of sexual offenses other than those charged.[4] Since Steven's testimony was uncorroborated, further testimony by him of other offenses not charged could only have had a bootstrapping effect of corroborating his own testimony. It would simply be cumulative of uncorroborated testimony and add nothing to the credibility or probative value of the initial testimony while seriously prejudicing the accused.

More significant than the court's holding is its discussion, contained in a footnote,[5] of the procedure to be followed on retrial under the new evidence code. While the new code would still not require the prosecution to call Thomas,[6] it abolishes the rule that a party calling a witness is bound by his testimony. Under section 785, "The credibility of a witness may be attacked or supported by any party, including the party calling him."[7] Thus, on retrial, the defendant may call Thomas to the stand and, if he denies the plot to "get" the defendant, impeach his testimony with his prior inconsistent statements to the private investigator.[8]

The court did not consider the purpose for which the private investigator's testimony could be admitted. If such testimony is admitted merely for impeachment, it is technically only relevant to Thomas' testimony. However, if it is substantive evidence, it is admissible for all purposes, including impairment of the credibility of Steven's testimony.[9] Under section 1235 of the new code, a prior inconsistent statement of a witness is admissable as substantive

4. 67 Cal. 2d 816, 433 P.2d at 915, 63 Cal. Rptr. at 827.

5. *Id.* at 816 n.1, 433 P.2d at 915 n.1, 63 Cal. Rptr. at 827 n.1.

6. *See* People v. Odom, 261 A.C.A. 889, 895, 68 Cal. Rptr. 255, 258 (1968).

7. CAL. EVID. CODE § 785 (West 1966).

8. The private investigator could be called to the stand to recite the prior inconsistent statements of Thomas. Whether the tape recording of the conversation could be introduced under California's new Invasion of Privacy Law, CAL. PEN. CODE §§ 630-37.2 (West Supp. 1967), depends on facts not developed in the record. *See* Degnan, *Evidence*, 1967 CAL. LAW: TRENDS AND DEVELOPMENTS 259, 262 n.12 (1968), where the author discusses the inability of *People v. Stanley* to fit within the exceptions of CAL. PEN. CODE § 633.5 (West Supp. 1967).

9. In fairness, it must be noted that since the substance of the conversation between the private investigator and Thomas was not disclosed, the court could not determine whether the investigator's testimony would be relevant to the fact in issue or whether it would merely reflect on the credibility of the witness. However, it could have provided guidelines for retrial to meet either eventuality.

evidence.[10] Reading the two sections together, Thomas' prior inconsistent statement would be substantive evidence.

There are limits, however, to the union of sections 785 and 1235. In *People v. Johnson*,[11] the supreme court held that the introduction against the accused of prior inconsistent statements of a witness violated the accused's right to confrontation where he did not have an opportunity to cross-examine the witness at the time the statements were made. In *Stanley*, the statements would be introduced at trial for the accused—not against him—so no such confrontation problems are present. However, the *Johnson* decision indicates that problems can result from reading section 1235 and 785 together. While it may be used in the defendant's favor, the prosecution may run into confrontation problems if he attempts to impeach his own witness with prior inconsistent statements.[12]

### *C. Presumption of Paternity*

*Jackson* v. *Jackson*.[1] The supreme court held that the conclusive presumption of legitimacy contained in Evidence Code section 621 did not apply where the husband could demonstrate by blood tests that he did not father the child and also show that no one else had access to his wife during the specific period of their cohabitation.

Within four days of the marriage, Jackson's wife left him. She later claimed support for a child which was born approximately nine months after their brief cohabitation. The trial judge refused to admit into evidence the results of blood tests[2] which, according to the offer of proof, demonstrated that the plaintiff husband was not the child's father. This ruling was based upon section 621 of the Evidence Code, which states that, "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate."[3]

In a four-to-three decision, the court held that this conclusive presumption does not apply where conception could not have occurred during the specific days of cohabitation.[4] The plaintiff therefore is

10. CAL. EVID. CODE § 1235 (West 1966).

11. 68 A.C. 674, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).

12. *See* the supreme court Note on *People v. Johnson* at p. 1727 *supra*.

1. 67 Cal. 2d 245, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

2. Blood tests cannot establish paternity, but they can, in some instances, conclusivcly establish nonpaternity. Blood tests are internationally recognized as valid for this purpose. *See* SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 244-45 (4th ed. 1967).

3. CAL. EVID. CODE § 621 (West 1965).

4. 67 Cal. 2d at 248-49, 430 P.2d at 291, 60 Cal. Rptr. at 651.

entitled to introduce blood test results to show that he could not have fathered the child, but such evidence is not conclusive as to his liability unless he can also prove that no one else had access to his wife during their period of cohabitation.[5] This follows from the fact that under section 621 the legal father need not be the biological father, so long as the child was conceived during the period of cohabitation.

By the express terms of section 621, the conclusive presumption of legitimacy does not arise when there is no cohabitation[6] or when the husband is impotent.[7] In addition, the courts have held that the conclusive presumption does not apply in certain other situations which are not expressly mentioned in the statute: for example, if the husband is sterile[8] or if the husband and wife were not cohabiting during the period in which conception could possibly have occurred.[9] Earlier opinions of the supreme court contain dicta to the effect that where the "laws of nature" make it impossible for the husband to

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5. *Id.*

6. Cohabitation is defined as living together ostensibly as husband and wife. Kusior v. Silver, 54 Cal. 2d 603, 616, 354 P.2d 657, 666, 7 Cal. Rptr. 129, 138 (1960), *noted in* 48 CALIF. L. REV. 852 (1960). The case was a reaffirmation of Estate of Mills, 137 Cal. 298, 70, P. 91 (1902). If there was no cohabitation but only access during the possible time of conception, the presumption becomes rebuttable and evidence can be introduced to disprove paternity. 54 Cal. 2d at 620, 354 P.2d at 668, 7 Cal. Rptr. at 138.

7. Impotent means incapable of performing the act of sexual intercourse, as distinguished from "sterile," which affects only the capability of producing the male sperm and has no bearing on the physical ability to perform sexual intercourse. Carmichael v. Carmichael, 106 Ore. 198, 206, 211 P. 916, 918 (1923).

8. Hughes v. Hughes, 125 Cal. App. 2d 781, 271 P.2d 172 (1954); *cf.* Krog v. Krog, 32 Cal. 2d 812 817-18, 198 P.2d 510, 513 (1948).

The courts have also indicated that the presumption will not apply when the husband and wife are of one race and the child is a hybrid. Estate of Lee, 200 Cal. 310, 253 P. 145 (1927) (dictum); Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919) (dictum); Estate of Walker, 180 Cal. 478, 181 P. 792 (1919) (dictum). However, a recent court of appeal case has refused to follow these dictum. The court held that the conclusive presumption did apply where a Negro child was born to a Caucasian mother who was cohabiting with her Caucasian husband. The plaintiff mother admitted having sexual relations with the Negro defendant while she was cohabiting with her husband. The court, relying on Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960), held that the legislature's specific refusal to enact the UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY § 5, note 15 *infra*, evidenced a legislative intent to treat the cohabiting husband as the legal father irrespective of his biological paternity. Hess v. Whitsitt, 257 Cal. App. 2d 618, 65 Cal. Rptr. 45 (1968).

9. For cases where cohabitation was considered to have occurred before the possible period of conception see Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919) (304 days); Whitney v. Whitney, 169 Cal. App. 2d 209, 337 P.2d 219 (1959) (297 days). In these cases sexual intercourse was presumed to have taken place on the last day of cohabitation.

For cases where cohabitation was considered to be after the possible period of conception see Smith v. Heilman, 171 Cal. App. 2d 424, 340 P.2d 752 (1959) (198 days); Murr v. Murr, 87 Cal. App. 2d 511, 197 P.2d 369 (1948) (190 days). In these cases sexual intercourse was presumed to have taken place on the first day of cohabitation.

have been the father,[10] the reason for applying the conclusive presumption vanishes.[11] Before blood tests became a method of disproving paternity, the courts had held that evidence could always be introduced to show that it was impossible for the husband to have fathered the child.[12] Under this rationale, scientifically reliable blood tests which disprove paternity should also render the conclusive presumption inapplicable. However, the legislative handling of the Uniform Act on Blood Tests has prompted a different type of judicial analysis when the admissibility of blood tests is at issue.

In 1953 California enacted a modified version of the Uniform Act on Blood Tests to Determine Paternity.[13] The legislature adopted the section of the Uniform Act which allows blood tests to be admitted where the experts agree that the alleged father is not the father.[14] However, the legislature completely eliminated section 5 of the Uniform Act, which would have allowed the cohabiting husband to use blood tests to overcome the presumption of section 621.[15]

In *Kusior v. Silver*,[16] the supreme court interpreted this omission by the legislature as evidence of an intention to preserve the rule of *Hill v. Johnson*,[17] which precluded the admission of blood tests disproving paternity as contrary to the statutory presumption of legitimacy.[18]

The legislature's refusal to allow the cohabiting husband to use blood test evidence has been severely criticized.[19] The court in *Kusior*, however, interpreted this statutory provision as a substantive rule of law which renders the husband the legal father of the child if he and his wife were cohabiting at any time during the possible period of

10. Estate of Walker, 180 Cal. 478, 492, 181 P. 792, 797 (1919).

11. Estate of McNamara, 181 Cal. 82, 96, 183 P. 552, 558 (1919).

12. *E.g.*, Estate of Walker, 180 Cal. 478, 491, 181 P. 792, 797 (1919).

13. CAL. CIV. PRO. CODE §§ 1980.1-.7 (West 1966).

14. *Id.* § 1980.6.

15. Section 5 of the Uniform Act, in 9 UNIFORM LAWS ANN. 110 (1952), entitled "Effect on Presumption of Legitimacy" states: "[T]he presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusion of all the experts, as disclosed by the evidence, based upon the tests, show that the husband is not the father of the child." Of the seven states which have adopted this Uniform Act, only California and Oregon have omitted section 5.

16. 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

17. 102 Cal. App. 2d 94, 226 P.2d 655 (1951).

18. *Id.* at 96, 226 P.2d at 656.

The additional words—"notwithstanding any other provision of law"—added by the legislature in 1955 to CAL. CIV. PRO. CODE § 1962(5) (now § 621 of the Evidence Code) were interpreted in *Kusior* as supporting the court's interpretation of the statute. 54 Cal. 2d 603, 618-19, 354 P.2d 657, 667, 7 Cal. Rptr. 139, 149 (1960).

19. *See* Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437, 465-67 (1962).

conception.[20] Furthermore, the court stated that section 621 would not be unconstitutional unless it transcends the power of the legislature to pass a substantive law which holds the husband as the legal father of any child conceived by his wife during their cohabitation.[21] Subsequent to this decision the California legislature reenacted without change section 1962(5) of the Code of Civil Procedure as section 621 of the Evidence Code. This might also be construed as a legislative intent not to change the policy of *Kusior*.

The holding in *Jackson* will have limited application and does not change the law significantly. It merely creates an additional situation in which the conclusive presumption will not apply. Prior to *Jackson*, if there had been cohabitation at any time during the period in which conception could have possibly occurred, the husband was conclusively presumed to be the legal father.[22] Jackson changes this, provided the husband can demonstrate by blood tests that he could not have fathered the child and also prove that no one else had access to his wife during their period of cohabitation. If these two factors can be shown, the conclusive presumption will not apply. The remaining rebuttable presumption of the husband's paternity of all children born during the marriage[23] is conclusively rebutted by the blood tests.[24] If husband and wife were cohabiting during the entire time of possible conception, however, the conclusive presumption will apply and blood tests will not be admitted. When cohabitation occurred for a period of time which was substantial, yet possibly short of the entire period of possible conception, it may or may not be possible for the husband to offer a sufficiently precise accounting of his wife's whereabouts to support a finding of non-access by any other male. What constitutes a sufficiently precise accounting under such circumstances is an unresolved issue.

Historically, the conclusive presumption of legitimacy has been applied in situations where the husband could conceivably have fathered the child.[25] The legislatures and courts were hesitant about weighing probabilities of paternity and therefore resolved the questions in favor of legitimacy. The legislative and judicial exceptions were

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20. 54 Cal. 2d 603, 619, 354 P.2d 657, 667-68, 7 Cal. Rptr. 129, 139-40 (1960).

21. *Id.*

22. See note 6 *supra*.

23. CAL. EVID. CODE § 661 (West 1966).

24. Kusior v. Silver, 54 Cal. 2d 603, 620, 354 P.2d 657, 668-69, 7 Cal. Rptr. 129, 140-41 (1960).

25. For a discussion of the development of this presumption in the common law and also in California see Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437, 465-67 (1962).