SUPREME COURT OF THE UNITED STATES

No. 98–5881

BENJAMIN LEE LILLY, PETITIONER *v.* VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

[June 10, 1999]

JUSTICE BREYER, concurring.

As currently interpreted, the Confrontation Clause generally forbids the introduction of hearsay into a trial unless the evidence "falls within a firmly rooted hearsay exception" or otherwise possesses "particularized guarantees of trustworthiness." *Ohio* v. *Roberts,* 448 U. S. 56, 66 (1980). *Amici* in this case, citing opinions of Justices of this Court and the work of scholars, have argued that we should reexamine the way in which our cases have connected the Confrontation Clause and the hearsay rule. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 2–3; see also, *e.g*, *White* v. *Illinois,* 502 U. S. 346, 358 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1011 (1998); A. Amar, The Constitution and Criminal Procedure 129 (1997); Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L. Rev. 557 (1992).

The Court's effort to tie the Clause so directly to the hearsay rule is of fairly recent vintage, compare *Roberts*, *supra*, with *California* v. *Green*, 399 U. S. 149, 155–156 (1970), while the Confrontation Clause itself has ancient origins that predate the hearsay rule, see *Salinger* v. *United States,* 272 U. S. 542, 548 (1926) ("The right of confrontation did not originate with the provision in the

Sixth Amendment, but was a common-law right having recognized exceptions"). The right of an accused to meet his accusers face-to-face is mentioned in, among other things, the Bible, Shakespeare, and 16th and 17th century British statutes, cases, and treatises. See The Bible, Acts 25:16; W. Shakespeare, Richard II, act i, sc. 1; W. Shakespeare, Henry VIII, act ii, sc. 1; 30 C. Wright & K. Graham, Federal Practice and Procedure §6342, p. 227 (1997) (quoting statutes enacted under King Edward VI in 1552 and Queen Elizabeth I in 1558); cf. *Case of Thomas Tong,* Kelyng J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (out-of-court confession may be used against the confessor, but not against his co-conspirators); M. Hale, History of the Common Law of England 163–164 (C. Gray ed. 1971); 3 W. Blackstone, Commentaries *373. As traditionally understood, the right was designed to prevent, for example, the kind of abuse that permitted the Crown to convict Sir Walter Raleigh of treason on the basis of the out-of-court confession of Lord Cobham, a co-conspirator. See 30 Wright & Graham, *supra*, §6342, at 258–269.

Viewed in light of its traditional purposes, the current, hearsay-based Confrontation Clause test, *amici* argue, is both too narrow and too broad. The test is arguably too narrow insofar as it authorizes the admission of out-of-court statements prepared as testimony for a trial when such statements happen to fall within some well-recognized hearsay rule exception. For example, a deposition or videotaped confession sometimes could fall within the exception for vicarious admissions or, in THE CHIEF JUSTICE's view, the exception for statements against penal interest. See *post,* at 3. See generally *White*, *supra*, at 364–365 (THOMAS, J., concurring in part and concurring in judgment); Friedman, *supra*, at 1025; Amar, *supra*, at 129; Berger, *supra*, at 596–602; Brief for the American Civil Liberties Union et al. as *Amici Curiae* 16–20. But why should a modern Lord Cobham's out-of-court confession

become admissible simply because of a fortuity, such as the conspiracy having continued through the time of police questioning, thereby bringing the confession within the "well-established" exception for the vicarious admissions of a co-conspirator? Cf. *Dutton* v. *Evans,* 400 U. S. 74, 83 (1970) (plurality opinion). Or why should we, like Walter Raleigh's prosecutor, deny a plea to "let my Accuser come face to face," with words (now related to the penal interest exception) such as, "The law presumes, a man will not accuse himself to accuse another"? *Trial of Sir Walter Raleigh,* 2 How. St. Tr. 19 (1816).

At the same time, the current hearsay-based Confrontation Clause test is arguably too broad. It would make a constitutional issue out of the admission of *any* relevant hearsay statement, even if that hearsay statement is only tangentially related to the elements in dispute, or was made long before the crime occurred and without relation to the prospect of a future trial. It is not obvious that admission of a business record, which is hearsay because the business was not "regularly conducted," or admission of a scrawled note, "Mary called," dated many months before the crime, violates the defendant's basic *constitutional* right "to be confronted with the witnesses against him." Yet one cannot easily fit such evidence within a traditional hearsay exception. Nor can one fit it within this Court's special exception for hearsay with "particularized guarantees of trustworthiness"; and, in any event, it is debatable whether the Sixth Amendment principally protects "trustworthiness," rather than "confrontation." See *White, supra,* at 363 (THOMAS, J., concurring in part and concurring in judgment); cf. *Maryland* v. *Craig*, 497 U. S. 836, 862 (1990) (SCALIA, J., dissenting) ("[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation").

We need not reexamine the current connection between the Confrontation Clause and the hearsay rule in this case, however, because the statements at issue violate the Clause regardless. See *ante*, at 6. I write separately to point out that the fact that we do not reevaluate the link in this case does not end the matter. It may leave the question open for another day.