Supreme Court of the United States

October Term, 1968

In the Matter of:

GLENN MARTIN HARRINGTON

Petitioner

vs.

CALIFORNIA,

Respondent.

Docket No. 750

Place Washington, D. C.

Date April 23, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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Washington, D. C.
Wednesday, April 23, 1969.

The above-entitled matter came on for argument at 12:45 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

ROGER S. HANSON, Esq.
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(Counsel for Respondent)

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 750, Glenn Martin Harrington, Petitioner, versus California.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Hanson.

ORAL ARGUMENT OF ROGER S. HANSON, ESQ.

ON BEHALF OF PETITIONER

MR. HANSON: Mr. Chief Justice Warren, and may it please the Court.

This is a first degree murder case out of the State of California from the city of Los Angeles, and my client, Mr. Harrington, according to the evidence participated in the robbery of a liquor store in the city of Los Angeles, along with three other co-defendants.

The interesting thing about it was the three other co-defendants were Negro, Mr. Harrington was a Caucasian and that is a significant factor which I will point out as we go along here a little bit.

The court held a preliminary hearing in the case, according to the California procedure. And at the time the preliminary hearing why it showed quite conclusively that there was going to be a lot of problems in the way of confessions.

It seems that all three of the other co-defendants, Mr. Rhone, Mr. Bosby and Mr. Cooper, had made confessions which implicated themselves and each other and Mr. Harrington

in this particular crime.

At the time of the trial setting in various preliminary motions, counsel for Mr. Harrington attempted to get sverance of the trials because of this problem and at that time he cited the case of Delli Paoli versus the United States and the Jackson versus Denno decision of this court in an effort to get these trials severed.

These motions were denied by the trial court.

And at various times during the trial, motions were made to sever the thing, each time as to Harrington being denied.

I think it rather interesting that throughout this trial numerous pages were devoted to in-chambers discussion between the counsel and the court in an effort to alter these various confessions in such a way that no incriminating statements were made as to the one man versus the other.

I set that out in my brief and it is contained in the single appendix for the court and I think it is very exemplary of the impossibility in this particular case as it is in most cases to make a meaningful deletion of the names to the point where in this case it became so ridiculous that the court upon being accused by Mr. Harrington's attorney at the time of trying to make the matter more difficult for his counsel said I am going to let all these confessions come in just the way they stand unedited.

Now Mr. Rhone made the confession which was probably the most damaging and I suppose the single, possibly weak point in my position here is that Mr. Rhone did in fact take the stand for cross-examination.

The other two gentlemen, Mr. Cooper and Mr. Bosby are referred to Mr. Harrington as the white man, the Caucasian and various other terms, never actually calling him by name which is probably caused by the fact that they didn't know each other too well.

So in that particular sense neither one of the other two actually named Mr. Harrington, but without a doubt because all four of them were being jointly tried, all four of them sitting at the counsel table together, three Negroes and the Caucasian, Mr. Harrington, coupled with Mr. Rhone's confession, actually naming Mr. Harrington why there is little doubt that in my opinion all four of these confessions or all three of the confessions solidified each other and brought home the inevitable result that took place in this particular trial.

Now, it is my contention here, of course when I filed the petition for certiorari of this court, it was prior to the decision of the court in Bruton versus the United States and Roberts versus Russell.

At the time I filed the petition I was going after a reversal of the Delli Paoli case and so when the court handed down the Bruton decision and the Roberts versus Russell

decision I anticipated the case being remanded to the District Court of Appeals in California with the usual admonition to reconsider the case in a matter not inconsistent with this particular opinion and so I was elated to have the chance to come to Washington when the court granted a hearing in the case.

It is my contention upon reviewing all the decisions of this court and the prime one that I hang my hat on is Brookhart versus Janis case, 384 U.S. 1, decision by Mr. Justice Black which I have cited throughout my documents that I have filed that if there was a denial of confrontation of witnesses, without waiver, why it would be a constitutional error in the first order of magnitude and no amount of want of prejudice would save this error from the case.

Of course in the Brookhart case as the court knows, with malice of forethought the confession of the co-defendant was actually used against Mr. Brookhart. It was introduced for that particular purpose and so the Court without hesitation in an eight-man opinion by Mr. Justice Black reversed that case without recourse to any consideration of harmless error rules.

In the Bruton case then, if I interpret that case correctly, the court went on to acknowledge that in its opinion it would be impossible for a jury to discern the difference between confessions of this type being given by

A. With an instruction to not consider it against B,

only consider it against A, never against B.

By Mr. Justice Brennan in that case, if I add Brookhart to Bruton it is my position in front of this court today that it calls for an automatic reversal of this case and all such cases on a national basis without recourse to any harmless error rules whatsoever.

Now in the concurring opinion by Mr. Justice Stewart in Chapman versus California, there is numerous type of errors that are set out called for automatic reversal. And as I understand, Mr. Justice Stewart in that case, you took the position that no harmless error rule should be applied at all in this particular type of error.

And as I go through the various types of vases that this court has passed judgment on, the Gideon versus Wainwright type of denial of counsel, reversed without recourse to harmless error and retroactively so.

The Jackson versus Denno case was a very analogous type of error, reversed without recourse to a harmless error rule, retroactively so.

In other words, we have in one hand as I study the cases the type of errors that actually book place during the trial itself, the denial of counsel at trial, the introduction of coerce confessions, this type of thing which actually permeated the very trial itself as opposed to certain pretrial type of maneuvers in the way of the Miranda errors where the

court said that its reason for reversing and not making it retroactive was because of the fact it wanted to discourage police conduct in these errors.

The search and seizure issues, of course, are along the same lines. But this type of error which we have in front of the court today to me there can be no question whatsoever that it has to be resulting in a reversal without recourse to any harmless error rules whatsoever.

I think, based upon my own personal experience in Los Angeles in trying some major cases, that I can think of no more severe error than a defense counsel would have to attempt to overcome than this particular one that took place in this case.

I think it alters entirely the defense of the case. The State of Illinois in its amicus curiae brief pointed out that after all Mr. Harrington did no more than put the State of California to its test to see if it had enough evidence to convict him.

He did not take the stand. He put on next to no defense whatsoever and I simply contend and point out to the ourt that in my opinion, when a magnitudinal error such as three confessions were introduced against him, the entire strategy of the case would change.

He was, I must admit, a previous loser. He had been doing time up in San Quentin for previous crimes. He therefore

had the problem that he would be impeached as a witness by previous convictions of a felony and so the counsel at that time apparently elected to not put him on the stand so, therefore, I contend that the entire strategy of the trial is altered by this particular difficulty and it is impossible for any reviewing court to say with any certainty that harmless error did not take place if the court is constrained to even apply harmless error rule to it.

This court, of course, has considered an analogous situation in the Barber versus Page case of the past term where the preliminary hearing testimony was introduced at the trial without making an effort to get the witness in front of the court again to reverse, again reversal without recourse to harmless error rules and in the recent case of Berger versus California the court made it again retroactive.

And I can only conclude that the court did the requisite amount of soul searching during the deliberations in chambers as to the magnitude of this particular error. I don't think the court would make an error of this magnitude retroactive unless it considered it to be a severe one, a tremendously severe one.

It is my contention that because of this severity of this error it is not at all applicable to any type of harmless error rules that must be reversed per se, throughout the nation when this type of thing takes place.

Q Did Harrington take the stand himself?

A No, your Honor, he did not. Harrington did not take the stand.

Q One of the co-defendants who testified did take the stand?

A Mr. Rhone took the stand.

Q You don't have any Bruton problem there.

A No, actually we don't.

Q The other two did not take the stand?

A That is correct.

Q So that in a sense their testimony was sort of cumulative, wasn't it?

A No question about it.

Q I take it that if only Rhone had been involved here there wouldn't have been any problem under Bruton?

A Apparently not, had he taken the stand been the only co-defendant apparently we wouldn't have the Bruton problem but as I read the Sixth Amendment it says you have a right to be confronted by all the witnesses.

Q Just in terms of harmless error were the confessions any -- were Rhone's, as far as Harrington was concerned, was there any measurable difference between Rhone's confession and the confession of the other two?

A No, actually not. As a matter of fact they probably were not near as damaging because of the reason they

didn't name him per se, like Mr. Rhone did.

Q So in terms of the impact on Harrington, his ability to cross-examine Rhone, would it have done him any good to be able to cross-examine the other two?

A Well, that is a good question. I contend that relying on the Sixth Amendment --

Q You contend that it would?

A -- it would have to be all the witnesses. I can't see how you can bifurcate the thing. You might have 49 witnesses that didn't take the stand and one that did, and it is just inconceivable to me that you can split hairs on the number that did and the number that did not.

This was a very severe type of case that ---

Q Did you say the confessions of the other two did not name Harrington?

A Well, did not name him explicitly. It referred to him as the white man, the Caucasian, the patti, and such things of this nature, in such a way that with all four of them sitting at the witness table, what other conclusion could you come to that they were likewise referring to Mr. Harrington.

There is little doubt about it in my opinion.

I might remind the court also of the recent decision of Smith versus Illinois which was as I recall the major issue that confronted the court was a question of a witness as to

what your address is and he did not answer, before the answer came in -- the court sustained an objection to answering that question.

This court reversed again summarily without recourse to any harmless error rule for the simple defect as I understand it, no response to the question, "Where do you live?"

And it was held in citing again with approval of Brookhart versus Janis case that if there is a denial of confrontation of witnesses, it is a constitutional error of the first order of magnitude and no want of prejudice will save it.

I simply in reading that case to which eight members of this court, I think Justice Marshall was not on the bench at that time or did not participate at that time, but apparently eight members of this court signed their name to it subscribing assent to the words of Mr. Justice Black in the Brookhart versus Janis case that this type of thing would not be subject to any type of harmless error rule.

Q Are the statementsof those three in the record?

A Yes, every confession is in the record.

Q Can you tell me quickly where?

A Well, I pointed it out. I did not index my copy.c Mr. Cooper's statement begins at page 198 of the single appendix. Mr. Bosby's confession is on 273 of the single appendix.

Further confession by Cooper on page 321 of the single appendix. Mr. Rhone's statement, 397 of the single appendix.

Q Thank you very much.

A They are spread throughout.

Q Assuming that we should disagree with you on there being no harmless error rule in the Bruton type error, are you going to argue the ---

A Yes, I am.

By and large I might move on to that and by and large the chief evidence against Mr. Harrington was, other than the confessions, was a couple of people who worked in the store who fortunately lived to tell about it.

The proprietor of the store was a woman and another male clerk was in the store. The interesting thing about it was when these people reported the crime and made their statements to the police, the man without hesitation admitted that he said four Negroes carried this crime out.

The woman equivocated somewhat but also admitted that she had told the police that in her opinion four Negroes had carried the crime out.

It is, therefore, my contention that an astute attorney in defense of these gentlemen, at least in defense of Mr.Harrington, absent the various errors that have occurred in this case, shall certainly have a fighting chance for an

acquittal in this case, because if they cannot tell the difference between Caucasian and Negro, why perhaps other evidence that they testified to would be much weaker also.

I would ask the court to in its opinion attempt to spell out with great specificity, this Bruton, Roberts versus Russell error. It has been one that has hung around for many years. I am confident that the court did not spell it out in such a way that there can be little doubt as to what the court means.

The court is going to be inundated with petitions for certiorari for the next decade. I think the case that just preceded this one, Banks versus California, is an excellent example of the fact that the Griffin rule is apparently still being emasculated by the various lower level courts around the nation and to me there just is no question that it must be subjected to a reversability, per se, if the Brookhart versus Janis opinion is interpreted correctly by myself.

I just can't believe that this type of error is any different than the Gideon versus Wainwright error, if I look at the Sixth Amendment and read it I see the right to counsel and the right to confront witnesses in the same paragraph.

I could read that short portion of it. I am sure it is more familiar to the court than myself. And I did bring it along with me, because I saw the television show on Mr. Justice Black's birthday a few months ago where you referred

to the copy of the Constitution that you carry with you, and so I had it along with me in case I had to refer to it.

But I think if the Court will check the Sixth Amendment those two types of rights are set forth right beside each other in the Sixth Amendment. And I can't see that they can therefore be distinguished.

That the Gideon versus Wainwright case be given total retroactivity with no application of harmless error rule so must the error in the Harrington case, Bruton versus the United States, Roberts versus Russell, must likewise be given reversal without recourse to any harmless error rules.

It is just impossible to calculate the impact of this type of thing.

Q The majority of the court held in the Fifth Amendment there, the no comment rule, was the harmless error rule, didn't we?

A I beg your pardon?

Q The majority of the court held as far as the no comment rule was concerned it was subject to a harmless error test?

A That is the Griffin error.

Q Yes.

A That is correct.

Q So you say that the Bruton rule stands on a level above that?

A I do. I contend that it stands exactly along with the Gideon versus Wainwright type of error and ---

Q Or with other confessions?

A Well ---

Q What if it was the defendant's own confession that was illegally introduced?

A Well, that is one that is of the same magnitude and it has so been held.

Q You don't get the harmless error in those cases do you?

A You mean the Miranda type error?

Q No, just the coerced confessions.

A No, no, there is no harmless error in coerced confessions.

Q And, why? Because it is a confession? Because it is especially damaging evidence?

A Well, I read your majority opinion in Jackson versus Denno and I found it difficult to believe he could dissent in the Bruton case the way you did but perhaps that is because I am not astute enough to discern ---

Q That is the confession of a co-defendant?

A Yes, I know. And I contend that is much more damaging. I think the confession of a man himself is much more reliable index than the confession of a co-defendant.

Q Well, that is the point. That is the point.

A Well, I tried a case in Los Angeles. You probably will hear more about it. It involves a man by the name of Robert Massey who contends that he has the right to be executed and I think that Justice Douglas stayed the execution here a few weeks ago.

But he is now in San Quentin and he contends he has a right to be executed and the Supreme Court of California I guess agrees with him because they have gone along with him because his petitions do not have any attorneys represent him and things like this.

But I tried that case with the Bruton error in it, or I mean after the Bruton error was reversed and I got an acquittal of this man and of his co-defendant Mr. John Better and I think that the court -- anyone, anyone that has to check the impact of this type of thing, get in and try it one time and it is an insurmountable thing when the co-defendant makes a confession.

Because I think that people who sit on the jury will say, rightfully so, that only somebody with a warped mind would accuse somebody, but in the Massey case, very clear Mr. Massey came down the second time and testified that he had accused Mr. Better of this crime simply because he got mad at him. That he actually was not with him.

Just because he got mad at him.

In this particular case, the inference is that he

lied about it, but I don't think a confession by somebody himself would be subject to that same type of attack.

If I confess that I committed a murder, I think that is pretty reliable index of guilt. Quite reliable, as opposed to my accusing somebody else and sustaining the conviction of somebody else on my testimony without my getting on the stand for cross-examination.

I still have difficulty ---

Q Yes, but I would suppose that a man's own confession may be more reliable?

A That is what I contend.

Q Yes.

A And in Jackson versus Denno this was reversed per se.

Q That is right. But Bruton involved a confession of somebody else.

A And you feel that is not the same difficulty?

Q That is what I said, yes.

A I read that but I still don't understand it.

Q I suppose it is a very similar argument to what you have got here in this case.

A I am sure that is correct.

Well, I will defer to my opponnent at this time and save the remaining amount of time for rebuttal.

MR. CHIEF JUSTICE WARREN: Mr. Kline.

ORAL ARGUMENT OF JAMES H. KLINE, ESQ.

ON BEHALF OF RESPONDENT

MR. KLINE: Mr. Chief Justice and may it please the Court.

The respondent and the amici join the respondent are vitally concerned over the impact of Bruton versus United States and Roberts versus Russell.

We feel that these two cases will have a profound effect on the administration of justice throughout the various States.

Now, Petitioner Harrington would expand the impact of these two cases by, one, making a Bruton error, per se, reversible without applying any type of harmless error standard; and two, by making Bruton fully retroactive.

At this time I would like to tell this court the experience of California as to joint trials.

We have a penal code statute which authorizes joint trials and we have obtained statistics from the Los Angeles District Attorney's office with regard to joint trials for the year 1967 and 1968.

Statistics for these two years, from this particular county reflect that approximately 20 percent of the trials involve two or more defendants.

Now if this percentage prevails throughout the State, this represents a sizable number of cases in California.

For instance, in 1967 there was a total of 13,500 contested criminal matters tried in the Superior Court of California. In 1968 there was a total of 16,140 contested criminal matters tried in the Superior Courts throughout the State. As you can tell the figures are progressingly getting higher and if you go back ten years, you go back twenty years, if you go back thirty years, the aggregate number of cases affected by Bruton is truly staggering.

Now, let us turn our attention to Mr. Hanson's first contention that the Chapman harmless error rule is not applicable to a Bruton-type of situation.

As I have indicated in my brief, a vast number of cases subsequent to Bruton which have discussed this issue have held that Bruton is not automatically reversible. I submit that logic and and sound policy support this rule.

It is obvious that there are material variances in co-defendants' statements with regard as to their inculpating effect as well as to whether the fact they added critical weight to the prosecution's case.

Now if an automatic reversal rule is adopted by the court, then a Bruton situation would be reversed, regardless if the particular error conceivably played any part in the verdict, either on direct appeal or on collateral attack.

Indirectly this court has indicated in Gilbert versus California that a harmless error rule is applicable to a

Bruton-type situation.

There, if you recall, the petitioner had a confession used against him in which he was mentioned approximately 159 times. The petitioner there requested that this court overrule Delli Paoli at that time and this court declined to do so noting that the California Supreme Court had adopted a randum which had rejected Delli Paoli.

This court also noted that the California Supreme Court had held the particular Bruton errorharmless in Griffin and this court noted that the harmless error standard applied by the California Supreme Court was substantially in compliance with Fahy and Chapman. Therefore, this court declined to rule on Delli -- overrule on Delli Paoli at that time.

Now, I would submit that the fair import of these remarks is that Bruton is subject to a Chapman's harmless error statute, standard.

It should be noted that the Burton case was an extreme case factually. The co-defendant's statement was not admissable against the co-defendant Evans.

As a result, since it was inadmissable against Evans, there was nothing on the other hand in which to alleviate any possible pressures against Bruton.

Also, the identification evidence was much weaker against Bruton than against Evans. And as a result, on retrial Evans was acquitted and so, therefore, the Solicitor General

indicated because of these facts the case should be reversed.

Now we contend that the evidence in the instant case is much stronger than was the situation in Bruton.

Before I apply the Chapman harmless error standard to the instant case I would like to delineate six factors which I think is pertinent to any inquiry in applying Chapman to a Bruton type situation.

Thefirst factor to consider, of course, is the quality of limiting instruction given by the trial judge. If a particularly lucid and precide instruction is promptly given to the jury before the statement is introduced into evidence, I would think this would help alleviate some prejudice of an incriminating statement.

And I note with interest Fraser versus Cupp, which was rendered by this court yesterday in which in the context of an opening statement, this court indicated that a limiting instruction can be effected to that extent.

The second factor to consider, of course, is the nature of the co-defendant's statement. Did defendant assume his fair share of guilt? This court noted in Bruton that it is common with co-defendants to shift the blame, but if the defendant assumes his fair share of the guilt that is something to consider also.

The Third factor to consider also is the amount of detail concerning actions of other parties. In other words,

if the details in the incrimingating confessions is quite skimpy in comparison with the other prosecution evidence I would think this is the pertinent inquiry in applying Chapman.

The fourth factor to take into consideration is the weight of the other evidence. Now if the weight of the other evidence is quite strong, then it would be my contention that the jury would be more unlikely to disobey a court's limiting instruction.

And the fifth factor to consider, of course, is the nature of the defense. Did the defendant offer any testimony in support of his defense or did he just put the prosecution to its proof.

Q Would you add one more to the extent of how many confessions naming the same man were introduced?

A I am sorry, I didn't hear that, your Honor.

Q Well, suppose you had five men jointly tried, six.

A Yes.

Q And five made confessions naming the sixth one. Would you take that into consideration that you had five different ones, emphasizing over and over again?

A Yes, your Honor. I think that is a pertinent factor to consider in applying Chapman.

Q Well, there were three here, weren't there?

A Yes, there were three co-defendants, your Honor,

whose statements were introduced in evidence but has been admitted by counsel that Rhone's confession is not subject to a Bruton type error because he was ---

Q He took the stand.

A He did testify on the stand and he was available for cross-examination and all the parties did in fact cross-examine him. And in that regard I would like to emphasize the fact that Rhone did admit making the statement and hints the situation with Rhone is vastly different from Douglas versus Alabama, where under the guise of refreshing a witness' recollection, the prosecutor asked the witness to either deny or affirm certain statements that he made in his confession.

This court indicated that since the wintess had declined to answer any of these questions that the other co-defendant was denied his right of confrontation because he had not admitted making such a statement.

Now that situation is different from this situation because Rhone did submit such a statement.

Q The other two confessions didn't mention Harrington, did they?

A That is correct.

Q The other two confessions mentioned the only white man in the group?

A Yes, that is true, your Honor.

But before I turn my attention to the other two

confessions, I would like to emphasize the fact that Rhone is the only person that does name petitioner Harrington and he is the only one that details the activities of Rhone, both before the robbery and after the robbery.

Rhone was quite explicit while telling where Harrington was while in the store at the different events that occurred in the store. He also indicated that ---

Q Well, the other two in their confessions never said that the only white man was Harrington?

A No, he did not. The only reference is to a white man.

And in that regard I would like to turn my attention to Bosby's statement.

Q Well, excuse me, if we should decide that a harmless error doctrine is applicable in this Bruton-type situation, do you think we ought to decide whether this record shows that the error is harmless or send it back?

A Your Honor, I am very happy you asked the question, because I think the lower court has used the standard which is the equivalent of Chapman and may I refer your Honor to page 437 of the single appendix in which it is part of the opinion of the lower State court.

Now the lower State court summarized the admissible evidence besides the three co-defendants' confessions. And they said that in summarizing the admissible constitutional

evidence, "It is virtually inconceivable that any jury could have escaped the conclusion that Harrington was engaged in attempted robbery and was answerable for the murder committed by his co-conspirator in the course thereof."

Now it is our contention that it is virtually inconceivable is the equivalent beyond a reasonable doubt.

Q But that means virtually inconceivable to the court. Is there a difference between the court saying it is virtually inconceivable to us, on the one hand, and, on the other hand, it is virtually inconceivable that a jury could have found it virtually or a juror could have found it virtually inconceivable?

A Your Honor, I think the precise language of the court is that it is virtually inconceivable that any jury could have escaped the conclusion, so I think the court itself has answered your Honor's question.

Q Well, there is still a difference between saying a jury or a juror because if you have just one juror who felt that Harrington was not the man and that that would have prevented a returning of a guilty verdict, wouldn't it?

A Your Honor, I would disagree with the test as you propose.

Q Well, I am not sure that is the test, but if it were the test, but what I am asking you, suggesting to you, is that there is a difference between the court saying that it

doesn't believe that a jury could have escaped the conclusion and the court facing up to a very difficult problem, which is whether a single rational juror, a single rational juror, might have arrived at the conclusion that he could not find Harrington guilty beyond a reasonable doubt, absent these statements in the confessions.

A I would agree, it would appear that those are two different matters. But I would disagree with the applicability of that particular statement.

Q You would say that we ought to look at it from the point of view of the jury as a whole?

A Yes, jury as a whole. Because after all ---

Q But that is different, do you agree that that is different from the point of view of the court, looking at it from the point of view of the court himself?

A Well, I think the court can look at the case as a whole. evidence as a whole, and determine if any particular error in the context of the evidence as a whole is prejudicial where a jury could conceivably reach any different verdict but for the fact that the error was not admitted.

Q I understand that these are subtle, psychological inquiries, psychological differences of the greatest subtlety and perhaps ---

Q When you get into -- excuse me.

Q Go ahead.

Q When you get into terms of framing the harmless error test in terms of second-guessing what the jury is, you are in deep trouble aren't you?

A Yes, I would think so.

Q Yes, and the real question here is whether or not it is unconstitutional for a State to have a harmless error rule which says, "We the judges will take a look at this record and satisfy ourselves as if it were a trial de novo, so to speak, and say whether this is a verdict that should be permitted to stand.

Isn't that what it comes down to? And the question is whether that is unconstitutional.

We reverse cases, and we did one the other day where because we couldn't tell whether a verdict rested on one ground which was impermissible or another ground. We can't tell. And the case has to be sent back.

Q Yes, I would agree with that position. Yes, your Honor.

Q It seems to me a shadowboxing a little bit if you try to talk about the Chapman rule in terms of second-guessing, either in terms of one juror or in terms of a jury as a whole, and appellate second-guessing what a jury would have done under any kind of evidence.

A Yes, your Honor.

Q But I suppose there is a question, counsel, as

to whether the standard of harmless error adopted by a State court should be considered in terms of State law?

A Yes, your Honor.

Q But what you are talking about here is the impact of the deprival of a Federal constitutional right. You are talking about the application of a standard that this court fixed in the interpretation and standard that this court laid down in the Chapman case.

A Yes, your Honor.

It is true that the standard utilized by the lower court is the State harmless error standard, but it is my contention that in view of the language of the lower court that the harmless error standard utilized as such is the equivalent of Chapman.

I would like to point out that in Gilbert versus California a comparable situation was there, too. There the California Supreme Court had utilized the State harmless error standard in reference to the Griffin error and this court indicated that that standard was substantially equivalent of Fahy and Chapman and the result indicated that it need not overrule Delli Paoli.

So I would indicate that the same reasoning it can be applied here since it is virtually inconceivable what I would equate beyond a reasonable doubt.

Now, let us turn our attention to Bosby's statement.

In regard to Bosby's statement, counsel for petitioner Harrington made an interesting comment and this is contained at page 237 of the single appendix, and he states as follows:

In reference to Bosby's statement, "Largely here in the Bosby statement we have a statement which is not in essence terribly incriminating against Harrington as it was originally given. He didn't even know Harrington's name."

That is true. He didn't even know Harrington's first name. He further described Harrington as a blond-headed fellow -- and this is contained at page 286 of the single appendix. All the prosecution witnesses in the instant case indicated that the defendant was a red-haired man, that he had bright red, shiny hair and yet Bosby describes him as a blond-headed fellow and if the jury literally followed that description, they would think that some other defendant besides Harrington was involved.

Furthermore, in comparison with Rhone's confession as compared to Bosby's confession, the details of the white man is extremely limited.

For instance, Bosby indicated that he presumed that the white man entered the store with Charles. Bosby did not know where the white man was at the time of the gunshot. Furthermore, Bosby never saw him with a gun. So when you compare Harrington statement -- when you compare Rhone's statement which does not fall within the Bruton ambit, Bosby's

statement is extremely limited with reference to the incriminating details as to the white man's role in the robbery.

Now let us turn our attention to the two statements of Cooper. Cooper actually made two statements, the first statement, of course, is an exculpatory statement. There he denied any involvement in the crime whatsoever. He merely indicated that he entered the store, approached the cash register, attempted to cash a check, noticed that there was a scuffle, a subsequent gunshot, he became frightened and ran out the store, got in his car and three other people got in his car.

Interesting enough he mentions the fact that there were other Caucasions around the store, before he entered the store. While he was attempting to cash the check at the cash register he indicates that there was a white guy behind him.

Now we don't know if this white guy thatwas behind him refers to petitioner Harrington or to some other Caucasion that Cooper had made reference to before.

He also indicated that there was a white boy in Cooper's car at the time Cooper got in the car. At no time did Cooper get into -- At no time did Cooper see the white boy with the gun, which is again at variance with the prosecution testimony.

Details of the white man's role in the robbery is even more skimpy than Bosby's confession.

Now, Cooper's second statement, that is, the Cooper's confession is only three pages long. It has a few more details of what the white man did. The four of them did go to the store. The four of them did go into the store. The white man followed Cooper into the store and that is the only reference that we have with reference to the white man as to Cooper's confession.

Again, we don't know what transpired in the store. We don't know whether Harrington had a gun. We don't know whether Harrington tried to get in the cash register or not.

In short, the references to Cooper and Bosby's statement are very limited in describing the activities of the white man while in the store. The white man's role in planning the robbery we don't know about and in comparison with Rhone's confession, Rhone is quite explicit on all these things and I would contend that Cooper's and Bosby's statements are merely cumulative of detail which was admissible in Rhone's confession.

In addition, the other evidence presented by the prosecution was exceedingly strong because this was no circumstantial evidence as was the situation in Chapman. We have not two witnesses; we have three witnesses who positively identified petitioner Harrington.

We have Mrs. Robbins, the proprietor of the store, her brother Mr. Ashcraft, as well as a customer by the name of Mrs. Williams.

Now, two of these witnesses described Harrington as a red-haired chap. It should be noted at the time of trial Harrington did not have red ahir. He had black hair, because Harrington had dyed his hair black after the robbery, and I would claim that this is significant in strengthening their identification since they recognized the fact that this was the red-haired chap that they had seen going into the store.

Furthermore, we have Harrington's very incriminating statements he made to the police. Harrington admitted the fact that he was the red-haired chap that entered the store with three Negro companions.

That after the murder he ran to the car with three other Negroes. That subsequent thereto, he dyed his hair red, he shaved off his red mustache. And I must agree with the lower court, it is virtually inconceivable that any jury would have come to any other conclusion than it did even absent the error of admitting Bosby's and Cooper's statements.

Furthermore, I would think that the -- as I have indicated earlier -- that the lower court has resolved the harmless error using a Chapman test and I would analogize to the situation in Gilbert versus California, which this court indicated that when the California Supreme Court utilize a standard comparable to Chapman that is permissible.

And I would think the lower court that since the lower court did the same thing in the instant case, that that rationale

should be applicable here also.

Next, I would like to discuss retroactivity. I approach this subject with a little bit of concern. It is my purpose in discussing retroactivity with the hope that you would reconsider Roberts versus Russell.

Now this court has indicated there are three criteria in determining whether a rule should be prospectively applied or retroactively applied. They are the purpose of the rule, of the reliance on the old rule, the effect on the administration of justice.

Now the purpose of Bruton obviously is to insure the reliability of the fact-finding process but that purpose need not necessitate the fact that the rule has to be applied retroactively.

For instance, in Johnson versus New Jersey, this court indicated there is a question of probability, you have to look to see if there are other safeguards. And, by comparison I would compare the situation to Stovall versus Denno which this court limited the retroactivity as the lineup cases.

Now surely there can be no greater affecting the reliability of fact-finding process than to have a suggested lineup and a mistake in identification. Certainly that leads to miscarriage of justice. Yet this court indicated that in that situation it cited to limited retroactivity.

Now I would quarrel with this court with the fact

that Bruton does not affect the integrity of the fact-finding process. To me it does not. And I would rely on the language of Judge Leonard Hand who stated that Bruton -- Delli Paoli procedure rests on a fiction, it still helps the jury in ascertaining the truth.

I would like to emphasize the fact that statements of co-defendants traditionally have been viewed with suspicion and distrust. A statement of a person himself has a lot more impact on a jury than a statement of a co-defendant who is bringing somebody else and I would submit that a limiting instruction in the proper case in view of the fact that a co-defendant ---

Q Are you also arguing for reconsideration of Bruton, is that it?

A No, your Honor, I am asking for reconsideration of Roberts versus Russell. My discussion here is only applying the case retroactively and I would hope that this court would reconsider Roberts and I am just trying to indicate that cases before Bruton should not have to comply with the Bruton new constitutional rule because of the fact of reliance.

For over 70 years this court has indicated that Delli Paoli procedure is all right. As late as January 23, 1967, in Spencer versus Texas, this court has cited Delli Paoli and endorsed Delli Paoli and as late as June 12, 1967, in Gilbert versus California, this court declined to overrule

Delli Paoli and I submit that as late as 1967, in view of Spender and Gilbert, that it would have been most difficult to predict the demise of Delli Paoli.

It should be noted that Jackson versus Denno which this court indicated for Bruton was decided June of 1964, and Gilbert is nearly three years later and yet this court declined to overrule Delli Paoli.

And I would like to emphasize the fact that this thus will affect the significant number of cases throughout the courts throughout the land. I think this new constitutional rule adopted in Bruton should be applied prospectively applied because Bruton only assists those who really band together, those vicious criminals who are engaged in robberties such as in the instant case.

And Bruton helps those criminals who have been in jail the longest. If the retroactivity doctrine is still adhered to by this court, that means that a conviction that is 20 years old would have to be reversed and the chances of a retrial are almost di minimus because the fact that witnesses cannot be located and the fact that witness' recollection fade.

A fully retroactive group, along with the fact that it is not subject to a harmless error rule would truly have a profound effect on the administration of criminal justice in every jurisdiction. This is demonstrated by the fact that

we have over 28 amici joining the respondent.

This shows the concern of the States as to applying this rule retroactively, so I earnestly solicit the score and earnestly ask this court to reconsider Roberts versus Russell since Roberts versus Russell had not been briefed and these considerations are not being brought to the court's attention before its decision.

So, therefore, we would urge that the judgment of the lower court be affirmed.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Hanson, you may proceed.

REBUTTAL ORAL ARGUMENT OF ROGER S. HANSON, ESQ.

ON BEHALF OF PETITIONER

MR. HANSON: Mr. Chief Justice Warren, and may it please the Court.

As far as the Retroactivity effects of this case goes, I am sure that this court has pondered that time and time again in its decision on Barber versus Page and Berger versus California.

I feel that the damage that is going to take place in this nation has already taken place by the judgment in retroactivity by this court.

It is my contention that if we are going to have a minimum of litigation in this country at the appellate level,

the only way that that can really be taken care of is the reversibility per se, because if a court honestly, honestly applies a Federal harmless error rule which I think is the very minimal that is going to come out of this discussion today, if it honestly applies it, it has to declare beyond a reasonable doubt that the error complained of did not contribute to the confession.

Now, I simply say that in 999 cases out of 1,000 I just find it inconceivable to believe that if a court honestly applied that rule ---

Q Without contributing. Would you spell that out a bit? You say this in terms of the jury or the juror, which?

A Well, in the Chapman decision, the Court says per Mr. Justice Black, "We prefer the approach of this court in deciding what was harmless error in our recent case of Fahy versus Connecticut."

There we said, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

And a little bit later Justice Black says, "There is little if any difference between our statement in Fahy versus Connecticut about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of constitutional error to prove beyond a reasonable doubt that

the error complained of did not contribute to the verdict obtained."

And it would seem to me ----

Q And he also says that apparently without meaning to make any difference between the two tests that, he says, "Absent the constitutionally forbidden comments, whether honest, fair-minded jurors might very well have brought in not-guilty verdict." Did you consider that to be the same test?

A Well, I think it is indulging in the type of analysis that Mr. Justice Harlan commented on a bit ago, attempting to second guess a lay jury. I think it is dangerous and I also think that any court honestly applying that Federal harmless error rule cannot come to any other conclusion that the majority of these cases must be reversed.

And I know from experience in California that the lower courts out there are not going to do it because you are too close to the ballgame out there.

There has been crimes that have been committed in the State. The people are insensed about it. And we have to take it to Washington where we have nine men that take a little distant viewpoint of these things in analyzing on the basis of what has been promulgated by this court heretofore.

And I think it is very clear that the Federal harmless error rule is a very minimal thing that is going to be applied to this case if it is applied at all.

And I contend this court really is not going to apply it. If the court applies the Brookhart versus Janis case with the Bruton case ---

Q I must say, Mr. Hanson, I am puzzled. I don't know what your distinction is. You said that any test related to a juror or jurors, was a dangerous test and that you favored that formulation did not contribute to the verdict. Well, what is the difference?

A Well, perhaps there is no great difference. I gatherered Mr. Justice Harlan felt there might be some problem in attempting for a court to say to put itself in the position of a jury and say "Do we as a court think that this jury would have come up ..."

Q Well, you will recall Mr. Justice Harlan dissented in Chapman. I am interested in your view. What you would suggest would be the proper formulation.

A Well, there is little doubt in my mind that jurors can't tell the difference in this error. Because our Supreme Court in California has exceeded that even further than that. They have granted the fact that even judges can't tell the difference.

Q Yes, but how do you test -- what I am trying to get from you is how do you test whether or not, beyond a reasonable doubt a judge may say that the error did not contribute to the verdict?

A Well, I agree, that is a problem. But if the Court will not apply harmless error rule we don't have the problem.

Q I am assuming, Mr. Hanson, that we are going to apply the harmless error rule. I am trying to get some help from you as to precisely how you test whether or not the error did contribute to the verdict.

A Oh, I just can't believe that an error of this magnitude can ever be said noncontributory. I just can't believe that it can be done. It is beyond my concept.

Q What do you mean an error of this magnitude? Do you mean any alleged Bruton violation?

A Yes.

Q Or a violation, a Bruton violation as serious as this one was because this is so lacking in a clear violative of the quality of Bruton that your brother counsel says this is not even a Bruton case.

A Well, I don't agree with that, of course.

Q The fact is that the one person who identified your client by name took the stand and was subject to cross-examination. So that part of it is not a Bruton case. And the three people who did not take the stand did not identify your client.

A Well, they certainly did by describing who he was.

Q You will recall they talked about a white man. Well, there are a good many millions of white men in the world.

A Well, I am aware of that but if that argument holds any water then they must have convicted him on something else beside those statements.

Because if the statements were to be believed, that they were exculpatory as to Mr. Harrington, why presumably he wouldn't have been convicted.

Q Mr. Hanson, wouldn't you agree that there is a great deal of difference between these two considerations.

On the one hand what does the court conceive of as the impact of this particular error, namely the admission of the confessions of the co-defendants? That is No. 1.

No. 2. Does the court believe that considering the record, the rest of the record without reference to the confessions of the co-defendants, is there beyond reasonable doubt in the court's mind whether from its point of view or its assumption of the jury's point of view, convincing evidence beyond a reasonable doubt that the man was guilty?

I am asking whether you agree that those two things are different; that is to say, one, did the admission of the confessions of the co-defendants contribute to the result or two, eliminating the confessions of the co-defendant, does there remain in the record evidence beyond a reasonable doubt--to shorten it up -- that the defendant was guilty?

A Well, point No. 1, I certainly agree there is a marked difference between those two statements, a very marked difference. I think the second statement is more analogous to the Federal harmless error rule, namely, if there is an error of this magnitude in the case, did that contribute, and I think in most all cases you have to say it did contribute.

Q Well, that is the first one. You heard the Banks argument. That is the first alternative that I put. You heard the Banks argument here in the preceding case?

A Yes, I did.

Q And there we were talking about a standard used by the California court to the effect that looking at the evidence as a whole and discounting the comment, the improper comment, the court felt that beyond a reasonable doubt this fellow was guilty.

A I am aware of that. That is the so-called State harmless error rule.

Q That goes to an evaluation of the total record absent the unconstitutional aspect of it and I was suggesting that perhaps there was a difference between that and an evaluation of whether the error contributed to the verdict.

A I quite agree. I think there is a marked difference between those two types of analysis. I think the first one is typical of the State of California's position, and the latter one is the Federal harmless error rule, which

Justice Black in the Chapman case said that when there is a constitutional error of Federal nature we prefer to apply our Federal harmless error rule to the case.

MR. CHIEF JUSTICE WARREN: Mr. Hanson, the court appreciates very much your having accepted this assignment to represent this indigent defendant. We consider that a real public service. We are always comforted by the fact that lawyers are willing to do that. So we appreciate it very much.

MR. HANSON: Thank you, your Honor.

MR. CHIEF JUSTICE WARREN: And, Mr. Kline, we appreciate the diligent and fair manner in which you represented the State of California.

MR. KLINE: Thank you, your Honor.

(Whereupon, at 1:45 p.m. the oral argument in the above-entitled matter was concluded.)