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Evidence—Coconspirator Rule Allowing Admission of Accomplice's Declaration Held Not Violative of Sixth Amendment Right of Confrontation

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ently enjoyed liberty.[94] The decision may also have an impact on prison disciplinary hearings where a violation of major proportions is alleged and where the prisoner is deprived of the "liberty" of mingling with the general prison population and is confined in an isolated cell block (prison within a prison) for a substantial period of time. Here again it would seem that notions of due process are equally applicable, especially since such hearings may result in actually increasing the effective length of the prisoner's sentence through loss of "good time" which he would otherwise earn.

Inspite of the seemingly insurmountable burdens and procedural difficulties imposed on the parole system by the instant decision, it is difficult to dispute the inherent logic of the court's argument and the justice of its position. Nothing rankles in the human breast more than a sense of injustice. Procedural fairness has for too long a time been sacrified on the altar of expedience. By acting to reverse the order of priorities in some measure the court has perhaps taken a step that not only will guarantee a greater measure of justice in the correctional process but may also have the welcome side effect of creating an atmosphere conducive to real rehabilitation.

CLARENCE J. SUNDRAM

EVIDENCE—COCONSPIRATOR RULE ALLOWING ADMISSION OF ACCOMPLICE'S DECLARATION HELD NOT VIOLATIVE OF SIXTH AMENDMENT RIGHT OF CONFRONTATION

Discovery of the handcuffed, bullet-riddled bodies of three police officers led to the arrest of appellee Evans, and two suspected accomplices, Williams and Truett. Charged with murder, Evans pleaded not guilty and asked to be tried separately. Truett was granted immunity from prosecution in return for his testimony as a State's witness. The case came before the Supreme Court on appeal after the United States' Court of Appeals for the Fifth Circuit reversed the denial of a writ of habeus corpus by the United States District Court of Georgia.[1] Truett, the prosecution's chief witness testified that he, appellee and Williams were accosted by the policemen while changing the license plates on a stolen car. As one of the officers was searching the automobile, Evans grabbed his firearm, disarmed the

stated that the retroactive application of the decision is mandated since it is a constitutional decision. Inmates of the Attica Correctional Facility have been granted retroactive application of the *Menechino* decision.

94. The Court of Appeals for the Second Circuit rejected the notion that counsel should be permitted in parole release hearings. Menechino v. Oswald, 430 F.2d 403, 410 (2d Cir. 1970).

1. Evans v. Dutton, 400 F.2d 826 (5th Cir. 1968).

other two, and with Williams, compelled the officers into a wooded area and shot them at close range. Georgia law requires corroboration of an accomplice's testimony in a criminal trial.[2] In addition to Truett, the prosecution offered nineteen other witnesses, among them a man who identified the burning automobile at the scene as his, and one Perry who testified to a conversation with Evans about the car theft and subsequent events. The assignment of error, however, was to the testimony of one Shaw, admitted over defense counsel's objection, to the effect that while an inmate in the federal penitentiary at Atlanta, Williams was brought there for arraignment, after which he told Shaw: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."[3] The objection was that this statement constituted hearsay, admission of which violated appellee's constitutional right to confront opposing witnesses.[4] Georgia's coconspiracy rule provides that declarations made by a conspirator are admissible against coconspirators if made in the course of or in furtherance of the conspiracy, or during its concealment phase.[5] *Held,* Georgia's coconspirator rule which permits admittance of declarations by one accomplice against another during the concealment phase of the conspiracy, while concededly broader than the federal rule, is not violative of a defendant's sixth amendment right to confront opposing witnesses. *Dutton v. Evans,* 400 U.S. 74 (1970).[6]

The sixth amendment right to confront witnesses has been the subject of considerable Supreme Court adjudication in recent years. In *Pointer v. Texas,*[7] defendant was charged with the armed robbery of one Phillips, who identified him at a preliminary hearing. Phillips moved outside the jurisdiction, and the state therefore entered into evidence his previous testimony over defendant's objection. Defendant had neither been represented by counsel nor had the opportunity to cross-examine the witness at the preliminary hearing. He objected to admission of this evidence as

2. GA. CODE ANN. § 38-121 *et seq.* (1954).
3. Dutton v. Evans, 400 U.S. 74, 77 (1970).
4. U.S. CONST. amend. VI provides:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the Witnesses against him;* to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense (emphasis added).
5. GA. CODE ANN. § 38-306 (1954) provides:
After the fact of conspiracy shall be proved, the declarations by any one, of the conspirators during the pendency of the criminal project shall be admissible against all.
6. Hereinafter referred to as instant case.
7. 380 U.S. 400 (1965).

violating his sixth amendment right of confrontation. The Supreme Court held the sixth amendment right of confrontation to be a fundamental right, made obligatory upon the states by the fourteenth.[8] The Court, in reaching its conclusion, emphasized the value of cross-examination to a defendant, stating:

> Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment.[9]

Douglas v. Alabama,[10] decided the same day as *Pointer,* concerned conviction of petitioner for assult with intent to murder. Loyd, an accomplice, had been previously tried and convicted, and was called as a witness at petitioner's trial. Since his appeal was pending, Loyd refused to answer on fifth amendment self-incrimination grounds.[11] The prosecution moved to declare Loyd a hostile witness, which motion was granted, allowing the prosecution to cross-examine him. The prosecutor read an alleged confession of Loyd's which incriminated petitioner. Three police officers testified to its authenticity, although the document was never offered into evidence. Loyd made no response to the purported confession during its presentation. Petitioner's objection on confrontation grounds was upheld by the Court's finding that his inability to cross-examine Loyd, which depended on Loyd's affirmation of the declaration as his,[12] plainly denied his rights as secured by the confrontation clause.[13] The Court emphasized that the prosecution's reading of the declaration "may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement. . . ."[14] *Barber v. Paige*[15] held a witness is not unavailable to allow

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8. *Id.* at 403.
9. *Id.* at 407.
10. 380 U.S. 415 (1965).
11. U.S. CONST. amend. V provides that in all criminal trials, the accused shall not "be compelled . . . to be a witness against himself. . . ."
12. 380 U.S. at 420.
13. *Id.* at 419.
14. *Id.*
15. 390 U.S. 719 (1968). This case followed Washington v. Texas, 388 U.S. 14 (1967), which held compulsory process for obtaining witnesses in a defendant's favor to be required by the sixth amendment and obligatory on the states by the fourteenth. In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court faced the issue of whether a conviction should be set aside after admission of a codefendant's confession implicating petitioner although the jury had been instructed to disregard the confession as to the petitioner. The Court found that despite the charge by the trial judge, there was a substantial risk that the jury looked to the alleged confession in arriving

prior statements of his as evidence unless the state has made a good faith effort to obtain his presence. Last term, the Court held that when a defendant is acting as his own counsel, and where his actions are such as to disrupt the trial proceedings to such a point as to make it impossible to continue with the proceedings in his presence, his removal from the trial court does not violate his right to confront witnesses as his actions are deemed a waiver of the right to be present at proceedings against him.[16] In *California v. Green*,[17] the Court was concerned with a situation where a witness had made damning statements against petitioner at a preliminary hearing, but at the subsequent trial, due to a loss of memory, was unable to remember the events to which he had previously testified. Here, the witness had been arrested for sale of marihuana, and had identified the petitioner as his supplier. The prosecution was allowed to enter his previous testimony over petitioner's objection. As to the argument that the petitioner had not cross-examined the witness at the hearing, the Court stated that the present availabilty of the witness for cross-examination was sufficient.[18]

In all but one of the above cases, the Court was presented with a situation where testimony of one defendant was offered, in one form or another, at the trial of the petitioner. This leads one to a discussion of the declarations and acts of defendants as they apply to and are admissible against codefendants in criminal proceedings. Necessarily, the Georgia coconspiracy rule as it conflicts with the federal rule must be considered.

The Georgia rule involved in the instant case is supported by a number of other state decisions. In *Carter v. State*,[19] petitioner was tried separately and convicted after he and a codefendant were charged with arson. Statements by the codefendant which implicated petitioner and which had been made after the commission of the arson were admitted on the grounds that acts or conduct of an accomplice not only during the pendency of the unlawful act, but in its concealment as well, are admissible against other accomplices. The theory behind the holding was that the conspiracy was still active during the attempts at concealment. This ruling was followed in *Chatterton v. State*[20] where it was stated: ". . . so long as the conspiracy

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at a guilty verdict as to the petitioner, admission of which violated petitioner's right of confrontation. The decision recognized the impact to a defendant's case inherent in an accomplice's incriminations, even to the extent of not being rendered ineffectual by a jury charge to ignore them. The holding was made retroactive in Roberts v. Russell, 393 U.S. 899 (1968).

16. Illinois v. Allen, 397 U.S. 337 (1970). This decision represents a digression from the rigid protectionism afforded by the Supreme Court to the confrontation clause in its prior decisions.

17. 399 U.S. 149 (1970).

18. 399 U.S. at 165.

19. 106 Ga. 372, 32 S.E. 345 (1889).

20. 221 Ga. 424, 144 S.E.2d 726, *cert. denied*, 384 U.S. 1015 (1965).

to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other."[21] Likewise, in *State v. Roberts*[22] where the defendant was convicted of murder on a declaration made by a codefendant, after perpetration of the murder and while the defendant was not present, defendant's objections that such evidence was erroneously admitted and prejudicial were overruled. In *State v. Emory*,[23] it was said that "[o]nce the conspiracy is so far established as to make the ascertainment of the fact a jury question . . . evidence of the declarations and acts of the coconspirators are admissible so far as they pertain to the furtherance of the common criminal design, to its consummation, to the disposition of its fruits, and to acts done to preserve its concealment."[24] The principle has been accepted by the courts of Alabama, Arkansas, Colorado, Massachusetts, Mississippi and Oregon.[25]

The federal coconspiracy rule limits admissions of conspirators against fellow conspirators to those made in the furtherance of or in the course of the conspiracy, but not to the concealment phase. In *Brown v. United States*,[26] overturning a murder conviction on the grounds of improper admittance of statements by an accomplice after the murder, the Court enunciated the principle that "[a]fter the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator by way of narrative of past facts, are not admissible against the others."[27] The question as to when a conspiracy was to be considered consummate was answered when it was held that admissions made subsequent to the *overt act* when the purposes of the conspiracy had been accomplished were inadmissible.[28] In

21. 106 Ga. at 432, 144 S.E.2d at 732. *See also* Burns v. State, 191 Ga. 60, 11 S.E.2d 350 (1940).

22. 95 Kan. 280, 147 P. 828 (1915).

23. 116 Kan. 381, 226 P. 754 (1924).

24. 116 Kan. at 384, 226 P. at 756. *Accord,* State v. Shaw, 195 Kan. 677, 408 P.2d 650 (1968); State v. Turner, 193 Kan. 189, 392 P.2d 863 (1964); State v. Borserine, 184 Kan. 405, 337 P.2d 697 (1959); State v. Bundy, 147 Kan. 4, 75 P.2d 235 (1938).

25. *See* Dailey v. State, 233 Ala. 384, 171 So. 729 (1937); Hooper v. State, 187 Ark. 88, 58 S.W.2d 434 (1933); Reed v. People, 156 Colo. 450, 402 P.2d 68 (1965); Smaldon v. People, 103 Colo. 498, 88 P.2d 103 (1939); Hoffman v. People, 89 Colo. 8, 30 P.2d 575 (1931); Commonwealth v. Smith, 151 Mass. 491, 24 N.E. 677 (1890); Watson v. State, 166 Miss. 194, 146 So. 2d 122 (1933); State v. Robinson, 120 Ore. 508, 252 P. 951 (1927); State v. Gauthier, 113 Ore. 297, 231 P. 141 (1924).

26. 150 U.S. 93 (1893).

27. *Id.* at 98.

28. Hauger v. United States, 173 F. 54 (4th Cir. 1909). In Lew Moy v. United States, 237 F. 50 (8th Cir. 1916), petitioner and a codefendant were convicted on the testimony of a third accomplice of conspiracy to bring ineligible aliens into the country. Petitioners contended that the overt act which should mark the termination of the conspiracy was when the last alien was brought across the border. The Court held

Fiswick v. United States,[29] it was declared that "[t]hough the result of the conspiracy may be continuing, the conspiracy does not thereby become a continuing one."[30] Indeed, the Court explicitly declared that confessions or admissions after apprehension are not in furtherance of the enterprise since apprehension frustrates the criminal endeavor.[31] The "harmless error" doctrine was formulated by the Court in *Kotteakos v. United States*.[32] If admissions are erroneously admitted, but there is certainty that they had little or no effect, the conviction will stand. If, however, "it cannot [be said] with any fair assurance . . . that the judgement was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."[33] Under such circumstances, the conviction must be set aside. Moreover, the fact that there may be independent evidence sufficient to support the verdict is irrelevant if the possibility exists that the erroneous evidence had substantial influence.[34]

The most extensive and incisive discussion of the federal approach is found in *Krulewitch v. United States*[35] where petitioner was indicted for conspiracy to persuade and induce a woman to cross state lines for purposes of prostitution. Testimony as to damaging statements made by an accomplice were found to have been made after termination of the conspiracy, and thus were held inadmissible. The government contended that inherent in every conspiracy, either expressly or impliedly, is a "subsidiary objective" to conceal the facts or identities of the parties.[36] In

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that this was too narrow a focus since more was required to bring about the unlawful end than mere transportation across international boundaries. Thus, this decision brought into consideration examination of the unlawful end sought to be attained to determine which overt act would terminate the conspiracy. This rule was examined in Graham v. United States, 15 F.2d 740 (8th Cir. 1926), where petitioner and four accomplices were convicted of narcotics offenses after two addicts, who had been arrested after they sold morphine to police officers, testified that the petitioners had been their source of supply. The court held, relying on Brown v. United States, 150 U.S. 93 (1893), that the acts or declarations are admissible only if during the pendency of the conspiracy, or in furtherance of its object. However, the court explicitly announced the federal view as to the extent of an active conspiracy: "As a general rule the arrest of a coconspirator may be said to effectively preclude any further concerted action, and ordinarily puts an end to the conspiracy." *Id.* at 743.

29. 329 U.S. 211 (1946).

30. *Id.* at 216.

31. *Id.* at 217.

32. 328 U.S. 750 (1946).

33. *Id.* at 764-65.

34. *Id.* Lutwak v. United States, 344 U.S. 604 (1953), upheld the conviction of petitioner and four codefendants on charges of obtaining entry into the United States of aliens by fraudulent means, holding that admission of incriminating declarations by one of the accomplices made after termination of the conspiracy were of such nature as to be harmless, irreversible error under the guideline of *Kotteakos*.

35. 336 U.S. 440 (1949).

36. *Id.* at 443.

rejecting this contention, the Court reiterated that a *going* conspiracy was required.[37] Mr. Justice Jackson, concurring,[38] offered a scathing denunciation of the government's position.

> We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. . . . I should concur in reversal even if less than sure that prejudice resulted, for it is better that the crime go unwhipped of justice than that this theory of implied continuance of conspiracy find lodgement in our law, either by affirmance or tolerance.[39]

The decision established the view that prior to termination of a conspiracy statements by an accomplice are considered authorized by codefendants, but that such authorization cannot be assumed past the point at which the purpose of the conspiracy has been either fulfilled or foiled.[40]

In the instant case, Mr. Justice Stewart, writing for the plurality rejected petitioner's argument that the Georgia coconspirator rule should be declared void because it was broader than the federal rule on the grounds that the federal rule was merely the product of the Court's rule-making power in the area of evidence. In addition, he was of the opinion that the limitations of the federal rule were not required by the sixth amendment.[41] As to the statement of Shaw it was found to be of "peripheral significance," the Court concluding that petitioner's right to confrontation had not been denied.[42] In reaching this conclusion the Court stated: that since the statement contained no assertion of past fact, "it carried on its face a warning to the jury against giving the statement undue weight;"[43] that Williams' knowledge of the identity of his fellow accomplices had been established both by his prior conviction and Truett's testimony; that the possibility of faulty recollection on Williams' part was unlikely; and that the circumstances surrounding the admission were such as to make misrepresentation of appellee's role improbable.[44] In addition, Justice Stewart was of the opinion that cross-examination of Williams himself would not in any way have changed the outcome.[45]

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37. *Id.*
38. *Id.* at 445.
39. *Id.* at 457.
40. *Id.* at 442.
41. Instant case at 82.
42. *Id.* at 88.
43. *Id.*
44. *Id.* at 88-89.
45. "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. *Id.* at 89.

Justice Blackmun, joined by Chief Justice Burger, wrote a separate concurring opinion[46] in which they accepted the plurality's judgement. However, reciting facts surrounding the alleged declaration which cast grave doubt on its credibility, and emphasizing the testimony of the other witnesses, he was of the opinion that the admission of Shaw's testimony constituted harmless error.[47]

Mr. Justice Harlan, concurring,[48] in a familiar vein, thought the proper approach was to look at the issue in terms of fifth and fourteenth amendment due process. The question then becomes whether or not there had been "adequate 'confrontation' to satisfy the requirement of the [confrontation] clause."[49] Of the opinion that exclusion of such testimony is to be preferred, he nevertheless concluded that to do so is not essential to a fair trial.

Mr. Justice Marshall, joined by Justices Black, Douglas and Brennan, dissented.[50] He flatly rejected Justice Stewart's view that cross-examination of Williams would not have changed the effect of Shaw's testimony, emphasizing the importance of cross-examination and the reliance placed on it by defense counsel generally. Pointing to the ambiguity of Shaw's statement, he argued that "absent cross-examination of Williams himself, the jury was left with only the unelucidated, apparently damning and patently damaging accusation as told by Shaw."[51] The result was to allow the admission of the prejudicial statement via an intermediary, which he "had thought . . . was precisely what the Confrontation Clause as applied to the States . . . prevented."[52] He considered the plurality's opinion to have been reached "in the complete absence of authority of reasoning to explain that result."[53] Carried to its logical end, he concluded, the plurality's decision would completely overturn precedent, and would allow any state exception to the hearsay rule to become an exception to the confrontation clause as well. He felt Shaw's statement did have significance, and could well have contributed to the corroboration.

The plurality's decision appears to have missed the real issue, namely, whether a federal and state rule so at variance with one another can both adequately safeguard a defendant's constitutional rights. The finding that these two rules are not necessarily exclusive is conclusory, and the support upon which it rests is that the coconspirator rule, whether federal or state,

46. *Id.* at 90.
47. *Id.* at 93.
48. *Id.*
49. *Id.* at 97.
50. *Id.* at 100.
51. *Id.* at 104.
52. *Id.*
53. *Id.* at 105.

is evidentiary in origin. Yet, the right to confront opposing witnesses is affirmed as a fundamental right. The result is that a fundamental right is impaired by a state evidentiary rule. On these grounds, the decision in the instant case is untenable, for the degree of justice a man receives should not be constrained by a state rule which facilitates conviction. The plurality never adequately explained the basis of the decision, and failing this, turned to the "harmless error" doctrine. Their dismissal of the evidence on this ground appears to have been proved patently at variance with the *Kotteakos* test[54] in Justice Marshall's dissent. It is difficult not to have doubts that the evidence may well have swayed the jury, especially in light of the trial judge's charge.[55] Regardless of the weight of the other evidence, *Douglas'* recognition that an accomplice's statements are usually highly prejudicial and potentially very damaging lends credence to the suggestion that Shaw's testimony could well have influenced the jury in reaching its verdict. In this case, the federal rule, both in terms of justice and logic is the sounder, for it places a limit on the time when a defendant can be bound and put in jeopardy by an accomplice's admissions. This point has been declared to be when the conspiracy has ended, that is, when the last overt act has been consummated. The conspiracy has been definitively declared at an end by prior Supreme Court decisions when the conspirators are in custody. The rejection by the Court of imputed conspiracy in *Krulewitch* and the warnings contained in that decision against expanding the doctrine of conspiracy stand as sound judicial policy which casts the decision in the instant case as anomolous. The decision neither answers the essential questions, nor does it serve to clarify existing law in this area. Rather, it has all the earmarks of a Pandora's box waiting to be opened.

NORMAN A. LEBLANC, JR.

FAMILY LAW—STATUTE PROVIDING FOR MATCHING RELIGIONS OF CHILD AND ADOPTIVE PARENTS WHEN PRACTICABLE DEEMED INAPPLICABLE WHERE IT WOULD SUBSTANTIALLY DELAY PLACING CHILD

In this civil proceeding against a mother for neglect of her out-of-wedlock child, the Family Court of New York City was presented with two issues; namely, whether the mother's consent was necessary for an adop-

54. *See supra* note 32 and accompanying text.

55. The charge to the jury in pertinent part reads: *"Slight evidence* from an extraneous source identifying the accused as a participator in the criminal act *will be sufficient corroboration of an accomplice to support a verdict"*. Evans v. State, 222 Ga. 392, 394, 150 S.E.2d 240, 244 (1966) (emphasis added).