

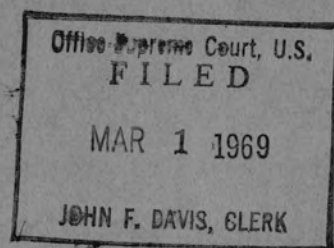
Supreme Court of the United States

OCTOBER TERM

In the Matter of:

----- X
:
PHILIP CARDINALE, JR., :
:
Petitioner; :
:
vs. :
:
STATE OF LOUISIANA, :
:
Respondent. :
:
----- X

Docket No. 76



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Place Washington, D. C.

Date February 24, 1969

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300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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Nathan Greenberg, Esq.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 ----- x
4 PHILIP CARDINALE, JR., :

5 Petitioner; :

6 vs. :

No. 76

7 STATE OF LOUISIANA, :

8 Respondent. :
9 ----- x

10 Washington, D. C.

11 February 24, 1969

12 The above-entitled matter came on for argument at

13 11:10 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 ABE FORTAS, Associate Justice
23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

25 NATHAN GREEN BERG, Esq.
848 Second Street
Gretna, Louisiana
Counsel for Petitioner

PRESTON H. HUFFT, Esq.
Special Counsel to
District Attorney
Attorney for Respondent
-- --

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: Case No. 76, Philip
3 Cardinale, Jr., Petitioner, versus State of Louisiana,
4 Respondent.

5 Mr. Greenberg, you may proceed with your argument.

6 ARGUMENT OF NATHAN GREENBERG, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. GREENBERG: Mr. Chief Justice, may it please
9 the Court.

10 My name is Nathan Greenberg. I am an attorney from
11 Gretna, Louisiana. I represent the defendant in this case,
12 Philip Cardinale, Jr., who was the petitioner in this
13 honorable Court for a petition for Writ of Certiorari.

14 The petitioner was convicted of the crime of murder
15 in Plaquemines Parish, Louisiana and he was sentenced to death.
16 For his appeal we originally perfected some 14 bills of
17 exceptions which we took to the Supreme Court of Louisiana and
18 we are here before Your Honors today on what would probably
19 amount to two of the bills of exceptions which had been combined
20 together in one.

21 The crux of the issues before Your Honors today is
22 the effect of testimony relative to prior offenses of the
23 accused where the accused has not taken stand in his behalf
24 and where actually we submit that the use of the prior convic-
25 tion in this case was to show nothing more than a disposition

1 to commit crime, which we submit would violate the due process
2 clause of the 14th Amendment.

3 The way this developed in this matter was like this:
4 The accused turned himself in in Tuscon, Arizona and while he
5 was in custody, he was interrogated by the police there. This
6 was pre-Miranda and subsequent Escabito. So the Escabito rule
7 applies.

8 During the course of his custodial interrogation,
9 the petitioner volunteered that he had previously been
10 convicted of an offense in Louisiana which offense was actually
11 a crime against nature. After he served his time in the Orleans
12 Parish prison that he went looking for the girl who had charged
13 him with this crime, according to him, allegedly with a gun
14 for the purpose of killing her.

15 Now, he did not find the girl, he did not commit
16 any offense in connection with it and his statements relative
17 to the prior offense were generally that -- I'll see if I can
18 read it -- during the course of his custodial interrogation in
19 Tuscon, Arizona he referred to a prior conviction occurring in
20 Louisiana which prior conviction was for a crime against nature
21 occurring on July 12, 1963 and causing the petitioner to be
22 sentenced to serve three months in the Parish prison on March 25,
23 1964.

24 Petitioner stated during the course of his custodial
25 interrogation that after he served his time in the Orleans

1 Parish prison, he went looking for his alleged prosecutrix
2 with a gun with a stated purpose of killing her. However, he
3 never did find here and, therefore, no further offense was
4 committed.

5 Now, in essence, what we have here is a situation
6 where this reference to the prior offense served absolutely
7 no useful purpose, we respectfully submit. The only purpose
8 this thing could possibly serve, we submit, is to try to
9 prejudice the jury, to show the jury, that this defendant is
10 a bad man.

11 This, of course, is why we are here before Your
12 Honors today. Because here we had a situation where this
13 could very easily have been separated from the remainder of
14 the statements of the accused. This could very easily have
15 been excluded, notwithstanding the fact that we sought to
16 exclude it from the time it first came up -- came up in the
17 opening statement, came up in the interrogation of the police
18 officer, came up in the closing argument by the District
19 Attorney.

20 Notwithstanding the fact, that we sought to exclude
21 it at each level of the proceedings, or each stage of the pro-
22 ceedings it was admitted and it was repeatedly referred to in
23 the closing argument.

24 Q Did you seek to exclude it on the basis of the
25 United States Constitution?

1 A In the District Court, if Your Honor please,
2 this trial occurred in May of 1966. This was prior to the
3 ruling of Your Honors in the Spencer case and of course we
4 picked up the language of the Spencer case which I believe was
5 in 1967 as a basis of relying upon the application for the Writ
6 to this Court.

7 The wording of the dissenting opinion by Mr. Chief
8 Justice Warren ---

9 Q I think you understand my question.

10 A Yes, sir.

11 Q I am wondering if you timely raised or when you
12 raised any Federal question in this case.

13 A Upon the application for the Writ.

14 Q Of Certiorari in this Court?

15 A Yes.

16 In the trial court what had happened was that the
17 State sought to justify the admissibility of the conviction on
18 a basis of propensity or pattern and of course we argue to the
19 Court at this time that there was no pattern because the prior
20 offense was crime against nature and this of course was murder
21 and of course the only reference to the alleged looking for
22 the prosecutrix with a gun and so forth related to an incomplete
23 offense.

24 We did not succeed in this respect. The State then
25 came in and sought to justify the admissibility of the testimony

1 on the theory that this was a part of the entire confession and
2 that the entire confession as a whole must go in, that Louisiana
3 has such a statute requiring this, that the entire confession
4 go in and since this defendant said this, regardless of what it
5 was, it must go into evidence.

6 Of course we respectfully submit that this should not
7 be so. For example, suppose the defendant made a statement
8 reflecting upon character or integrity of jurors, for example.
9 Should this go in because it is part of an alleged confession.

10 Should the prosecution be entitled to use this as an
11 attempt to prejudice the jury against the defendant. We
12 respectfully submit that the issue in this case is quite
13 simple. The issue is, to what extent the evidence of prior
14 convictions should be allowed to go in on behalf of the
15 prosecution?

16 Q Was the Federal question which you raise here
17 decided at all in the lower court?

18 A No, sir, it was not.

19 Q So there has been no State decision on any
20 Federal question?

21 A That is correct.

22 Q Where did we get jurisdiction to hear the case?

23 A Because of the contention that the Constitution
24 was violated with reference to the admissibility of the
25 evidence per se. In other words, the Louisiana Supreme Court

1 held that the confession must be considered as a whole.

2 Q When a case comes here from a State court does
3 not jurisdiction depend upon the State court having decided
4 the Federal question?

5 A The Federal question, if Your Honor please, in
6 connection with this matter was not raised in the State court
7 for the reason that in the trial court there was no expression
8 which actually hit this on the button as it did on the dissent-
9 ing opinion in the Spencer case which came after this trial in
10 the State court.

11 Q When you come to a State Supreme Court the error
12 was not assigned and the bill of exceptions is a Constitutional
13 error, wasn't it?

14 A No, sir, it was not. We originally ---

15 Q And the State court opinion does not treat it
16 on the ground of Constitutional error, do they?

17 A No, sir, it did not. We took the ---

18 Q What is the answer to Justice White's question?

19 A The issue as to Constitutionality was not raised
20 prior to the time of the preparation of the application for
21 the Writ to this Court.

22 Q Then do we have any jurisdiction?

23 A Well, we submit that the Constitutional issue
24 is present, if Your Honor please, that this is a question where
25 we have raised a Federal question. Perhaps the State may not

1 have passed on it but even though the State may not have passed
2 upon it, it has been raised in connection with the application
3 for the Writ.

4 Q Where in the record is the exact language of
5 the objection?

6 A I believe that I referred to it at the Transcript
7 Page 496 to 510.

8 Q Where is it? 496?

9 A Through 510.

10 Q You don't have it printed.

11 A In the appendix we refer to the bill of excep-
12 tions which bill of exceptions set forth the actual reference
13 as to the manner in which it was raised. In the appendix I
14 can refer Your Honors to that.

15 Q It just says you objected to it.

16 A Yes, sir, we did.

17 Q But in no place did you mention that you object
18 on the grounds that it violates any provision of the Constitution.

19 A Yes, sir, that is correct.

20 We did raise other issues relative to the Constitu-
21 tionality of various other matters in the course of the case.

22 Q As of the bill of exceptions.

23 A I am looking at the appendix here and particularly
24 the bill of exceptions, No. 3, which appears at Page 9, 10 and
25 11 of the appendix and bill of exceptions No. 10, which appears

1 at Pages 12, 13 and 14.

2 Q Well, I have skimmed through 9, 10 and 11 and I
3 don't see U. S. Constitution anyplace.

4 A This is correct.

5 Q So you didn't raise it?

6 A Not in the district court, no, sir.

7 Q This bill of exceptions is in the Supreme Court,
8 isn't it?

9 A No, this bill of exceptions was prepared and
10 submitted to the trial judge.

11 Q What was submitted to the Supreme Court of
12 Louisiana?

13 A These bills of exceptions.

14 Q And no place is the Federal question raised.

15 A No, sir. Not as to bill of exceptions No. 3
16 or bill of exceptions No. 10.

17 Q Well, my answer was noplac?

18 A That is correct.

19 Well, now, there were -- permit me to say this --
20 we did raise other Federal Constitutional questions in other
21 bills but this was not the basis of the application for the
22 Writ.

23 Q You argue in your briefs, or orally, that this
24 was unconstitutional under the Federal Constitution.

25 A The exact question which was raised in the

1 application ---

2 Q The one you are arguing now?

3 A No, sir, we did not.

4 Q Do you have any authority to the effect that
5 we have jurisdiction in such a situation?

6 A Well, if Your Honor please, the issue which
7 we raise herein is one which really developed since the trial
8 of this case. This case was concluded, I believe, on May 5,
9 1966 and the issue which was raised was actually pinpointed
10 in Your Honors' decision of the Spencer case which was decided
11 by this honorable Court in 1967.

12 Insofar as the focusing of attention of this issue
13 was concerned, at that time the bills of exceptions had already
14 been signed, the appeal had been lodged in the State Supreme
15 Court and there was no way in which the issue could be raised
16 at that time. For the very simple reason that under the
17 State practice and procedure we have to raise the bills of
18 exceptions, the basis of the objections to the admissibility
19 of the evidence, have them signed by the Court and then we
20 take the appeal.

21 So there was really, we submit, no way in which we
22 could raise the issue at that time because the matter had already
23 been tried, submitted and the trial court had lost jurisdiction.

24 Q Do you take any comfort out of the opinion of
25 the Court in the Spencer case?

1 A Yes, sir, we do. This is the entire basis for
2 the application for the Writ. We respectfully submit that
3 the opinion in the Spencer case both majority and dissent would
4 fully indicate that the position of the defense in this case
5 was correct, that it would be violative of the due process
6 clause.

7 In the Spencer case, in the majority opinion, the
8 majority stated: "Petitioners do not appear to be arguing that
9 the Constitution is infringed if a jury is told of a defendant's
10 prior crimes". And this, of course, is exactly what happened
11 in this particular case. The Spencer case was a habitual
12 criminal, a multiple offender situation, out of Texas. Of
13 course, here we don't have this case at all because here we
14 have a situation where the only thing which is involved here
15 is the question of the defendant's prior offense coming into
16 evidence where the defendant has not taken the stand, has not
17 sought to offer any character evidence or anything of this type,
18 and what, in essence, has occurred here is that the prosecution
19 said, "Well, since you, Mr. Defendant, made this statement
20 during the course of this confession we are entitled to bring
21 it into evidence."

22 Q What do you get out of the sentence that you
23 just read from the majority opinion to help you?

24 A We submit that this actually leaves our question
25 open. And as was pointed out in the dissent, it leaves the

1 question open here as was stated in the dissenting opinion.

2 While this Court has never held that the use of
3 prior convictions to show nothing more than a disposition to
4 commit crime would violate the due process clause of the 14th
5 Amendment, our decisions exercising supervisory power over
6 criminal trials in Federal courts as well as decisions by
7 Courts of Appeal and of State courts suggest that evidence
8 of prior crimes introduced for no purpose other than to show
9 criminal disposition would violate the due process clause.

10 This, of course, is exactly the situation ---

11 Q But is that applicable here. I know the State --
12 I think I recall that the State Supreme Court did not rely on
13 this point but isn't it a fact that this prior conviction was
14 part of the story as to the motive, the alleged motive, for
15 the petitioner's killing this woman?

16 A Well, Your Honor is talking about the propensity
17 of pattern.

18 Q No, I am not either. I am talking about motive.
19 Didn't the State allege that the reason that this petitioner
20 killed this woman was that she had been the prosecutrix in the
21 prior conviction?

22 A Yes, sir.

23 Q Now, how could the State have proved motive --
24 am I right, too, that the State Supreme Court does not rely
25 upon that?

1 A This was a different woman.

2 Q This was a different woman?

3 A Yes, absolutely.

4 Q It was a different State, wasn't it?

5 A No, same State.

6 Q Same State?

7 A Yes, sir.

8 Q But he was convicted for killing a different
9 woman than the one that he had this alleged motive for killing?

10 A Yes, sir.

11 In other words, we were placed in a rather anomalous
12 position here where the basis of our application here really
13 occurred while this thing was pending, if Your Honor please,
14 and we have a situation where I must admit in all fairness to
15 the Court that the direct matter raised here today was not
16 submitted to either the trial court or to the Louisiana Supreme
17 Court.

18 However, in our research we discovered the basis
19 of our coming up here on a Federal question subsequent to the
20 trial, subsequent to the time that the bills of exceptions had
21 been perfected and of course subsequent to the time that the
22 brief had been prepared in the Louisiana Supreme Court.

23 Q But you still don't have any authority for this?

24 A We don't have any authority to come before
25 Your Honor and say, "I know that I can point to such and such

1 a decision" and say that this is the basis of it.

2 Q No, no. I mean you don't have any authority
3 to say that you can raise in this Court for the first time
4 a Federal question that was not raised, nor decided, nor submitted
5 by the State Court.

6 A I do not. However, if Your Honor wants some
7 research on this we would be glad to check the matter out and
8 submit a supplemental brief in connection with the issue.

9 We came up solely on the basis of the prior offense
10 coming into evidence which we felt was an unconstitutional act
11 on the part of the prosecution. We raised it in a different
12 way. There is no question about that. However, it really is
13 a question of a scope.

14 Q I suppose there still remains a Federal forum
15 you can get this question decided in.

16 A Well, in the event our rights of appeal would
17 be terminated because we came up here in a normal course of
18 the appellate review then of course we would have to resort to
19 habeas corpus in the Federal Court system to present the issue.

20 In other words it would be just like a situation
21 where subsequent to Miranda, for example, a defendant was tried
22 and didn't have adequate counsel and then he came in and
23 sought to review it by way of habeas corpus in the Federal
24 Court system.

25 Q Does the Louisiana statute that your Court relied

1 on, do you find that sort of a statute in other States?

2 A The statute in connection with the entirety of
3 a confession?

4 Q Yes.

5 A We have not researched this from the standpoint
6 of other States, but my recollection is that there are some that
7 have a similar statute.

8 Q Louisiana has an entirely different historical
9 background, doesn't it, in its ---

10 A Not in criminal law.

11 Q Doesn't it?

12 A Louisiana has a different historical background
13 from the standpoint of development of the law in the civil law
14 area.

15 Q In the civil law area?

16 A Yes, sir.

17 However, insofar as the law of crime is concerned
18 it is taken from the common law.

19 Q That is interesting. You are sure about that,
20 are you?

21 A Oh, yes, absolutely. Our civil law is based
22 upon the Code of Napoleon which in turn is based upon the
23 Code of Justinian. However, in the law of crimes our law is
24 taken directly from the common law. It is, of course, codified
25 by statute today.

1 Q Yes.

2 A We respectfully urge Your Honors' consideration
3 of the issue which is raised and which was, as was pointed out,
4 raised for the first time in this application for a Writ.

5 We respectfully request the indulgence of the Court
6 for additional time within which to file a supplemental brief
7 to research the issue raised in connection with the matter of
8 jurisdiction. It is of course true that the habeas corpus
9 remedies which are available to petitioner have not been
10 utilized.

11 However, we felt that inasmuch as the time for
12 appeal had not yet run and inasmuch as the opportunity still
13 presented itself for this case to run the gamut through the
14 course of the appellate review that we should ask for the
15 application of the Writ of Certiorari, which we did. And of
16 course we realize that we did not raise this Constitutional
17 issue in the District Court or in the Supreme Court but the
18 issue is, nevertheless, existent, one which we submit should
19 warrant Your Honors' attention to the matter.

20 We submit it is a matter of prime importance. It
21 is a matter which had a great effect in connection with prose-
22 cution of criminal cases, not only in Louisiana, but in other
23 jurisdictions.

24 What is the effect of prior offenses where the
25 defendant has not taken the stand, has not put the issue of

1 his character or his reputation at evidence, and in the course
2 of the confession the defendant referred to the prior offense
3 and then the prosecution brings this out as a part of the
4 confession as a whole.

5 We submit that the evidence which was taken in this
6 case would warrant Your Honors' taking cognizance of the matter
7 and reversing it.

8 Q I suppose the purpose of the statute that requires
9 that if any part of the confession is offered by the prosecution
10 then the entirety must be offered is at least partly to protect
11 the defendant in the case, wasn't it?

12 A Well, there isn't any doubt in my mind that
13 this was the intent of the statute. As a matter of fact we
14 had cited the statute in the brief and of course here one
15 phrase of the statute is used against us and this is the
16 statute: "Every confession, admission or declaration sought
17 to be used against anyone must be used in its entirety so that
18 the person to be affected thereby may have the benefit of any
19 exculpation or exclamation that the whole statement may afford."

20 So actually the exculpatory proviso of the statute
21 is one which really requires the utilization of the confession
22 as a whole and here the confession as a whole was being used
23 to show that the defendant is a bad man.

24 Q Was this a written confession?

25 A No, sir, it was not. It was an oral confession.

1 Q He was arrested in another State. It was an
2 oral confession to the law enforcement officers or the arresting
3 officers.

4 A That is correct.

5 We respectfully request Your Honors' favorable
6 consideration of this matter. Should the Court require or
7 wish supplemental briefs on the issue of jurisdiction if Your
8 Honors would fix some additional time within which this matter
9 can be raised.

10 We submitted that the matter that we had jurisdiction
11 under the statutory provisions raised.

12 Q Your client is under sentence of death, is he?

13 A Yes, he is. He is on death row.

14 Q You said that Spencer in Texas was a case
15 decided after the trial of this case.

16 A Yes, sir.

17 Q Which explains, you say, why you didn't raise
18 this point as a Constitutional point in the course of the trial
19 or the appeal through the State Courts of Louisiana. Those
20 other cases have been subsequently decided that might affect
21 the Constitutional rights of your client now and I think
22 particularly of the Whitherspoon case?

23 A Yes, sir.

24 Q You have got that kind of a claim in this case?

25 A Yes, sir, we do.

1 Q The purpose of that question is to suggest
2 that maybe the appropriate forum might be a Federal Habeas
3 Corpus court, a District Court, rather than here where your
4 points were never raised as Federal questions.

5 A May I just state this to the Court. I note that
6 my time is running out. Inasmuch as our right to review had
7 not been lost because of the lapse of time we sought to come
8 up by way of the application of the Writ for Certiorari.

9 We want to make this abundantly clear to Your Honors
10 that we thought that we should appeal in this statute ---

11 Q Isn't it also clear, however, that you did raise
12 a good number of Federal issues in both the trial court and
13 the State Supreme Court?

14 A Absolutely.

15 Q And had them decided in the State Supreme Court.

16 A Yes, sir.

17 Q But you didn't bring any of them here?

18 A No, sir.

19 Q The only one you brought here was one that you
20 never took to the State Court?

21 A That is correct.

22 We reserved bills of exceptions in connection with
23 this matter, but it was on a State statute.

24 Q I gather it was 4th and 5th Amendment questions
25 that you raised, weren't they?

1 A That is correct.

2 Q And I gather this is neither, is it?

3 A No.

4 Q You must have been surprised when we granted
5 this petition.

6 A Well, I was hopefully ---

7 Q Apparently we are too now.

8 There used to be a requirement before you could
9 go into a Federal Habeas Corpus that you must have petitioned
10 for Certiorari here but that hasn't been true for many years.

11 A We felt that we could try this anyway because
12 the delays had not expired.

13 Q I see.

14 A Thank you.

15 Q The sentence has been stayed?

16 A Yes, sir, it has.

17 Q Stayed by the State Court?

18 A Yes, sir.

19 MR. CHIEF JUSTICE WARREN: Mr. Hufft.

20 ARGUMENT OF PRESTON H. HUFFT, ESQ.

21 ON BEHALF OF RESPONDENT

22 MR. HUFFT: If Your Honor please, I represent the
23 State in this matter.

24 Before starting here I would like to point out just
25 one brief comment with respect to Spencer. Spencer was

1 decided on January 23, 1967.

2 We argues this case before the Supreme Court of
3 Lousiana in December of '67 and the opinion was handed down
4 on January 15, 1968, almost a year after Spencer.

5 Now just to review ---

6 Q Spencer was not relied on?

7 A Spencer was not relied on. The only Constitutional
8 issues raised, Federal questions raised in the State proceedings,
9 was one on the question of the search warrant for the evidence
10 and this Supreme Court had just decided the Warden case which
11 was in point and the State Supreme Court used it and disposed
12 of the question of the search warrant.

13 He also raised the question with respect to Miranda
14 and this case was instituted prior to Miranda and the Supreme
15 Court of our State made note of the fact that the Johnson case
16 would apply since we had started beforehand, and also took
17 special note that even if this case had started after Miranda
18 this case met the test of Miranda.

19 In order to really picture it let me just go into the
20 facts so we can see exactly what we are dealing with here.

21 Q There was also a Schmirber point, wasn't there?

22 A Sir?

23 Q A Schmirber point. Your Supreme Court relied
24 on Schmirber and California.

25 A They did cite it in their opinion.

1 Q That had to do with hair and blood of the victim?

2 A Yes, sir, and the Warden case came in and

3 we decided on the Warden case to eliminate all questions. That
4 was one of the cases cited but Warden case was used because they
5 objected to the fact that we issued search warrants in order
6 to search for evidence and we raised Gulard case and the Warden
7 case came out directly on point.

8 We had no trouble whatsoever, at least our State
9 Court didn't, in disposing of that question.

10 Now these are the facts of the case. This man lived
11 in Marrero, Louisiana which is right across the river from
12 New Orleans. Plaquemines Parish adjoins Jefferson Parish.
13 This man lived across the river from Jefferson Parish. He
14 went into the downtown area of New Orleans, picked up this
15 girl in a bar, had -- this is the victim I am talking about now --
16 had several drinks with her, went from place to place.

17 During the course of the night one witness identified
18 that the defendant had stopped in for gas and had sped off and
19 he heard the scream of a woman in the car, that help her out
20 that she was being held in the trunk.

21 The defendant admits being at the scene. He admits
22 having blood on his hands and his car, his clothes, the scene
23 in which we found the victim. He rode around town that night,
24 finally fled the State of Louisiana and we issued a warrant
25

1 for his arrest based on the information of the people who had seen
2 them together at the bars and the nightclubs, the service
3 attendant who recognized him, recognized his car and so forth
4 and so on

5 He fled to the State of Arizona, in Tuscon. One
6 night while he was walking down the street in Tuscon he flagged
7 two policemen and said, "Take me in. I have committed a crime".
8 They said, "Well, wait a minute. Let us give you your rights."

9 They give him his rights under Escobito, the fact
10 that you don't have to say anything, and if you say it, it can
11 be used against you and you have a right to contact your
12 attorney.

13 They took the man in. The police didn't know what
14 he was charged with. The police had difficulty trying to
15 verify the charge because the man said that he had committed
16 a crime in Orleans Parish, where, not known to him, he had
17 just crossed the line and murdered the girl in Plaquemines
18 Parish. So the police in Tuscon didn't have the opportunity to
19 check his story to see why he was wanted.

20 Now, in Tuscon, talking to these policemen, they said
21 he was very relaxed. Here was a man who wanted to get something
22 off of his chest. Here is a man who flagged the policemen
23 down, a man who wanted to talk about something that had
24 occurred.

25 He talked to policemen who knew nothing about it.

1 Our courts, in the State Supreme Court, ruled that the Johnson
2 case was applicable where they said even over and above the
3 Johnson case they felt this confession met that comment in the
4 Miranda case that you don't have to stop a man when he walks
5 into the police and flags them down and wants to get something
6 off of his chest.

7 In this Writ there is no issue raised, whatsoever,
8 as to the voluntary nature of this confession and this confes-
9 sion meets all the tests of being voluntary. The only issue that
10 arises is the following testimony in which this police officer
11 from Tuscon gave the defendant's confession, included in that
12 confession was this comment and I will read it to the Court.
13 This is the police officer talking.

14 Q Where are you in the appendix, what page?

15 A I am not in the appendix. This is on Page 5
16 of my brief, sir.

17 Q I see, thank you.

18 A "Yes, he did. He told me that several months
19 prior to this taking place, he picked up a woman whom he
20 described as a prostitute downtown in New Orleans" ---

21 Q What was the preceding question that prompted
22 that answer?

23 A They asked him whether or not -- let me put
24 it this way. During this course of his relating the confession
25 when the police officer arrived at the point in which he was

1 then going to relate this comment relative to the previous
2 incident the defense objected and there is a long protracted
3 argument and after the Court had ruled that this was admissible
4 on the basis that it was part of the confession under the
5 State statute, that the confession had to be used in its entirety,
6 and this was admissible, so this picks up right after the
7 argument and the decision of the trial judge that that question
8 was admissible.

9 Q Was there a specific question in the direct
10 examination that called for the prior crime?

11 A It is raised that earlier in the preliminary
12 statement in order to introduce the confession it had been
13 mentioned in the preliminary statement and an argument had
14 ensued on that basis. This statement had been mentioned when
15 the judge took under the question whether or not the question
16 was voluntary and this comes now for the first time that
17 the jury has heard this actual testimony and I would imagine,
18 sir, that it was in the form of a question knowing the stopping
19 so as to make certain that all of the arguments are presented,
20 thereto.

21 Q Why did you need that?

22 A We did this, sir. In the introduction of this
23 evidence we went on a two-pronged attack insofar as the intro-
24 duction.

25 No. 1, we said under the State statute, Title 15-450,

1 it says that if you use a confession, the confession must
2 be used in its entirety.

3 Q Do you agree with attorney for the petitioner
4 that that is for the protection of the defendant?

5 A Well, I say this, sir. This is a State statute
6 which does not give the District Attorney any discretion for
7 him to say what he shall put in and what he shall not put in.
8 This is meant for the protection of the defendant, yes, sir.

9 Q Well, couldn't he waive that protection?

10 A There is no provision to waive that protection.

11 Q Well, didn't he object?

12 A He objected, yes, sir.

13 Q Well, was that as far as he could go toward
14 waiving it?

15 A As far as he could go toward waiving it, yes,
16 sir. But the State statute ---

17 Q My final question is, did it help him?

18 A The objection?

19 Q No. Did this testimony help the defendant?

20 A No, sir.

21 Q So, you weren't helping him, were you?

22 A No, sir. What I am trying ---

23 Q You were giving the jury the theory that this
24 man was the type of man who went around murdering women?

25 A No, sir. I say this ---

1 Q Isn't that what you did?

2 A Well, Mr. Justice, I will say this: We had
3 two bases upon which we said this testimony was admissible.
4 They were very strong then and are very strong now. This
5 testimony was admissible because the law said in the State
6 of Louisiana that to use a confession you have got to use a
7 confession in its entirety.

8 Secondly, we argued very strenuously, and still do
9 here, that this testimony was appropriate, was admissible,
10 because it tended to show motive and intent.

11 This is one of those instances ---

12 Q That he made a business of murdering women?

13 A When you look at the circumstances ---

14 Q Is that the impression you were giving the
15 jury?

16 A I am going to give the circumstances, sir, in
17 which he says exactly what took place in the prior incident,
18 what took place in the crime with which we charged him, was an
19 identical incident. We are showing that this man on the basis
20 that someone would complain against him and use his very words,
21 I am going to read, would take a gun and kill that person for
22 having complained against him. We say that is essential.

23 Q But you are not relying on the statute.

24 A Sir, we have two bases. We said we had to do it
25 and we also say it is admissible.

1 Q I see.

2 A Now, this is the man's statement, if I can
3 get back to it.

4 "Yes, he did. He told me that several months prior
5 to this taking place, he picked up a woman whom he described
6 as a prostitute downtown in New Orleans and that after having
7 several drinks together, they had intercourse and then in his
8 statement, in his own words, 'She went down on me.' He said
9 then, after an argument that she slapped him and he backhanded
10 her. Then he said that a while later she signed a complaint
11 against him for backhanding her and that he received a sentence
12 of 90 days of which he did 45 days. He said that immediately
13 after getting out of jail from doing the 45 days that he went
14 out and got a gun and looked for two or three nights for her
15 downtown in the area where he had first seen her with the
16 intention of killing her because she had signed a complaint
17 against him."

18 In the present case the facts are almost identical.
19 We have no witnesses to say what really happened in that
20 automobile because this victim we have wasn't quite as fortunate
21 as the first woman, he didn't find her. The victim we have in
22 the second question was murdered.

23 Now, this is the entire statement, that what I have
24 just read is the entire statement that the jury heard with
25 reference to this.

1 We say that under our statute we had no alternative,
2 we had to produce the statement in its entirety. That is the
3 way the lower court ruled. That is the way the Supreme Court
4 of Louisiana ruled in a long line of decisions.

5 Q May I ask you as a matter of fact in Louisiana
6 where you have a man under interrogation for hours -- this
7 happens in all States -- do you, in presenting your case to the
8 jury, relate everything that happened during those hours.

9 A Yes, sir, I would, sir, for this reason ---

10 Q I am not asking you what you would do. I am
11 asking you if this is the practice?

12 A In our area, yes, for this reason: The statute
13 was intended that this man would have the benefit of having
14 the jury hear his confession in the same way he gave it. Now,
15 what I may consider to be irrelevant a juror may attach a
16 certain weight to.

17 One of the reasons for putting this statute in was
18 not to give me, as a prosecutor, the opportunity to determine
19 what I should withhold, what I should keep in the background,
20 or have as a confidence between the defense and myself. You
21 have got to tell the jury everything, just like the man told
22 it to you. You have got to relate all the incidents and let
23 the jury draw their own conclusions with respect to this
24 individual's confession.

25 Q Can you take the confession by questioning the

1 man's life and get all of the sordid things which might have
2 occurred in his life and then attach that to the confession
3 and introduce it?

4 A Mr. Chief Justice, this is not that kind of a
5 case. This is a case in Tuscon where the man walked in and
6 they had no background on the man whatsoever, no opportunity
7 whatsoever to ---

8 Q Well, this is background, this is background ---

9 A This is something the man volunteered, came
10 out with of his own free will, talking to people who had no
11 opportunity, even searchback, to determine even what they
12 were considering.

13 It is an entirely different situation and that
14 question did not arise in this particular instance.

15 Now, we say this information was essential over and
16 above the statute. We contend in our brief that he has no
17 comfort whatsoever in it.

18 Q Would you make a distinction between the
19 application of a Louisiana statute to a written confession and
20 to this kind of situation -- that is to say what happened here
21 is that the petitioner talked to the police in Tuscon and I
22 suppose he told them a lot of things.

23 Now, would you make a distinction between -- and
24 then the police officer took the stand in Louisiana and
25 testified.

1 A Correct.

2 Q Now, is there a distinction in the application
3 of the Louisiana statute between that kind of a situation and
4 a written confession with respect to what is appropriate and
5 what is not appropriate?

6 A No, sir.

7 Q A matter of common sense would seem that maybe
8 you could make such a distinction.

9 A There is no distinction made in the jurisprudence
10 of the State.

11 Q I notice here that actually the statement about
12 the previous offense and his relationship with this other
13 woman as appears on Page 509 of the typed transcript that that
14 was elicitive by the police officer, the Tuscon police officer,
15 by a question of the prosecuting attorney.

16 A As I said before, if Your Honor please, if
17 given the background, when this was mentioned there was
18 considerable argument as to whether or not this police officer
19 could state this part of the confession.

20 When the confession was heard by the trial judge as
21 to whether ornot it was voluntary argument ensued on this
22 particular point. When the thing was finally presented to
23 the jury, the trial judge had ruled.

24 It went on into the confession and then came this
25 Court and it came at this point with the question where it

1 was stopped on the basis that defendant again raised their
2 objection when it was being presented to the jury. He objected
3 three times. And it was in the course knowing when this objection
4 was coming and affording the defendant an opportunity ---

5 Q I suppose that it is at least arguable that the
6 question is, what is the confession. Now, when you have a
7 written confession there is a confession. When you have a police
8 officer testifying as to what the defendant told him I suppose
9 it is questionable as to what is the -- it is arguable anyway
10 that what is the confession within the meaning and intentment
11 of this Louisiana statute. He might have told him all sorts
12 of things that all lawyers would agree are not admissible
13 in the course of the conversation between the defendant and
14 the police officer.

15 Isn't that conceivable?

16 A Well, the theory behind this particular statute
17 is obvious. It is the fact that they don't give me, as a
18 prosecutor, the discretion ---

19 Q I understand that. I understand that. But
20 on the other hand the question is whether that statute has
21 a different implication with respect to a written confession
22 and with respect to what the policeman says. Would you take
23 the position that everything, everything, that the defendant
24 told the police officer in Tuscon is, not only admissible, but
25 has to be received in evidence?

1 A Correct, ---

2 Q Because everything he said is part of the
3 confession whether properly relates to this crime or not.

4 A Correct, sir, that is what the statute says
5 and that ---

6 Q Well, then, that is impossible. I suppose that
7 this would be impossible for the police officer to do that and
8 maybe if they taped every word that the defendant said that
9 they could do it.

10 A He doesn't have to say every word. But, of
11 course, he does have to give the substance under the juris-
12 prudence but he cannot leave out items such as that, that he
13 figures to be irrelevant under the State's statute.

14 Q No, but as I read this statute, what it says
15 is that it has to be a confession, an admission or a declara-
16 tion and it has to be something that the prosecutor intends to
17 use. I gather your Supreme Court has said here, in any event,
18 that this was -- I don't know whether it was a confession,
19 declaration or admission -- but in any event it came within
20 the four corners of the statute.

21 A Correct, sir.

22 Q That is what your Court has said.

23 A Yes, sir.

24 Q I suppose we are concluded by that as far as
25 this testimony of the Tuscon officers are concerned, aren't

1 we?

2 Yes, sir.

3 Q Can I ask you a question? Does your State
4 Courts consider this under the common law rules of evidence
5 as applied ---

6 A Our State Courts, if Your Honor please, consider
7 it under Title 15. This statute ---

8 Q Just the statute.

9 A Also we have two other statutes which were
10 mentioned with respect to the admissibility of previous
11 offenses when they intended to show motive, knowledge and
12 so forth ---

13 Q But did the ---

14 A --- within the traditional cases that this
15 Court has recognized.

16 Q But did the Courts consider it under that?

17 A No, sir, it had to come in on the basis that
18 it is part of the confession and our State Supreme Court did
19 not.

20 We brought both issues but the State Supreme Court
21 said of one issue: "This is determinative", and didn't reach
22 the other question. But we raised them both times, we argued
23 both of them here on the very same basis.

24 Quickly winding up, also on the question of Spencer,
25 we say there is not given any hope or encouragement with

1 respect to the position of the defendant. Spencer would not
2 entitle him to set the statute aside. He may have a different
3 opinion as to what it should be but the statute says that is
4 what we should do. It is a rule of evidence in the State of
5 Louisiana. It has been on the books for many, many years. We
6 think it is an essential point. It is not violative of the
7 14th Amendment.

8 He relies on the general Fanniss approach such as
9 they did in Spencer. This is not a Burgett case where he has
10 a denial of his specific Federal right. There is no specific
11 Federal right involved here.

12 MR. CHIEF JUSTICE WARREN: We will recess now, Mr.
13 Hufft.

14 (Whereupon, at 12:00 Noon the argument in the above-
15 entitled matter recessed, to reconvene at 12:35 p.m. the same day.)
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1 (The argument in the above-entitled matter resumed at
2 12:35 p.m.)

3 MR. CHIEF JUSTICE WARREN: Mr. Hufft, you may continue.

4 FURTHER ARGUMENT OF PRESTON H. HUFFT, ESQ.

5 ON BEHALF OF RESPONDENT

6 MR. HUFFT: At the recess I was reviewing the fact that
7 it is the State's position that the Spencer case applicable in
8 this instance would uphold the statutes of the State of Louisiana.

9 I refer to this particular language in the statute
10 that it would be fully unjustified encroachment by this Court
11 upon the Constitutional powers of the State to promulgate their
12 own rules of evidence, to try their own State created crimes
13 in their own State courts.

14 I also point out that the Burgett case which this
15 Court decided after the Spencer decision found that there
16 was a specific Federal Constitutional right involved. The
17 question of this defendant had been denied the right of counsel
18 in one of his State prosecutions and this Court was not going
19 to allow error to be piled on top of error and allow him to be
20 denied a second time. And rightfully so in the Burgett case.

21 We also take the position that even under the
22 minority decision in the Spencer case that this evidence which
23 we introduced meets the test that this Court was talking about
24 in all of its decisions. This information was essential. This
25 under the State law in which this man was being prosecuted --

1 he was charged with murder.

2 Under our State code murder is the killing of a human
3 being when the offender has a specific intent to kill or to
4 inflict great bodily harm.

5 In furtherance of carrying out our responsibility
6 to prove intent as a necessary ingredient of the crime of
7 murder this evidence was admissible. I have cited several
8 State cases directly on point in which they deal with the
9 question that when intent is a necessary ingredient of the
10 crime charged, it is something which goes to the determination
11 of the issue directly before the jury with respect to intent.
12 That it is admissible. And there are long lists of cases in
13 our jurisprudence and many of those cases have been recognized
14 by this Court that there are exceptions to that general rule.

15 We say we fall under it, No. 1, because it is our
16 statute. It would not be within the province of this Court
17 to rewrite that statute under Spencer.

18 Secondly, even if this Court were to say that that
19 statute would be unconstitutional, we say that this evidence
20 is admissible under other decisions of this Court and of the
21 State Court on the basis that we were showing motive and
22 intent.

23 When you look at my brief, if Your Honors please,
24 on Page 18, I have laid side by side the facts in this case
25 for which we are charging this man with murder and the facts

1 of the previous incident -- come across the river, the same
2 area of town, picks up the girl in the same area, has drinks
3 with her, commits certain acts, one winds up where she complains,
4 he gets a gun, goes out with an intent to kill her because she
5 complained of his conduct.

6 We say the second girl wasn't quite so lucky. She
7 was killed before she could complain. We say this draws a
8 definite parallel, and this is essential information. It
9 was information that the State was required to put in in order
10 to prove intent, and we carried our responsibility with respect
11 thereto.

12 Q Your view is that under the common design motive,
13 et cetera, in which other crimes are admissible under your
14 Louisiana cases this would have been held admissible.

15 A Yes, sir.

16 Q Let me ask you this. The State courts in taking
17 the other route, namely the whole evidence statute, for want
18 of a better term.

19 A Yes, sir. The statute that says that the
20 entire confession must be used in its entirety?

21 Q Yes.

22 A Yes, sir. A long line of decisions.

23 Q With respect to other than exculpatory statements.

24 A It is a general rule with respect to any ---

25 Q I know the statute says that and it has been

1 construed in this case that way but I was wondering whether
2 your judicial construction of that statute is interpreted in
3 the statute with respect to other inculpatory statements in the
4 same way as it was in this case?

5 A Yes, sir. If it is part of the confession, it
6 has to be introduced?

7 Q Do you cite those other earlier cases holding
8 the same way in your brief?

9 A Yes, sir. They start off with the Manning case.
10 In fact the Evans case which was decided by our State Supreme
11 Court just prior to this case came up to this Court and Writs
12 were refused involving the very same principles under 444 and
13 446 of the intent and also under the use in this statute.

14 I didn't brief the question about whether the case
15 should be here. I didn't believe it should be but I took the
16 position that you had granted it and I was ---

17 Q Didn't your brief say there was no jurisdiction?

18 A No, sir. It did not.

19 Q It did say, didn't it -- or perhaps all it said
20 was that Constitutional questions weren't raised. Don't you
21 make that point in your brief?

22 A No, sir. What I am doing, sir, is merely
23 answering that which he has inserted in his application in
24 which the application was ---

25 Q Well, do you object to our deciding this case

1 on jurisdictional grounds?

2 A No, sir. I don't believe he has jurisdiction,
3 sir.

4 Q So you do object to our deciding this case
5 at all on jurisdictional grounds?

6 A Yes, sir. I don't believe he has jurisdiction.
7 I didn't then. I didn't brief it on the basis that the Writs
8 would be ---

9 Q Because we would grant it?

10 A Yes, sir. I just in my brief concerned myself
11 with answering the charges. I say, even if you had jurisdiction
12 I say we answered all of his challenges. I would make just
13 one quick closing comment, if Your Honors' please, that ever
14 since reference ---

15 Q How about your brief in opposition to the
16 petition for Writ of Certiorari?

17 A I use the same reasoning with respect to then
18 as I did with the others.

19 Q You can't, in that situation, say that you didn't
20 raise it because we have granted it. That was before we
21 granted anything.

22 A My reasoning then was the same as in that
23 instance. I presumed when I was asked or briefed in response
24 to the points raised by him that the other question was already
25 resolved.

1 Q How would you think it was resolved by us when
2 all we had was his petition and we were waiting for you to
3 file your opposition?

4 A That is the conclusion I reached and that is
5 why it is not mentioned in there, Your Honor.

6 I make this argument, when we mentioned Whitherspoon
7 before, mentioned it here because some question was raised
8 as to whether or not the State had shifted its position in
9 the question raised about fairness.

10 I know in the Burgett case the Court said not to be
11 concerned with the question of good faith. But I wanted to
12 bring out one thing with Whitherspoon. We have met the require-
13 ments of Whitherspoon in this very case which was long before
14 this Court decided Whitherspoon. We have a statute similar
15 to Illinois and Louisiana. We had a man who said he was
16 opposed to capital punishment. We questioned the man until
17 he finally reached the point where he said: "I could not, under
18 any circumstances", and we allowed the man to go and we did
19 not challenge him. Such a juror served in this case.

20 Q Of course that is not a question that A, is
21 before us or B, if it were, if the claim were before us that
22 we could possibly decide without having the voir dire or ---

23 A Correct, sir. I understand this. I mention
24 that question on the basis of good faith, as the situation
25 goes.

1 I have nothing further.

2 Thank you, Your Honors.

3 MR. CHIEF JUSTICE WARREN: Mr. Greenberg.

4 REBUTTAL ARGUMENT OF NATHAN GREENBERG, ESQ.

5 ON BEHALF OF PETITIONER

6 MR. GREENBERG: May it please the Court. I merely
7 would like to call two matters to the Court's attention.

8 At Page 4 and 5 of the Appendix, we brought forth
9 the chronology of events and at the bottom of Page 4 it
10 indicates that the case was concluded on Friday, May 6, 1966,
11 that the defendant was sentenced to death on July 19, 1966 and
12 on October 6, 1966 the pecurium on the bill of exceptions was
13 signed by the trial court.

14 Now, under Louisiana law the rule which was in
15 existence at that time was that, upon the signing of the bill
16 of exceptions, the trial court is divested of jurisdiction
17 and any bills filed thereafter and presented to the judge for
18 his signature in pecurium come to light and cannot be considered
19 on appeal.

20 This is the decision of State versus Harrell, 228
21 Louisiana 434, 82 S.Ct. 701.

22 Q Is this true even when there has been an inter-
23 vening change in the applicable law?

24 A Yes, sir, absolutely. Now, the law has since
25 been changed in Louisiana. We now have a new code of criminal

1 procedure. However, this case was tried prior to the effective
2 date of that code of criminal procedure.

3 Spencer versus the State of Texas which focused atten-
4 tion on the issue raised herein was argued on October 17 and
5 18 of 1966 and was decided was decided on January 23, 1967,
6 which, of course, was subsequent to the taking of the appeal,
7 the filing of the bills of exceptions and the rendition of
8 pecurium by the trial court.

9 We also wish to call Your Honors' attention to the
10 decision of O'Conner versus Ohio decided by Your Honor in
11 1966, 87, S.Ct. 252, 385, U.S. 92 in which case Your Honors
12 actually took jurisdiction of a matter which had not been
13 raised in the trial court and held that since the defendant
14 was not in a position to literally foresee the action which
15 Your Honors were going to take in this particular case.

16 Q That had to do with the comment rule, the Ohio
17 comment rule on the defendant's failure to testify.

18 A Yes.

19 Q Really, the Spencer case -- it is the Spencer
20 that you rely on, isn't it?

21 A Yes, sir. We actually pinpoint the issue in the
22 Spencer dissent which literally focuses attention on it. We
23 respectfully urge favorable consideration of our application.

24 Thank you, Your Honors.

25 (Whereupon, at 12:45 p.m. the argument in the above-
entitled matter was concluded.)