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I

It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced. In the *Pointer* case itself, we referred to the decisions of this Court that have approved the admission of hearsay:

> "This Court has recognized the admissibility against an accused of dying declarations, *Mattox* v. *United States,* 146 U.S. 140, 151, and of testimony of a deceased witness who has testified at a former trial, *Mattox* v. *United States,* 156 U.S. 237, 240-244. See also *Dowdell* v. *United States, supra,* 221 U.S., at 330; *Kirby* v. *United States, supra,* 174 U.S., at 61. . . . There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses."[fn12]

The argument seems to be, rather, that in any given case the Constitution requires a reappraisal of every exception to the hearsay rule, no matter how long established, in order to determine whether, in the words of the Court of Appeals, it is supported by "salient and cogent reasons." The logic of that position would seem to require a constitutional reassessment of every established hearsay exception, federal or state, but in the present case it is argued only that the hearsay exception applied by Georgia is constitutionally invalid because it does not identically conform to the hearsay exception applicable to conspiracy trials in the federal courts. Appellee does not challenge and we do not question the validity of the coconspirator exception applied in the federal courts.

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That the two evidentiary rules are not identical must be readily conceded. It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise. *Lutwak* v. *United States,* 344 U.S. 604; *Krulewitch* v. *United States,* 336 U.S. 440. The hearsay exception that Georgia applied in the present case, on the other hand, permits the introduction of evidence of such an out-of-court statement even though made during the concealment phase of the conspiracy.

But it does not follow that because the federal courts have declined to extend the hearsay exception to include out-of-court statements made during the concealment phase of a conspiracy, such an extension automatically violates the Confrontation Clause. Last Term in *California* v. *Green*, 399 U.S. 149, we said:

> "Our task in this case is not to decide which of these positions, purely as a matter of the law of evidence, is the sounder. The issue before us is the considerably narrower one of whether a defendant's constitutional right 'to be confronted with the witnesses against him' is necessarily inconsistent with a State's decision to change its hearsay rules . . . . While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established
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> such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." *Id.*, at 155-156 (citations and footnote omitted).

These observations have particular force in the present case. For this Court has never indicated that the limited contours of the hearsay exception in federal conspiracy trials are required by the Sixth Amendment's Confrontation Clause. To the contrary, the limits of this hearsay exception have simply been defined by the Court in the exercise of its rule-making power in the area of the federal law of evidence.[fn13] It is clear that the limited scope of the hearsay exception in federal conspiracy trials is a product, not of the Sixth Amendment, but of the Court's "disfavor" of "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404. As *Grunewald*, *Krulewitch*, and other cases in this Court make clear, the evidentiary rule is intertwined, not only with the federal substantive law of conspiracy, but also with such related issues as the impact of the statute of limitations upon conspiracy prosecutions.

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In the case before us such policy questions are not present. Evans was not prosecuted for conspiracy in the Georgia court, but for the substantive offense of murder.[fn14] At his trial the State permitted the introduction of evidence under a long-established and well-recognized rule of state law.[fn15] We cannot say that the evidentiary rule applied by Georgia violates the Constitution merely because it does not exactly coincide with the hearsay exception applicable in the decidedly different context of a federal prosecution for the substantive offense of conspiracy.

II

It is argued, alternatively, that in any event Evans' conviction must be set aside under the impact of our recent decisions that have reversed state court convictions because of the denial of the constitutional right of confrontation. The cases upon which the appellee Evans primarily relies are *Pointer* v. *Texas, supra; Douglas*

v. *Alabama, supra; Brookhart* v. *Janis, supra; Barber* v. *Page, supra;* and *Roberts* v. *Russell, supra.*

In the *Pointer* case it appeared that a man named Phillips had been the victim of a robbery in Texas. At a preliminary hearing, Phillips "as chief witness for the State gave his version of the alleged robbery in detail, identifying petitioner as the man who had robbed him at gunpoint." 380 U.S., at 401. Pointer had no lawyer at this hearing and did not try to cross-examine Phillips. At Pointer's subsequent trial the prosecution was permitted to introduce the transcript of Phillips' testimony given at the preliminary hearing. Thus, as this Court held, the State's "use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him." 380 U.S., at 403. The *Douglas* case, decided the same day as *Pointer,* involved an even more flagrant violation of the defendant's right of confrontation. For at Douglas' trial the prosecutor himself was permitted to read an "entire document" purporting to be an accomplice's written confession after the accomplice had refused to testify in reliance upon his privilege against compulsory self-incrimination. "The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim." 380 U.S., at 417. In reversing Douglas' conviction, this Court pointed out that the accomplice's reliance upon the privilege against compulsory self-incrimination

"created a situation in which the jury might improperly infer both that the statement had been made and that it was true." 380 U.S., at 419. Yet, since the prosecutor was "not a witness, the inference from his reading that [the accomplice] made the statement could not be
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tested by cross-examination. Similarly, [the accomplice] could not be cross-examined on a statement imputed to but not admitted by him." *Ibid.*

Brookhart v. *Janis* and *Barber* v. *Page* are even further afield. In *Brookhart* it appeared that the petitioner had been "denied the right to cross-examine at all any witnesses who testified against him," and that, additionally, "there was introduced as evidence against him an alleged confession, made out of court by one of his co-defendants . . . who did not testify in court." 384 U.S., at 4. The only issue in the case was one of waiver, since the State properly conceded that such a wholesale and complete "denial of cross-examination without waiver . . . would be constitutional error of the first magnitude . . . ." 384 U.S., at 3. In *Barber* the "principal evidence" against the petitioner was a transcript of preliminary hearing testimony admitted by the trial judge under an exception to the hearsay rule that, by its terms, was applicable only if the witness was "unavailable." This hearsay exception "has been explained as arising from necessity . . . ." 390 U.S., at 722, and we decided only that Oklahoma could not invoke that concept to use the preliminary hearing transcript in that case without showing "a good-faith effort" to obtain the witness' presence at the trial. *Id.*, at 725.

In *Roberts* v. *Russell* we held that the doctrine of *Bruton* v. *United States*, 391 U.S. 123, was applicable to the States and was to be given retroactive effect. But *Bruton* was a case far different from the one now before us. In that case there was a joint trial of the petitioner and a codefendant, coincidentally named Evans, upon a charge of armed postal robbery. A postal inspector testified that Evans had confessed to him that Evans and the petitioner had committed the robbery. This evidence was, concededly, wholly inadmissible against the petitioner. Evans did not testify. Although the trial judge
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instructed the jury to disregard the evidence of Evans' confession in considering the question of the petitioner's guilt, we reversed the petitioner's conviction. The primary focus of the Court's opinion in *Bruton* was upon the issue of whether the jury in the circumstances presented could reasonably be expected to have followed the trial judge's instructions. The Court found that "[t]he risk of prejudice in petitioner's case was even more

serious than in *Douglas*," because "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." 391 U.S., at 127, 135-136. Accordingly, we held that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." 391 U.S., at 137. There was not before us in *Bruton* "any recognized exception to the hearsay rule," and the Court was careful to emphasize that "we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U.S., at 128 n. 3.

It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.[fn16] But this Court has never equated the two,[fn17] and we decline to do so now. We confine ourselves, instead, to deciding the case before us.
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This case does not involve evidence in any sense "crucial" or "devastating," as did all the cases just discussed. It does not involve the use, or misuse, of a confession made in the coercive atmosphere of official interrogation, as did *Douglas, Brookhart, Bruton,* and *Roberts*. It does not involve any suggestion of prosecutorial misconduct or even negligence, as did *Pointer, Douglas,* and *Barber*. It does not involve the use by the prosecution of a paper transcript, as did *Pointer, Brookhart,* and *Barber*. It does not involve a joint trial, as did *Bruton* and *Roberts*. And it certainly does not involve the wholesale denial of cross-examination, as did *Brookhart*.

In the trial of this case no less than 20 witnesses appeared and testified for the prosecution. Evans' counsel was given full opportunity to cross-examine every one of them. The most important witness, by far, was the eyewitness who described all the details of the triple murder and who was cross-examined at great length. Of the 19 other witnesses, the testimony of but a single one is at issue here. That one witness testified to a brief conversation about Evans he had with a fellow prisoner in the Atlanta Penitentiary. The witness was vigorously and effectively cross-examined by defense counsel.[fn18] His testimony, which was of peripheral significance at most, was admitted in evidence under a co-conspirator exception to the hearsay rule long established under state statutory law. The Georgia statute can
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obviously have many applications consistent with the Confrontation Clause, and we conclude that its application in the circumstances of this case did not violate

the Constitution.

Evans was not deprived of any right of confrontation on the issue of whether Williams actually made the statement related by Shaw. Neither a hearsay nor a confrontation question would arise had Shaw's testimony been used to prove merely that the statement had been made. The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.[fn19]

The confrontation issue arises because the jury was being invited to infer that Williams had implicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament. But we conclude that there was no denial of the right of confrontation as to this question of identity. **First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight.** Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know

whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *California* v. *Green,* 399 U.S., at 161. Evans exercised, and exercised effectively, his right to confrontation on the factual question whether Shaw

had actually heard Williams make the statement Shaw related. And the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal.

Almost 40 years ago, in *Snyder* v. *Massachusetts*, 291 U.S. 97, Mr. Justice Cardozo wrote an opinion for this Court refusing to set aside a state criminal conviction because of the claimed denial of the right of confrontation. The closing words of that opinion are worth repeating here:

> "There is danger that the criminal law will be brought into contempt — that discredit will even touch the great immunities assured by the Fourteenth Amendment — if gossamer possibilities of prejudice
> Page 90
> 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." 291 U.S., at 122.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for consideration of the other issues presented in this habeas corpus proceeding.[fn20]

It is so ordered.

[fn1] Page 76
The parties agree that this death sentence cannot be carried out. See n. 20, *infra*.

[fn2] Page 76
Evans v. *State*, 222 Ga. 392, 150 S.E.2d 240.

[fn3] Page 76
385 U.S. 953.

[fn4] Page 76
The opinion of the District Court is unreported.

[fn5] Page 76
Evans v. *Dutton*, 400 F.2d 826, 827.

[fn6] Page 76
393 U.S. 1076. Since, as will appear, the Court of Appeals held that a Georgia statute relied upon by the State at the trial was unconstitutional as applied, there can be no doubt of the right of appeal to this Court. 28 U.S.C. § 1254 (2).

[fn7] Page 77

Three of these were rebuttal witnesses. There were four defense witnesses, and Evans himself made a lengthy unsworn statement.

[fn8] Page 78
Ga. Code Ann. § 38-306 (1954).

[fn9] Page 78
Evans v. *State,* 222 Ga. 392, 402, 150 S.E.2d 240, 248.

[fn10] Page 79
400 F.2d, at 829.

[fn11] Page 79
400 F.2d, at 830, 831.

[fn12] Page 80
Pointer v. *Texas,* 380 U.S., at 407. See also *Salinger* v. *United States,* 272 U.S. 542, 548.

[fn13] Page 82

See 18 U.S.C. § 3771. Fed. Rule Crim. Proc. 26 provides:
"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, 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."
See *Hawkins* v. *United States,* 358 U.S. 74.

[fn14] Page 83
We are advised that at the time of Evans' trial Georgia did not recognize conspiracy as a separate, substantive criminal offense.

[fn15] Page 83
The Georgia rule is hardly unique. See, *e. g.*, *Reed* v. *People,* 156 Colo. 450, 402 P.2d 68; *Dailey* v. *State,* 233 Ala. 384,171 So. 729; *State* v. *Roberts,* 95 Kan. 280, 147 P. 828. See also 2 F. Wharton, Criminal Evidence § 430 (12th ed. 1955):
"The acts and declarations of a conspirator are admissible against a co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense but also its subsequent concealment. . . .
. . . . . .
"The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission: the conspiracy to commit the crime devolves after the commission thereof into a conspiracy to avoid arrest and implication."
The existence of such a hearsay exception in the evidence law of many States was recognized in *Krulewitch, supra.* 336 U.S., at 444.

[fn16] Page 86
It has been suggested that the constitutional provision is based on a common-law principle that had its origin in a reaction to abuses at the trial of Sir Walter Raleigh. F. Heller, The Sixth Amendment 104 (1951).

[fn17] Page 86
See Note, Confrontation and the Hearsay Rule, 75 Yale L. J. 1434:

"Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform

Page 87

Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well." *Id.*, at 1436. (Footnotes omitted.)

[fn18] Page 87
This cross-examination was such as to cast serious doubt on Shaw's credibility and, more particularly, on whether the conversation which Shaw related ever took place.

[fn19] Page 88
Of course Evans had the right to subpoena witnesses, including Williams, whose testimony might show that the statement had not been made. Counsel for Evans informed us at oral argument that he could have subpoenaed Williams but had concluded that this course would not be in the best interests of his client.

[fn20] Page 90
It was conceded at oral argument that the death penalty imposed in this case cannot be carried out, because the jury was qualified under standards violative of *Witherspoon* v. *Illinois,* 391 U.S. 510. The Court of Appeals for the Fifth Circuit has already set aside, under *Witherspoon,* the death sentence imposed upon Venson Williams, Evans' alleged accomplice. See *Williams* v. *Dutton,* 400 F.2d 797, 804-805.