Vote by Blackmun Curbs Liberal View On Suspect's Rights

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WASHINGTON, Dec. 15—Justice Harry A. Blackmun, the Supreme Court's newest member, cast the decisive vote today as the Court limited one of the liberal holdings of the Warren Court for the protection of criminal defendants' rights.

Justice Blackmun and President Nixon's other appointee, Chief Justice Warren E. Burger, joined with three conservative holdovers from the Warren Court in a 5-to-4 ruling upholding a murder conviction.

The decision cleared the way for state courts to use hearsay evidence that would not be admissible in Federal trials. It also provided an early indication that President Nixon may have already delivered on his campaign pledge to mold a Supreme Court majority that will take a tougher line on the rights

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of criminal defendants.

Justices John M. Harlan, Potter Stewart and Byron R. White also voted to uphold the conviction. The case had been considered last year by the eight-member Court, which deadlocked and ordered new arguments this fall after Justice Blackmun became available to cast the "swing" vote.

The four dissenting justices were Thurgood Marshall, William J. Brennan Jr., Hugo L. Black and William O. Douglas, who frequently joined with former Chief Justice Earl Warren to provide the liberal majorities of the latter Warren era.

In a dissent written by Justice Marshall, they asserted today that the majority had acted out of concern that a different result would bring "a moment of clamor against the Bill of Rights." The outcome, they said, was "completely inconsistent with recent opinions of this court."

The case concerned Alex S. Evans, who was sentenced to death in connection with the murders in 1965 of three policemen in Gwinnett County, Ga. At his trial a clerk from the prison hospital quoted an alleged co-conspirator in the killings as saying that if it had not been for Evans, he would not be in trouble.

Normally, such testimony quoting persons who incriminate third parties is held inadmissible as hearsay. But various jurisdictions have developed intricate sets of exceptions to the rule against hearsay testimony, and Georgia had a law that admitted such statements when made by co-conspirators.

However, in 1965 the Warren Court held that the states are bound by the provision of the Sixth Amendment that gives defendants the right to be confronted by the witnesses against them. In subsequent rulings the Supreme Court implied that this might invalidate any hearsay exception that did not permit the defendant's lawyer to cross-examine the person who was quoted as having made accusations against the defendant. The high court had

previously said that in Federal trials, hearsay testimony of co-conspirators would not be admitted.

The United States Court of Appeals for the Fifth Circuit overturned Evans's conviction and declared the Georgia hearsay law unconstitutional. Its reasoning was that the law permitted the jury to hear the co-conspirator's statement, yet because the co-conspirator did not testify, Evans's lawyer could not cross-examine him.

Today the Supreme Court overturned that ruling and upheld the Georgia law, although the majority's five members did not agree why.

Justice Stewart wrote the prevailing opinion, which said that the state's hearsay rules do not necessarily have to be as strict as those followed in Federal courts. In this case, he added, cross-examination of the co-conspirator would not have softened the impact of his remark.

Justice Blackmun and Justice Burger agreed but added a concurring opinion stating that admitting the single item of testimony would have been harmless error anyway, since there was so much other evidence against Evans.

Justice Harlan wrote a separate opinion stating that the various hearsay rules should not be judged by their impact upon the defendant's right of cross-examination, but upon whether they deny him a fair trial.

Today's ruling was the second criminal case that has been decided this term and the second in which the Court has sharply restricted a liberal ruling of the Warren Court. On Nov. 23 the five Justices that composed today's majority, plus Justice Black, held in a 6-to-3 decision that a guilty plea can be valid even if the defendant insists that he is innocent when he pleads guilty.

Justice Stewart concluded his opinion today by quoting a warning issued in 1934 by Justice Benjamin N. Cardozo:

"There is danger that the criminal law will be brought into contempt — that discredit will even touch the great immunities assured by the 14th Amendment—if gossamer possibilities of prejudices to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."