Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

A.L. DUTTON, WARDEN Appellant; vs. ALEX S. EVANS, Appellee.	Docket No.

Place Washington, D. C.

Date October 15, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

A. L. DUTTON, WARDEN,

Appellant;

v. No. 10

ALEX S. EVANS,

Appellee.

Washington, D. C.
October 15, 1970

The above-entitled matter came on for argument at 11:35 a.m.

BEFORE:

HON. WARREN E. BURGER, Chief Justice
HON. HUGO L. BLACK, Associate Justice
HON. WILLIAM O. DOUGLAS, ASsociate Justice
HON. JOHN M. HARLAN, Associate Justice
HON. WILLIAM J. BRENNAN, JR., ASsociate Justice
HON. POTTER STEWART, ASsociate Justice
HON. BYRON R. WHITE, Associate Justice
HON. THURGOOD MARSHALL, Associate Justice
HON. HARRY A. BLACKMUN, ASsociate Justice

APPEARANCES:

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ERWIN N. GRISWOLD, Esq.
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For the United States, as amicus curiae

APPEARANCES (continued):

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We shall hear arguments in No. 10, Dutton against Evans.

Mr. Evans, you may proceed whenever you are ready.

ARGUMENT OF ALFRED L. EVANS, JR., ESQ.

ON BEHALF OF APPELLANT

MR. EVANS: Mr. Chief Justice Burger, may it please the Court:

This case presents problems which extend from the relationship of the hearsay rule and the confrontation clause of the Sixth Amendment. The issues arose during the trial of the appellee Evans for murder in connection with the slaying of three police officers in Gwinnett County, Georgia.

Evans was convicted primarily by the testimony of one Wade Truett, an accomplice who turned state's evidence. Truett was an eye-witness to all the details of the crime.

Q When did this take place.

A Yes, sir, the murder was on the evening of April 17, 1964. The trial was approximately over a year later, in October 1965.

As I was saying, Truett testified as to all material details of the triple slaying. Truett's testimony is not here in question and I shant go into it in great detail. However, I do think it might be appropriate to summarize some of the highlights so as to crux the issues which I will come to discuss in

the proper factual context.

According to Truett, he, Evans and one Venson Eugene Williams had been engaged in a plan and concert of action to steal automobiles. The basic nature of the crime was as follows: They would first purchase a vehicle which had been wrecked beyond the point where it could be commercially repaired. By this I mean to commercially repair a wrecked vehicle entailing the purchase of spare automotive parts.

They would, first, purchase a vehicle that was so badly repaired that the purchase of the automotive parts would cost more than they could recover on a subsequent sale of the vehicle. That was the first step of their operation.

The second step was to steal an identical vehicle. By doing this they could pirate the required parts from the stolen vehicle, put them on the wrecked vehicle and sell it at a very substantial profit. In addition, they could use the spare parts of the stolen vehicle for resale and make a profit on these parts as well.

In pursuing this plan it is important to note the car was stolen before, at the time of and after the time of the slaying of the three police officers. The slaying itself grew out of the theft of an automobile. The car in question was an Oldsmobile. It was stolen during the early morning hours of April 17th, 1964.

Following the ordinary course of operations, they drove

the automobile to a rural location in nearby Gwinnett County, Georgia, for the purpose of as quickly as possible changing the ignition and also the license plates on the car.

While they were doing this, a person in the vicinity saw the lights. It was a little bit unusual in this particular area in that county, so he called the police. The police dispatched three officers in a car to investigate. The police officers arrived and apprehended the three criminals.

Then unforunately the youngest police officer made a bad mistake, which was to cost him and the two other officers their lives. He bent over in the front seat of the automobile to examine the ignition switch. As he was doing this, he apparently was a little bit careless about where Evans was. Evans was standing near him. As he was bending over, Evans managed to grab his revolver, his police revolver. He ordered all the officers to put their hands up, which they did.

The officers were promptly disarmed and manacled with their own handcuffs. At this points either Evans or Williams told Truett to get the police car off the road. Truett backed the police car off the road into a field. As he returned to where the officers were, he heard what sounded to him like a pack of firecrackers going off. He arrived and saw the police officers still manacled with their own handcuffs on the ground. Two were quiet and one was making a rather peculiar rasping noise.

Truett testified that he then saw Williams bend over

and shoot the officer making the noise two or three times more while Evans, the petitioner in this case, the appellee, held the flashlight for him. After this was done, the three car thieves turned murderers set off into the night.

Now Truett's testimony was corroborated by an abundance of physical evidence, such as location of the automobile, the location of the pistols which were later found as well as the testimony of various other witnesses.

As I stated earlier, none of the testimony which I have related to this point is at all in issue in this case. The testimony that is in issue is the testimony given by one of the corroborating witnesses. This testimony is the testimony given by one Lynwood Shaw.

Shaw was a fellow inmate in the Federal Penitentiary approximately a year after the crime, at the time Venson Eugene Williams was arraigned in connection with the triple slaying. On the day following his arraignment, back in the Federal Penitentiary, his fellow inmate Shaw asked Williams, "How did you make out?" The reply was, "If it hadn't been for that dirty S.O.B., Alex Evans, we wouldn't be in this now."

This testimony was objected to by Evans during his trial on the ground it violated both the hearsay and his rights under the confrontation clause of the Sixth Amendment. The trial court admitted the evidence on the ground that there had clearly been a showing of car theft conspiracy and that the

statement had been made during the continuance of the conspiracy, thus it would be admissible under the Georgia exception to the statutory rule.

Q Now, Mr. Evans, why in your estimation did the prosecution put that testimony in?

A Sir, it is corroborating testimony. There was an eye-witness under Georgia law. The testimony of an accomplice must be corroborated by other evidence. There were several witnesses which were corroborating witnesses. One was M. C. Perry. I could name the others. There were several. This was one corroborating witness.

Q In your estimation would there have been sufficient corroboration without this particular testimony from this fellow?

A Yes, sir, I don't think there was any question as to that.

Q In fact, it was much weaker corroborating testimony than the testimony of one M. C. Perry, as an example?

A Yes, it was merely cumulative corroborating testimony.

Q What was the testimony of Perry that you discussed, if you would highlight that again? Would you ---

A Yes, sir, M. C. Perry. Well, Perry testified that he had been conversing with both Evans and Williams about stealing an Oldsmobile right before the Oldsmobile was stolen.

He testified -- actually he almost went with them, but he didn't because they had it underpriced -- what he would get for helping them.

He also testified that shortly after the crime in a conversation with Evans he indicated to Evans that along the line -- I can't quote it exactly, of course -- but he talked to Evans, indicating that he had some idea who was responsible for the murders, which of course had hit the newspapers by that time.

Evans grabbed him, pumped him in the chest and, in effect, told him if he knew anything, he had better keep quiet about it. And this, of course, is in addition to the physical evidence which ties to the crime itself, which of course did of course did not directly tie Evans to the crime. You have to concede that. It did tend to verify Truett's testimony generally -- the location of the pistols. Truett testified that the pistols had been thrown out of the window of the car as they sped along the expressway. This is where the pistols were found.

Q What I am trying to get at, though, is your attitude as to whether conceivably this was harmless error. Are you taking the position it was harmless error in any event?

A Yes, sir, we think this evidence, in light of the overwhelming evidence produced in this case -- we think that this particular testimony beyond any reasonable doubt could not have possibly affected the verdict.

Q Did the Georgia court itself on the direct appeal direct itself to the harmless error aspect?

A No, sir.

Q The dissenting judge did, however, did he not?

A I am not certain, sir. I would have to answer it that way.

Q But you are taking the position that, in any event, this is harmless error?

A Most definitely, sir.

In any event, Evans appealed this ruling to the Supreme Court of Georgia. The Supreme Court of Georgia affirmed under the long-standing Georgia rule that the tendency of a conspiracy encompasses the period of fulfillment after the accomplishment of the unlawful objectives, although I point out here that we show unlawful objectives, but the conspiracy we know extended up to the time of the murder because there is testimony that cars were stolen after the time the murder had been completed

Evidence ---

Q Now it was not addressed to the harmless error aspect at all, it is purely on that particular rule?

A It was the ruling of the Supreme Court, yes, sir.

Evans appealed this case after leaving the Georgia Supreme Court and applied for certiorari to this Court.

Q May I interrupt you once more and I will let you step down.

I am reading from the dissent. "His testimony was hearsay, and while the admission of hearsay evidence is not always hurtful, in this instance it obviously was prejudicial to the defendant." And this is the one dissenter.

Why do you think that the majority of the court did not respond to that observation if they felt it was harmless error?

A I think -- I did not say that the Georgia Supreme Court, I do not believe, considered the harmless error issue, because the Georgia Supreme Court did not consider it error, in the first place. The majority thought it was properly admitted, so therefore they did not treat it as harmless error because they thought there was no error at all, harmless or otherwise.

Q Well, if they were wrong in that respect, it would have been helpful if they could have concluded it was harmless.

A In retrospect I would certainly agree.

In any event, this Court denied the petition for certiorari.

Unsuccessful in direct appeals, Evans next turned to state's district court where he continued what has become lamentably an integral part of the appellate process. In other words, he filed his petition for a local habeus corpus.

The district court denied the writ. It cited Wigmore to the effect that the evidentiary and the constitutional

standard are not the same, and that the confrontation clause does not go to the scope of testimony which can be given by a witness who is on the stand and available for cross-examination.

Upon appeal, however, the court of the Fifth Circuit took a different view. Unlike Wigmore, unlike the district court, and we respectfully submit unlike both the prior and subsequent decisions in this Court, the Court of Appeals equated hearsay with the confrontation clause. I should say it equated the exclusionary aspects of the hearsay rule with the confrontation clause.

Now I emphasize this point because the Court of Appeals did not stop with the customary exceptions -- and of course there are numerous exceptions -- to the rule in the beginning. To the contrary, it said that all exceptions to the rule must be continually scrutinized and the rule evaluated by Federal courts.

And, secondly, they said that state exceptions to the rule would be permitted only in the light of the facts of the case. The admission of the evidence in the case was supported by "salient and cogent reasons."

They are of the opinion that the facts and the circumstances of this case were not such as to render the admission salient and cogent, because they held that as applied Georgia's statutory exception to the hearsay rule was unconstitutional because it violated Evans' rights under the confrontation clause.

In our brief we set forth four reasons why we think

the Court of Appeal ought to be reversed: First and foremost, we think the Court of Appeal erred in equating the evidentiary rule with the constitutional standard. Under the traditional Wigmore view, which we urge to be the appropriate view, there is an important difference between the two.

Under the Wigmore view the hearsay rule deals with the competency of evidence, under whatever existing rules of evidence are then in effect. The confrontation clause, according to Wigmore, deals with the procedure by which testimony is presented to the jury, and that is that it must be presented by live witnesses who are available for cross-examination and not by ex parte affidavits and depositions. Unlike live witnesses, a piece of paper cannot be cross-examined.

In Mattox v. United States this Court cited its approval of a great number of decisions of state courts, such as, Sunny v. Ohio, which clearly pointed out that the confrontation clause was not intended to effect the nature or state of testimony given by a witness who was on the stand and available for cross-examination.

Since I last argued this case, of course this Court decided California v. Green, which we think goes a considerable way to upholding our position on this threshold error of the Court of Appeals. That decision appeared to reaffirm the statement in Stein v. New York that the hearsay rule was not to be read into the Constitution.

Surely it is a rule which is singularly undeserving of a constitutional status. The hearsay rule is unknown in most every civilized system of jurisprudence. The Continental lawyer throws up his hands in wonder when I try to explain it to him.

Within the systems which do have the hearsay rule it is, I would say, universally criticized by overriding numbers in the law review articles. You find that it is a rare person that has much good to say about the hearsay rule.

I think it would be a great pity if the informers, virtually all of whom are either for total abrogation or drastic revision, must now fight the Constitution as well as 200 years of inertia.

We urge the Court to reiterate and affirm that the hearsay is not the same as the confrontation clause.

Even beyond this threshold area we would say that perhaps the greatest potential of mischief in the course of appeals decision is the whole suggestive test it devised for Federal judges to set themselves against state judges. According to the Court of Appeals, no matter how subtle the state exception to the hearsay rule might be, the application of a state evidentiary rule in a state criminal proceeding by a state judge is now to be subject to reversal if the reviewing Federal judge five years later feels that, as he sees the facts of the case, the reasons for admission were not sufficient, to cite the words of the Court of Appeals, "salient or cogent."

Now of course there is no doubt at all for the state trial judge, who has to make a decision during trial. He can't obviously call a recess and phone the Court of Appeals -- the Federal Court of Appeals or a Federal court judge to get a reading as to whether the reasons set out are "cogent."

We hope the Court will reverse the Circuit Court on the grounds of the threshold error. However, if the Court should disagree with this, if hearsay to some extent or other is to be equated with the confrontation clause, we sincerely hope that this Court will come up with some intelligible objective standards so that a state trial judge will have some idea of what to do when a hearsay question comes up during a trial of a criminal case.

Now of course this is not incorrect in our view that the hearsay rule and the confrontation clause differ. Or, for that matter, if the overlap is substantial and if the overlap does affect the state of testimony as well as ex parte affidavits or depositions, we must then be able to question of the status of both nonrecognized and, for that matter, any new state exceptions to the rule.

Then such exceptions of long standing is the exception under which the evidence rule was admitted, the co-conspirator exception to the hearsay rule. In Georgia, as elsewhere, the declaration of one conspirator subject to certain restrictions is admissible against other conspirators. One general restrictio

is that the statement must be made during the pendency of the conspiracy.

But alas, there is great disagreement as to what the "pendency" is. In Georgia, as I am sure in most states, the conspiracy is viewed as continuing into the period of concealment after the primary unlawful act objective has been accomplished. This must be supported by criminal evidence and is based on what I think is a rather common sense approach, that a conspirator has in his mind -- he has an interest, I should say, in accomplishing all objectives of the conspiracy.

Now, can you say that the avoidance of detection is any less an objective than committing the crime, in the first instance? I think not. We recognize, of course, that the Federal view differs. In cases like Krulewitch this Court has held that in Federal criminal proceedings the conspiracy terminates upon completion of the last overt act in its furtherance.

Krulewitch clearly shows that this is but the supervision of this Court over the evidentiary rules in Federal criminal proceedings. In fact, Krulewitch referred to Georgia and other states which had a different view. It did not hint that there was anything unconstitutional about Georgia or the other states adhering to this view.

In any event, we find it hard to think of any reason why this difference of view should be a constitutional issue. Surely it would have no showing on the trustworthiness justification

which is further a means in support of the rules of exception.

We think the statement in question clearly bears all the earmarks of being trustworthy. To start with, it was not a long narrative statement where the error or the danger of error in the retelling would be great. It was a spontaneous -- a simple, spontaneous explanation, really in the nature of "ouch" to a specific question which the declarant -- excuse me, in answer to a question posed to the declarant.

I assume there would have been no objection at all if the witness had testified to the physical reaction to his question, such as anger, tears or flushed face. What logical reason can there be for the distinguishing between the auditory and visual perception of the witness who was on the stand, of course?

Moreover, the statement to the extent that it has any significance at all is obviously a declaration of interest. Most normally declarations against interest are not made unless they are true.

If measured by the trustworthiness criterion, we think that this spontaneous explanation against interest is at least as trustworthy as the bound declaration exception about which apparently no one disagrees. We think it is far more trustworthy than reputation evidence, which is admissible in criminal cases and as a court of the law. Reputation evidence not only can be hearsay. It must be hearsay and it can be nothing but hearsay.

We think the Georgia co-conspirator exception to the rule, both on its face and as applied in this case, is reasonable, serves a valid purpose of shedding more rather than less light on the question at issue and ought not to be held unconstitutional whether or not the hearsay rule and the confrontation rule are to be equated.

Coming then to harmless error, we think that either if the admission of the declaration should against our intentions be held to be a violation of the confrontation clause -- we think that it could not conceivably have influenced the verdict or prejudiced the accused in any way.

It was the testimony of Wade Truett which convicted Evans. Shaw's testimony was fully corroborative, and even as corroborative evidence it was second string compared to the corroborative evidence of witnesses such as M. C. Perry.

This Court has held that where the submission is merely cumulative and will not affect the results, the error is harmless. We think that Harrington v. California ought to control on this point.

I should like to save my remaining time, if I may.

MR. CHIEF JUSTICE BURGER: Very well. The Court is adjourned until one o'clock.

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

(The argument in the above-entitled matter resumed at 1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may proceed when you are ready.

ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MR. GRISWOLD: May it please the Court:

I need not say that this is a very difficult case. The facts have been stated by Mr. Evans and I see no reason to devote any more time to them. The issue, of course, is the admissibility of the evidence of Shaw as to the statement which was made to him by Williams some 15 months after the killings involved here.

As a matter of fact, when this case was before the Court a year ago -- and incidentally, it was argued a year ago today to the day, on October 15, 1969 ---

Q At least we are not losing any time.

A It was urged on me that I should file a brief amicus curiae and I gave very careful consideration to that suggestion and I didn't just ignore it, I finally decided not to do it because I couldn't make up my mind which side I would be on if I filed a brief amicus curiae, and I found it not likely to be able to file a brief dubitante.

Last June the Court requested the Solicitor General to file a brief. I was thus put in the position which, of course,

I am constantly in, that I had to come to a conclusion. With the help of associates I wrestled with it and we have come up with the brief which has been filed and the arguments which I shall present, which does come to a conclusion. But it is quite plain that that is in the minds of all of us in a closed sense a difficult matter.

Q May I ask you a question, Mr. Solicitor General? Am I wrong in thinking that your views are somewhat changed from the amicus brief you filed in the Green case and the one you filed in this case?

A If so, Mr. Justice, I am not aware except to whatever extent we may have learned. The law may have been advanced by the decision in the Green case, which of course we have tried to utilize. I may say that in some ways it seems to me that the problems -- and I perhaps say the outer limits of the problems, the differing views of the problems -- are well presented in the Green case by your concurring opinion and Mr. Justice Brennan's dissenting opinion, and the facts here, of course, are somewhat different in that case so that it comes up in a different context.

I may say, too, that the interest a year ago in filing a brief amicus curiae on behalf of the Department of Justice was primarily with respect to preserving or protecting the co-conspirator exception to the hearsay rule. There was concern that something that was said or done in this case might eliminate or

drastically restrict what you might call the basic central use of the co-conspirator exception in cases where it is a statement during a conspiracy and in furtherance of a conspiracy and there was quite understandable concern within the Department of Justice that that would be a very serious matter. And I think that people in the Department and I have had in mind the situation that arose in the Bruton case where a case adverse to the Government was reached in a matter as to an issue that was not raised by any party in the case and where the Court did not set -- did not direct the attention of counsel to the question whether della Pioli should be overruled.

I have felt chagrined since that time not that the result would have been any different. You did give some consideration at the time the Bruton was being briefed and argued, but we could not then brief the issue of the validity of della Pioli without submitting it to the Court, which was something which had not been done by the other side.

And so in the brief which we have filed, we have developed our first argument to the general proposition not dispositive in this case, but an important part of the background, that the co-conspirator exception to the hearsay rule is not only well established in the decisions of this Court, but is valid and is consistent with the confrontation clause.

Now, of course, there has been quite a bit of development of thought in this area. It wasn't until the Point case some

six years ago that the confrontation clause was found to be directly binding on the states. And in the Pointer case the opinion of Mr. Justice Black, the confrontation clause and the right to cross-examination are equated. The opinion refers to under this Court's prior decision the Sixth Amendment guarantee of confrontation and cross-examination was unquestionably denied petitioner in the case.

It is true a little later on there was somewhat regularly recognized that there were a few exceptions, but the general treatment was that confrontation means the right to cross-examination. And our first proposition here would be that closely related as they are and designed to achieve a similar end, that confrontation and the right of cross-examination are not the same things, and I believe that that is shown by passages is subsequent opinions.

I can't rely on the decision in California against Green in respect to that because the basis of the decision in Green is that there was a right to cross-examine in that case, even though the witness was not willing to saying anything.

Q There was an opportunity to cross-examine?

A There was an opportunity for cross-examination for whatever you could get from it and, as was pointed out, the very nature of his "nontestimony" on cross-examination had a considerable bearing on the propriety of his prior statement.

Now it is clear, it seems to me, from this Court's

decisions of long standing and which are not, as far as I know, now subject to question, that the right of confrontation does not mean that there must be the right of cross-examination, that they are not co-equal or co-extensive.

The clearest example is the two Mattox cases in the 140 and the 150 U.S. In one the dying declaration case, and in the other was the case of the prior testimony of a witness who is now dead. In neither case can there be present cross-examination. In both cases the evidence was held to be admissible and we feel that those decisions are not only historically valid, but was currently sound. In both cases there was compliance with what might be called the "best evidence" rule, if I can use that phrase here, in that in neither case was the declarant available. In both of them he is dead and in one of them he was dead shortly after he made the statement, and in the other he was subjected to cross-examination at the first trial and had died in the interval.

There are a few other illustration of exceptions to the hearsay rule where evidence is traditionally, and I think I can almost say "daily," admitted where there is no right of cross-examination.

The clearest instance of that is the business records exception, which has been widely established and adopted, and where many facts are shown, generally speaking facts that are not really subject to dispute and where, if they are disputed, means

can be found to substantiate them, but where records made in the ordinary course of business are shown to prove the truth of these statements contained in the record.

Q There was quite a bit of opportunity for cross-examination as to the business records pattern itself, the procedures.

A Yes, Mr. Justice, except that the record can be admitted on the testimony of the secretary of the company or somebody who knows nothing whatever about what was put in the record. He can be cross-examined as to the procedures and the regularity and that sort of thing, but by this time ordinarily you do not know who made the particular entry into the --

Q But to the extent that they are known, that they are identified, there is no limit to cross-examination.

A There is not and there is a considerable guarantee as to their trustworthiness, and that, I think, is a part of the touchstone to which we will come with respect to this case.

Q Well, in this case the witness Shaw was subject to cross-examination and was cross-examined quite extensively.

A The witness Shaw was subject to cross-examination, was cross-examined. There is no doubt about the propriety of investigating the truth of what he said. The problem arises because it wasn't what he said that is controlling, but it is what he said that Williams said that is the substantiating or corroborating evidence in this case.

Now we come to the next element in the case. I think it was largely disposed of in California against Green. This is the Constitution, the Sixth Amendment, does not enact "the hearsay rule" or whatever they were at some particular time. It would be hard to know the time and it would be awfully hard to be sure just what the rules were at that time.

Or to put it another way, that the Sixth Amendment does not forbide development of the law of hearsay or experimentation by the states. And I would like to suggest, for example, that it would not be irrational ---

Q What about the states, you said it was ---

A What about?

Q You said "by the states," that they would use ---

A Yes, Mr. Justice, I would think the same thing would apply to the Federal Government. Indeed, I would think it was a fortiori as to the states. But, as I understand it, the business records exception is the result of a Federal statute and it is certainly included in the proposed rules for the district courts, which are under preparation by the committee under the judicial conference.

It seems to me to be rational. It would certainly not be surprising to a Frenchman or a German if a statute were to be enacted either by the Federal Government or by a state which said, in substance, that the hearsay rule is hereby abolished, and all evidence which are heretofore been considered as hearsay

shall be admissible, civil or criminal, provided it meets the following test:

Now item 1 would be "relevance." Item 2 would be "some element of trustworthiness, some basis for believing it had some tendency to be true." Now note that I didn't say that it was true, but there is some basis for believing that there is some reason that the jury should be allowed to rely on.

I think with respect to criminal cases we might have to add something further. Certainly statements made to the police would have to comply with Miranda and other requirements, certainly hearsay statements made under compulsion: "I had him by the throat and he said so and so" would not come in. And I suspect, too, and this would be hard to verbalize or formulate that long narrative statements involving a succession of facts amounting to a picture of what happened at the scene or over a period time could not be used that way consistently with the confrontation clause.

I obviously have not tried to formulate this statute and experts on the laws of evidence have never put it all together. All that I am contending for is that this Court's decision in this case should not foreclose the possibility that there may be development and expansion ---

Q You know, in some of those states -- I am thinking of my own home State of New Jersey -- a new code of evidence, have they dealt with this problem?

A No, Mr. Justice, as far as I know no state code has gone as far as I have suggested. You are familiar, of course, with the California Code provision which was involved in the Green case, which went beyond the traditional hearsay rule, going as far back as Benton, at least academic thought as to hearsay has favored restricting the limits on the use of hearsay and there has been much talk about its abolition, but I know of no statute which has undertaken to eliminate it entirely. And, as I have indicated, I don't think that it could be eliminate entirely consistently with the confrontation clause.

Q But the choice is true, is it not, that in the 190 years that have passed since the adoption of the Sixth Amendment, that there have been a lot of exceptions to the hearsay rule, particularly the business records, isn't that right?

A Very, very slowly, which the statute in California against Green is ---

Q Well, I am talking about now federally.

A And ---

Q That is the point, and it didn't affect the states.

A And the business records rule was a statutory enlargement which came up largely as the result of the work of Professor Morgan 30 or 40 years ago, and is one, as far as I can see, which is not merely universally accepted, but is regarded as a great improvement in the law.

Q Well, in addition to that, in bits and pieces in the Federal field have made marks from time to time, have they not?

A Certainly in the law of evidence with respect to hearsay. How far those have had any effect on problems of confrontation in criminal cases I don't know. I think you will find that most of those relate to the civil matters of one sort or another.

Now we come to this particular case where you have the Georgia statute, which on its face is not very striking, after-the-fact conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all. And that is rather consistent when looked at simply verbally with the traditional co-conspirator exception to the hearsay rule.

The Supreme Court of Georgia has in a series of decisions, not in just this case but in prior cases, extended that so that it is applied literally. That is, it is not limited to the time when the conspiracy is continuing, and it is not limited in acts in furtherance of the conspiracy. And in both respects that goes beyond the traditional co-conspiracy exception to the hearsay rule.

Here we have a statement which is ---

Q There are some states which have this statutory rule, are there not, like Colorado, Kansas?

A There are two or three states which have something like this, I believe.

Q In a criminal extent.

A It has not been a general -- most of the states have limited it to in furtherance of the conspiracy and during the continuance of the conspiracy, although many of the states treat the conspiracy as continuing as long as it is to conceal the past events, which has much the same effect.

It is clear to us that this statement would not have been admissible in a trial in a Federal court. We think not because it violated the conspiracy -- it violated the confrontation clause of the Constitution, but because it is not within any now-existing Federal rule of evidence with respect to the admissibility of such statement.

Now the question whether it should be admissible in a state trial involves not merely the laws of evidence and law of the Constitution, but also a special aspect of the law of the Constitution and that this is a Federal system. And the undesirability, as we view it, is this Court establishing a fixed and rigid pattern with respect to the law of evidence to which every state must adhere and which would prevent further development and experimentation in this area.

And we, having examined this evidence in this case, as thoroughly and closely as we can, find it difficult to see how it could properly have been admitted in the Georgia case for

the reasons stated by the Georgia Supreme Court. That is, under the construction of the statute given by the Georgia court, which of course is binding upon this Court, as to the meaning of that statute, that this comes within an exception to the hearsay rule with respect to co-conspirators, both because the time delay of 15 months is too great and because it was not in furtherance of the conspiracy.

The underlying reason for the admissibility of the co-conspirator's statement is agency authorized -- it is very hard to see how anybody can fairly say that Evans authorized Williams to say this. Or perhaps very close to the same, but not necessarily the same, assumption of risk.

Q How long after Evans was apprehended was this statement made? What was the time lag between the deed and the statement?

A How long after Evans was apprehended.

MR. EVANS: Well, it was the day after he was arraigned.

A It was the day after the arraignment and the arraignment -- it was the day of the arraignment.

MR. EVANS: I think it was the day after and a year after the crime.

A It was the day after the arraignment. It was shortly after the apprehension, within a few days, and 15 months after the crime.

Q But this delay is accounted for by the fact that

these men were not apprehended.

A That is right.

Q That is a long time.

A That is right, and during which the element of conspiracy to conceal obviously continued.

But we should ---

Q But your thought there may relate to it. How is the situation like the one of the witness Perry, who, in effect, confronted Evans with some suggestion, and the testimony was that Evans threatened him if he were to reveal it? Would that be the kind of factual setting which could be regarded as in furtherance of concealment of conspiracy?

A Now, Mr. Justice, that of course was Evans who did that. You don't have somebody else. In this case it is Williams' statement, and Perry's testimony is with respect to facts that Perry saw and observed. Evans said, of course some of it was his words, but that could be of the order of confession or admission.

You don't have any hearsay problem with respect to what Evans did. But we suggest -- what we finally came down to after we had wrestled with this for a long time -- was that this evidence can properly be admitted in this case if there are adequate safeguards of trustworthiness. And again I don't say that it is true, but "adequate safeguards of trustworthiness."

And we think that there may be here, first, in the

spontaneity of the statement, which is like the old classical exception to the hearsay rule of res gestae. The scholars have debated have debated whether that is a concept which really means anything. But the things which happened spontaneously, it is felt that there is some tendency that they would be likely to be true. They aren't premeditated. There isn't forethought, and they aren't schemes.

And then there is the further fact that the statement was against the interest, the penal interest, of the declarant Williams. And when you add both the spontaneity and the against penal interest, we think that there are grounds upon which they state in administering its criminal law could properly saw that this can be received as an exception to the hearsay rule.

Q May I ask, Mr. Solicitor General, why would you add spontaneity if you have a declaration against the man.

A Well, I think both ---

Q I understand Williams' declaration, but why do you need both?

A I don't know that you do need both, but you have both, and they do tend to reinforce each other as providing not a guarantee of truth, but a basis for saying that this is at least as strong a basis, it seems to me, as the dying declaration one, which is very firmly established in our law.

Now we suggest that the ---

Q I would suppose that this statement would not be

necessarily against interest.

A You would ---

Q Those statement pursuant to the conspiracy would surely be against him.

A The statements might or might not be against interest. Williams might have said that I didn't have anything to do with it, it was only Evans, in which case it -- what his statement was, "We wouldn't be in this fix if it weren't for that S.O.B. Evans."

Q (Unclear)

A That, Mr. Justice, would be arguable. We would have spontaneity, but we wouldn't have against interest. All I am trying to say is here we have both.

Now it is quite clear that the Georgia Supreme Court did not decide anything as to the law of Georgia with respect to these indicia of trustworthiness. Georgia might not find that that was consistent with its law and I don't think that this Court should make that kind of a law for Georgia, and so we would suggest that in the inevitable remand of this case, because no matter what the Court does there are other issues, that the question should be left open for the Supreme Court of Georgia to hold that under its law evidence of this sort is admissible because it does contain the earmarks of trustworthiness which are within the ambit of the extensions of the hearsay rule, of which the state court and legislature can make.

One of the factors which moves us to this conclusion is the great undesirability of having the Federal court sit in review of every interstitial decision in state criminal trials. Every question with respect to the admission of evidence can be brought into a due process question. Many questions under hearsay or otherwise can be brought into questions under the confrontation clause.

We recognize fully, of course, the overriding importance that this Court see to it that the Federal Constitution is enforced, and we recognize fully that this Court is the final arbiter of what the Federal Constitution requires. But we think it highly undesirable to set up a situation under which more questions in state criminal trials are brought into Federal courts than is the case today.

Q Turning again to the premises on which you are arguing, what would the Georgia court do on the man that it hasn't already done by virtue of it local rule?

A The Georgia court would, as I see it, say that the basis upon which we decided this case previously, namely, that this comes within a co-conspirator exception to the hearsay rule, is not sound becuase there are no earmarks of trustworthiness with respect to a statement made so long after the event. There is no agency or authority. There is no assumption of risk.

However, the question still remains whether there are other bases which we did not consider, which provide earmarks of

trustworthiness.

Q And those would be completely independent to any co-conspirator ---

A Yes, Mr. Justice, those would be completely independent. And the other bases which I suggested are spontaneity and against the penal interest, and the Georgia court could decide on the basis of examining authorities elsewhere in its own view it thought those were adequate tests of trustworthiness; and if it so found, I should think that should be final and not subject to further review as far as compliance with the Federal Constitution is concerned.

Q I have one more question, Mr. Solicitor General. Would it be -- would you venture to say what the Court might do? Would it be rational for the Georgia Supreme Court to say that this declaration, coming so soon after an occasion which triggered it, namely, apprehension and indictment, is something that you can use for trustworthiness?

A In other words, can 15 months be exceeding ---

Q More or less.

Q People find that when you are trying to conceal a conspiracy when you are not likely to have an occasion to be talking about it. And here we have an event, a very dramatic event ---

A Perhaps that is another way of putting what I am trying to say. I would not like -- I don't think I could defend

a rule which would say that anything that was said within the first two days after arrest would be admissible. It seems to me that here the circumstances, the return from arraignment and under some stress, and the explosive nature of the response and the against interest nature of the response do give an earmark of authenticity, which made it sufficient to warrant it being considered by the jury.

It was, of course, impeached in the cross-examination of Shaw. But all of that, it seems to me, is the sort of thing that juries are qualified to consider in fact-finding. I agree, here for more than a year these people knew, assuming that they did, that three policemen had been killed and they were walking a very tight rope. They were arrested, they were arraigned, and the tension is probably still there.

Immediately after arrest in those circumstances there is a further earmark of trustworthiness. I think I would say, in answer to your question, that the Georgia court ought to be able to take into account all of the facts and circumstances in deciding whether there was an adequate indication of trustworthiness, but I don't think that without such a showing it should be admissible, nor do I think that a long narrative statement, i.e. a confession, should be admissible under the circumstances.

Q May I ask you this question because I am a little puzzled. It is a hard case.

As I understand it, you are saying that there is no

violation of the confrontation clause of the Fifth Amendment.

A Yes, Mr. Justice, that is truly our position.

Q That takes it out of the case, from your view. I can't see how, in addition to that, you are saying much more. Since that is not the case, the question of its admissibility to the State of Georgia -- and you are suggesting that they should consider certain things as to trustworthiness and so forth.

A Well, perhaps, Mr. Justice, I will repeat the finding. I am surely arguing that the confrontation clause and the right to cross-examine are not co-extensive, but there comes a place where they run into each other, and a place where, as far as I am concerned, they do run into each other is with respect to a long narrative confession.

If the prosecutor in Georgia undertook to produce Shaw and Shaw said, "Well, we talked together for half an hour and he told me all the facts. He told me how they went out and took the cars, they were stealing the cars and they were putting parts on, and the police came and then the policeman leaned forward and somebody took out his gun and then he was shot" and so on. It seems to me clearly that that is not admissible and is not admissible not because it violates the hearsay rules, but because it violates the confrontation -- the right to confrontation.

The case-in-chief cannot be presented by completely hearsay evidence to that extent. Now why can't a little bit of

evidence be presented? Why can't a dying declaration be presented? Why can a book entry or a business entry be presented? Because the confrontation and the right to cross-examination are not co-extensive, and in certain circumstances, perhaps some of them limited, and in all of which I think there is some earmark of trustworthiness, the courts have found that it can be admitted.

Now obviously it can't be admitted if it violates the confrontation clause, therefore my answer to your question was that it didn't violate the confrontation clause. But if you try to push it too far, you come to a place where you violate ---

Q Does that go to the length of the thing? Is that the reason?

A I think the best I can say, Mr. Justice, is that because of the factual circumstances which give earmarks of trustworthiness.

Q Do you consider whether or not the confrontation clause does not cover this, it might be better and more in line with our system of government to say that the question of state law -- and they can determine whether or not it is admissible?

A Well, I think is more than I could now set. If, for example, a state ---

Q If it were considered by you in reaching your conclusion.

A If, for example, a state would say that a statement made by a third party to a police office, outlining the crime and

implicating Evans, is admissible without the appearance of the third party, I would think that that plainly violated the confrontation clause.

And where the line draws in between that and dying declaration and other things which are clearly admissible is a hard question.

Q They might not be admissible under the reconsideration of the confrontation clause, and the whole question might be they would have to be a burden.

A If, for example, a state should simply say that the hearsay is abolished, period, nothing else, then I think we would get these questions and we would find that under such a rule of state law there would be types of evidence this Court would feel could not be received consistent with the confrontation clause.

Q Well, would it be a matter of the confrontation or a matter of due process?

A Well, Mr. Justice, I think you and I tend to agree on that. I would much prefer to put it on due process. The majority of the Court has put it on confrontation.

I would be quite content to say that it was a violation of due process.

Q Well, this is prompted by Justice Black's inquiry of you. If confrontation doesn't apply, you would not ---

A Then we would still, of course, have the due

process as it stands.

Q But he is suggesting that if confrontation doesn't apply, that there would be no Federal admission, as I understand it, under this kind of evidence.

A One problem, Mr. Justice, is that if you say that the confrontation clause doesn't apply, I don't see anything to which it does apply. And obviously it seems to me that it does apply and has a very significant role in our system of criminal trial.

Q Mr. Solicitor General, your emphasis on the length hasn't been completely interpreted in all its ramifications, but I suppose you would agree that there has been some dying declaration in which a man involved in a criminal act, or knowing of it, knowing death was imminent and knowing that the clergymen are on hand administering the last rites, and the physician has assured him that the end is near and he then dictated a lengthy statement. Would a dying declaration be any the less admissible by virtue of its length?

A No, Mr. Chief Justice, as I understand it, if it has reached the test for a dying declaration, it is admissible no matter how long it is. I think that most of the cases involving dying declarations are somebody with his last breath or gasp says that it is Joe who did it, but I know of no qualification for the exception on dying declaration.

MR. CHIEF JUSTICE BURGER: Thank you. Oh, excuse me.

Did you have a further question?

Q I just had one.

I am bothered by the mechanics of your suggested beliefs in this case. As I understand it, Mr. Solicitor General, you say that the Court of Appeals is correct in its conclusion that the co-conspirator doctrine was insufficient constitutional justification for the admission of the evidence, that would we ordinarily be led to affirm, I gather, the Court of Appeals. Then you go on to say the Georgia court should be given the opportunity to consider alternative grounds for admission. And to that end there is reversal of the judgment below.

What happened? This is habeus corpus, Federal habeus corpus.

A Yes, Mr. Justice.

Q I am just wondering mechanically how does this work? How does it get back to the Georgia court and what Georgia court?

A Well, when I said that the decision with respect to co-conspirators was right, I meant the reasoning with respect to co-conspirators. However, the decision is that the judgment of the district court is the judgment -- the judgment is that the judgment of the district court is reversed, and I think that that at least was put on the wrong ground.

If the judgment of the district court should be reversed it should be for the purpose of remanding it to the Supreme Court

of Georgia, which you can't quite do. I don't know what you would do with that.

Well, there is going to have to be a retrial here anyway now, because ---

Q There is a doctrine or something that you said before. What brings that up?

A Because there is a Witherspoon problem in the case which is not passed on by the Court of Appeals because it didn't have to.

There is a further problem which gives me considerable concern. Maybe Mr. Evans has an answer to it. If there isn't a new trial in this case, then there will have to be a commutation of the death sentence as in the Witherspoon case. On the other hand, if there is a new trial in this case, there can be a new trial before a new jury which is selected in accordance with the Witherspoon case and the man may end up with another death sentence.

I don't know the answer to that. I would suppose -- I would hope that in all of the circumstances that the State of Georgia would work that out, and that if this Court held that the evidence was admissible that there would be, as Mr. Evans said in the prior argument, a commutation.

But that is nothing for me to decide.

Q You would think that it would work its way back to the Georgia courts and there is a commutation, that ends that,

including the Witherspoon question.

A Yes, I would suppose that ended everything.

MR. CHIEF JUSTICE BURGER: Mr. Thompson.

ARGUMENT OF ROBERT B. THOMPSON, ESQ.

ON BEHALF OF APPELLEE

MR. THOMPSON: May it please the Court:

I would address myself to the last matter that was discussed. It is somewhat out of order with the proper discussion of the case, but since it is fresh in our minds right now I shall do it.

There was a companion case to this originally, Mr. Williams' case. Mr. Williams was tried a couple of weeks before Evans was. He likewise received the death penalty. The two cases found their way into the U. S. District Court and then into the Fifth Circuit Court of Appeals.

The Williams case was affirmed as to the conviction and a new trial was not granted. It was remanded, however, for application of Witherspoon. There was another issue involved that is not involved here and it was also to be resolved by the trial court.

Williams, we understand, was commuted under Witherspoon to the life imprisonment. However, the Supreme Court of Georgia has followed a different course from that; although there is no statutory law that contemplates a bifurcated trial, the Supreme Court of Georgia where Witherspoon has been raised and was

applicable has remanded the case to the trial court for a sole issue of trial punishment. They did not grant a new trial, but the jury that convicted him, that verdict stands and a new jury would be selected in accordance with the teachings of Witherspoon, and a new trial would be had on the issue of penalty only.

This has been our observation and experience. We do not know what course this case could take in following Mr. Justice Thurmond's halt. I do know from here the mechanics of getting this case back to the Supreme Court of Georgia for reconsideration.

Q May I interrupt, Mr. Thompson. In the Federal habeus in the district court he sustained the conviction, didn't he?

A He overruled the motion for -- in effect, he sustained that.

Q That's right, so the conviction stood. Now under the Court of Appeals reversal this automatically would require either, I gather, an order if that is affirmed here. That would require an order of the district judge releasing Evans, unless he is given a new trial within some specified period. Is that it?

A That would be my understanding of the mechanics of it.

Q But a reversal of the Court of Appeals on the Solicitor General's ground, I don't see how it works out.

A As I see the mechanics of it, I had recently seen this. As I mentioned, the judge of the Georgia Supreme Court formulated a rule under Witherspoon for a second trial where we had no provision by statute or otherwise. But I would assume that in normal course that if this case were reversed, it would be sent back to the Court of Appeals and the Court of Appeals would decide the other issues involved, which it has always substantially decided in Williams anyway, and then would ultimately send it back to the district judge, affirming the denial of habeus corpus and there we would be.

Q But never have a new trial on the subject of guilt or innocence?

A I assume that we would on the subject of guilt or innocence, no, sir; on Witherspoon, perhaps on commutation.

Q But this issue goes to guilt or innocence, this issue that we have before us now?

A This is correct.

Q I would have a complete retrial, all the evidence. The jury listens to it to determine whether to give him a death penalty or something less. Is that it?

A This would be the option, of course, of the district attorney as to what the evidence would be on the issue of penalty. Normally, we have a new statute in Georgia where we do have such a second trial now that has been recently enacted. The jury sits, first, in judgment of guilt or not guilt and then

sits in judgment on the penalty.

Then under the statute that is presently existing the jury would only hear evidence with reference to the background, the history, what should be imposed, that there would be nothing to preclude the introduction of evidence concerning the crime itself.

Q I would assume that all the evidence would be admissible that was admissible before.

A I would assume that it would be, if it were tendered, yes.

In this particular case I think ---

Q And did you say that the State of Georgia was doing this now, the Witherspoon case?

A Yes, sir. Sending it back for trial solely on the issue of the penalty or sentence.

I would not spend too much time citing the facts of this case, as Mr. Evans did recite them rather fully. We think more as an advocate, however, as impartial observer of the record. Perhaps my observation of it, too, is too much as an advocate since I did try the case. Mr. Evans did not.

We submit that this is not a case where the evidence is overwhelming, where the introduction of something such as we have here would be harmless. I am not arguing now the issue of harmlessness, but I will discuss thatin a moment.

But in context I would state that evidence in this case

is based almost solely upon the testimony of Wade Truett, who testified as to all of the events which Mr. Evans has recited. His testimony was secured by the state and we think this is significant as to the weight. We know this Court will not weigh the evidence. We think as to whether or not the evidence is overwhelming -- we think this is significant.

Mr. Truett testified under an immunity from prosecution. He was granted immunity from prosecution for three murders, apparently for his larceny ring. He was never prosecuted for that. He was also given other promises such as he was then serving a Federal sentence which the State of Georgia would attempt to secure parole for him.

Q The jury knew all of this?

A Yes, sir. I am not arguing the facts of the weight of the evidence, if it please the Court. It merely wanted to point out that the evidence was not so overwhelming as it was suggested.

Now there was corroboration of Mr. Truett's testimony as to events, time and place. There was only one slight bit of evidence that would connect Evans with this offense, and that was the testimony referred to a moment ago of M. C. Perry. He had talked to Evans on one occasion or more and had talked to Williams on other occasions concerning the theft of the automobile.

This, we would say, would tend to corroborate Truett's

testimony.

The only other corroboration or suggested corroboration in the record of Truett's testimony given under the circumstances as we outlined was this statement of Lynwood Shaw, the statement that is here in question. Cryptic as it is, we suggest that as the state did at the time of the trial in its argument to the jury, it meant that Evans did participate in the crime.

We approach those facts now in context with what happened. First of all, Shaw had testified two weeks previously at Williams' trial and Williams had been convicted. At that trial he had testified differently than he had testified to here, as is shown on page 51 of the appendix. He testified actually at that trial: "If it had not been for that dirty S.O.B. Alex Evans shooting Everett" -- that was one of the officers -- "we wouldn't be in this mess."

At the trial we did not go into that and cross-examine concerning this statement, because it would have been more hurtful to citizen than helpful to a jury.

But in any event, knowing that Mr. Shaw would testify to something in this substance, the objection to the evidence here was made prior to the time it was introduced, and it was made on the constitutional ground, on hearsay grounds and on other grounds. The state nevertheless -- and Mr. Justice Black asked the question a moment ago, why did the state introduce the evidence -- the state fought strenuously the motion to exclude it.

And the record takes a good portion of the argument of counsel in ruling the court in this connection.

Despite the raising of the issue, somewhat prematurely but it is protective of the defendant on trial, the state still insisted that it be admitted into evidence. Thereafter Shaw was subjected to rather strenuous cross-examination, not on the question of what Williams said, but on his own -- attempting to test his own veracity.

We submit that that very thing that happened here in perhaps a different context, well perhaps different statements and in different courts of the same things that have happened in the four cases previously decided by this Court, in which the Court ruled that such testimony under the circumstances present here was inadmissible. Whether it be considered hearsay or not is not too important, but because it denied the defendant confrontation.

Q Did you call Williams?

A We could have called Williams, yes, sir. We could have subpoenaed him and he could have -- he was in custody, of course. He could have been placed on the witness stand by either side in this case.

Q Without that testimony can the state convict?

A Without that testimony?

Q Do they ever sustain a verdict of guilty without that testimony?

A If it please the Court, Mr. Justice Black, the Supreme Court held that there was other corroborative evidence in this case.

Q It held there was enough evidence without it?

A It did not rule one way or the other on that issue. It merely ---

Q What is your ---

A Sir?

Q What is your judgment?

A It is my judgment that the Supreme Court would hold there was sufficient corroborative evidence, to be candid with the Court.

Q There was what?

A There was sufficient corroborative evidence.

Q But the evidence was not in.

A Without this. Yes, sir, that is what I am stating. The absence of this testimony of Shaw, if it were excluded from the record, it is our opinion that the Supreme Court would hold that the evidence was sufficiently corroborative excluding this statement. That is what we believe the Court probably would hold.

Q I don't quite understand "sufficiently corroborative." That's not what I am ---

A Well, ---

Q In your judgment if that statement is wholly excluded and taken out of the case -- forget corroboration or

anything else ---

A Yes.

Q --- is it your judgment could be sustained?

A Yes, sir.

Q It could?

A Yes.

Q There were a total of 20 prosecution witnesses, were there not? There was Truett, who was the eye-witness, who testified in detail as to what happened, and then there were 19 other witnesses, some very minor to be sure. And Shaw was one of the 19, was he not?

A Yes, sir.

Again, Mr. Justice Stewart, we have to take in the case in context with Georgia law, which I omitted referring to and perhaps I was jumping a little bit -- Mr. Justice Black ---

Q But the total event has to be corroborated.

A That is correct.

Q That is Georgia law?

A That is Georgia law, yes.

A defendant or an accused cannot be convicted solely on the testimony of his accomplice. His accomplice must be corroborated, and under the Georgia rule must be corroborated in such a manner as to connect the accused with the offense and not merely at the time the event took place. These other 20 or 19 witnesses that I referred to ---

Q (Unclear)

A A number of them were testifying relative solely to the time of the event and place.

The Georgia -- well, there is no need to discuss the prior rulings of the Georgia Supreme Court on corroboration. This case deviated, I might state, somewhat from the previous rulings of the court as to corroboration, as Justice Williams pointed out in his dissenting opinion.

Q Mr. Thompson, I think you said that Williams could have testified.

A I know of no reason, if it please the Court, I could not have subpoenaed him.

Q Did you say he was convicted a couple of weeks earlier?

A Yes.

Q Did he have an appeal pending then?

A He did, sir.

Q If you had called him, would you have gotten his testimony?

A I do not know, sir. We did not test that.

Answering the question that was addressed to me, we had the right to subpoena him or, in this case, secure habeus corpus to require his appearance. But as to whether he would testify ---

Q For a short right, that is quite an incriminating

statement, so that Williams made was ---

A Yes, sir, we thought that it was.

I did want to discuss the prior decisions of this Court. But as I referred to a moment ago, I discussed them thoroughly in the brief. I would want to discuss them briefly here in order that we might have the entire matter, from my standpoint at least, in focus.

We submit that beginning with the Pointer case we have not discussed the facts of any of these cases substantially here this morning -- or this afternoon, but begin with the Pointer case. Now Pointer was the case, the Court will recall, where the witness had testified at a preliminary hearing of some kind or a statement had been taken from the witness, and he had since left the state and was not anticipated to return.

The prior testimony of this witness was admitted against Pointer. This Court held that this denied the defendant on trial confrontation. We relate the situation here, and I will discuss availability in just a moment, because Mr. Justice Harlan discussed availability in the Green case.

Q There was no counsel at the preliminary hearing in the Pointer case, was there?

A I think the Court -- that is correct. In the Pointer case, and he did not knowingly waive his right to counsel at the time. That is correct.

But we concede really no substantial difference between

Pointer and the case here at issue. You had the testimony of one -- in effect, the testimony or the declaration of one who was not present being used against the defendant on trial. The same might be said of the Douglas case.

In Douglas, the Court will recall, the co-defendant had been previously convicted just as Williams in this case. The prosecuting attorney called him to the witness stand to testify, as perhaps the district attorney could have done in this case. He refused to testify on the ground that it might incriminate him and the district attorney, through the guise of asking him questions, read the statement to the jury that the co-defendant had previously made, implicating the defendant on trial.

Subsequently he placed on the witness stand the officer who had taken the statement, to corroborate or to establish the fact that it was the statement made by the co-defendant. This Court told him that this was denial of confrontation.

We submit again that the facts are not dissimilar from those present here. Instead of having an officer verify that Williams had made the statement, it was merely a fellow inmate who testified that he had made the statement. Actually, while not on all fours naturally, we submit that the case is fully applicable here -- the intent, the design and the logic and reasoning of that case.

In Janis the question was similar. A co-defendant's

testimony was used against Janis. The co-defendant was not available to testify and did not testify, and this Court held that criminal on trial was denied confrontation.

The same is true actually in Hooten and Roberts, which are the cases that I mentioned a moment ago.

Q Suppose if Williams and Evans had been tried jointly at the same trial, would Hooten have a bearing on the admissibility of those statements then? If there had been a joint trial?

A We would think that Hooten would fully apply in that case and the statement would not have been admissible upon the trial of the case, had they been tried together.

The only difference that -- and I am not overlooking that in my discussion -- the only difference that we have here that might be urged here in the co-conspirator rule. The co-conspirator rule, of course, would have apparently have applied in any of the other cases that this Court had decided. It was not discussed insofar as we can recall.

Q Well, the big difference we have in Hooten -- the big difference between the situation here and what the situation would have been had there been a joint trial, is that in this case you have told us that you could have called Williams yourself, whereas if Williams had been the co-defendant in the trial here with Evans, you couldn't have obviously because if you had tried to, he would have pleaded the Fifth Amendment. He wouldn't

have testified. He was then being tried.

But in this case Williams had been convicted, you told us, and you could have subpoenaed him.

A I know of no reason, if it please the Court, why I could not have subpoenaed him. I know of no rule that would have precluded that.

Q Well, do you know why he wasn't subpoenaed?

A Do I know why he wasn't subpoenaed?

Q Yes, sir.

A If it please the Court, he was on appeal. I in my own mind knew from consultation with his counsel that he would not testify at this trial.

Q That he would not?

A Yes, sir. His case was on appeal at the time. I was present, of course, during his trial and counsel were familiar with each other.

Of course, again we ---

Q You don't really know that in the absolute sense by calling him and putting him on the stand?

A This is correct.

Q But tactically you decided that this was not a risk worth taking. Am I assume that?

A This would be correct.

Q It would be a very hazardous business on your part.

A I would discuss now the co-conspirator rule and the one that we had discussed in our brief, and the decision of the Fifth Circuit concerning the application by the Georgia Supreme Court, except the Court is more scholarly, more learned than I in what the laws above the jurisdictions might be. We do not have available to us at all a library that would be capable of furnishing information to us.

But insofar as I know, in most jurisdictions -- there may be some exceptions that Mr. Justice Stewart mentioned -- but in order for a statement of a co-conspirator to be admissible in a conspiracy trial or in a trial where conspiracy evidence is admissible, it must have some relevance to the conspiracy. It must be in furtherance of the conspiracy generally.

We submit that the application of a rule of law which would make any statement made by a co-conspirator, whether it be accusatory in nature or narrator of past events or what-not, would have the same effect that this Court has ruled impermissible in the cases that we referred to a moment ago, beginning with Pointer. That this would be nothing more than a method of having an actual witness testify through the mouth of someone, the witness' veracity being untested and untestable and not subject to cross-examination.

Now I am not overly concerned with attempting to draw some line between the right of confrontation and the right of cross-examination. It seems to me from the exceptions that have

stated to the Court, and those which we know, the right of confrontation is also denied where the right of cross-examination is, such as the case of a dying declaration. The party is not confronted with the person who actually made the declaration.

The business records rules is similar. The party is not confronted with the one who actually made the records. But in all of these exceptional cases there is some reasoning, some purpose, some exceptional circumstance which the courts have found negated or eliminated the need of a necessity for confrontation.

Wherever this confrontation exists, there is the right for cross-examination.

We submit that in the absence of a rule which would circumscribe the type of testimony that would be admissible under the co-conspirator rule, that is, at least to make it relevant or to make it in furtherance of the conspiracy, then the defendant would be denied a confrontation and such an exception should not exist. There is no constitutional or logical or even reasonable rule that we can see that would permit such an exception.

It has been suggested in oral argument here that the reliability of the statement might be something that would be tested. There again we have pointed out previously, in connection with this particular case the witness had testified a different way two weeks earlier than he testified here. There is

nothing in the context of the testimony that was given here of the statement that was purportedly made by Williams, which would lend reliability to it.

Now the Court has made comments concerning our ability to subpoena Williams, which we have admitted that we could do. Of course, in the Douglas case the defendant -- or the co-defendant Lloyd I believe was his name -- was subpoenaed and was placed on the stand by the state. The Court held there, however, that he was still unavailable to be cross-examined.

I might state, incidentally, that had we subpoenaed Williams and had we placed Williams on the stand to testify, that he would not be subject to cross-examination by us under the laws of the State of Georgia. We would direct him. He would be subject to cross-examination by the state.

While this might make only a little difference, it does have some weight. We do point out that it was the state that called Douglas in the Alabama case.

Q Do you have the practice in Georgia of calling a witness as a hostile witness? For cross-examining?

A We can if we can establish that they are hostile, yes, sir.

We are told by counsel for the United States, the Solicitor General, that the statement made by Williams was against his penal interest and this might be one reason the Court should consider it being admissible.

Actually, I don't know whether it was against his penal interest or not. The statement, as we understand it, was an accusation against Evans. It was not an admission on Williams' part at all. He merely accused, as we see it, Evans of doing something.

Q Well, you argued the case to the jury, so I suspect you would have pointed that out to him.

A I suspect that I did, if it please the Court. I don't recall, but I am reasonably satisfied that I did. His statement was rather cryptic.

This does point out one of the issues that I am sure we did argue to the jury was another matter concerning the cryptic statement made by Williams. Evans gave an unsworn statement, as he had a right to do at the trial of the case. In his unsworn statement he testified that -- or rather, he stated to the jury that he had made efforts himself -- and the evidence will show that Evans was previously a law enforcement officer of Gwinnett County, being a deputy sheriff of the county in which these three officers were killed.

He testified that he himself had made efforts to investigate the offense and bring about who the killers might have been. He testified that in his opinion that this whole case was a frame against him and partly because of his efforts to make this investigation.

Had Williams been available to testify, had Williams

testified as to what this statement meant, then he would have been -- it might well be that it could have been developed that it was not an accusation at all.

We point out merely that the inability or the lack of having an opportunity to cross-examine Williams might have more effect than is just shown on the face.

Q Are unsworn statements subject to cross-examination under any law?

A No, sir, they are not.

Q He had the best of both world then really, didn't he? He had the opportunity to get his story to the jury and be free of the rigors of cross-examination.

A This is correct. In Georgia the a defendant has an election he can make. He can elect to give sworn testimony or he can elect to give an unsworn statement.

We submit, incidentally, that the recent decision of this Court in Green reemphasizes the prior decisions of the Court relating to confrontation. Green pointed out circumstances in which an out-of-court or an extra-judicial statement would be admitted, and this would be only where the person who made the statement was available as a witness to testify, to deny it or explain it.

The Court's suggestion that we could have called Mr. Williams to explain or deny this statement again would call into issue another facet or doctrine of the law because there is no

burden on the defendant to prove anything in the trial. It ought to go forward with the evidence, as we understand it. Certainly that is Georgia rules.

The question of harmless error we have discussed previously and alluded to it previously. As Mr. Justice Brennan pointed out, one of the justices of the Supreme Court of Georgia who considered that issue thought that it was prejudicial. The three judges who sat on the Court of Appeals thought it was prejudicial and certainly held that it could not be held to be harmless beyond a reasonable doubt.

The prosecuting attorney at the time that the evidence was introduced certainly exerted every effort he could to get it before the jury. He thought it was prejudicial, or he certainly would not have wanted it there.

We submit that the entire purpose of the admission of this evidence was for the purpose of the function that it did perform, to prejudice the court as much as possible.

Q (question unclear)

A Except to this extent, the record in this case shows an extraordinarily strenuous effort to keep the evidence out. And now the argument is that it is a drop in the bucket. At least at the time the prosecutor had a different opinion of it.

Q In most of the state courts the defendant does not have the benefit of the unsworn statement. There are only a few

states which do, Georgia being among them.

A I don't know of any state other than Georgia which has that.

Q To some extent it is a counterbalancing factor. He could make a denial and not be subject to the penalties of perjury or cross-examination and the usual predicaments that the defendant is put into.

A This unfortunately is something that he could not deny, because he was not in a position to deny whether Williams said what Shaw claimed that he said. This is the ---

Q I mean, make a denial of any suspicion of a criminal act. He would deny all the evidence against him.

A He could do that, sir.

MR. CHIEF JUSTICE BURGER: Mr. Evans, I see on here we have only allowed you 30 minutes, but we have allowed the Solicitor General and Mr. Thompson two hours -- an hour. If you think you need more time than your five minutes ---

MR. EVANS: I do not think so, Mr. Chief Justice. I have actually very few comments.

MR. GRISWOLD: I believe he is entitled to 45 minutes. He had 45 minutes and I had half an hour.

MR. CHIEF JUSTICE BURGER: Our schedule shows him only 30 so I thought he would like a little more.

MR. GRISWOLD: I think that is an error.

MR. CHIEF JUSTICE BURGER: I think it is, too. That is

why I was ---

MR. GRISWOLD: I think he has about 15 minutes left.

MR. CHIEF JUSTICE BURGER: Our schedule shows only five, but we will allow 15.

REBUTTAL ARGUMENT OF ALFRED L. EVANS, JR., ESQ.

ON BEHALF OF APPELLANT

MR. EVANS: I hope to complete it in five, sir.

I would like to mention for the Court's general information that in the companion trial of Williams, that Evans was, in fact, called as a witness and did testify. Therefore there is no question that the defense could have called Williams to testify and repudiate a statement or to put him on the stand.

Q During the trial Evans was called by the prosecution or the defense?

A By the defense, sir.

Q Did he testify?

A Yes, sir, he did testify.

Q He was on charges awaiting trial.

A His testimony, of course, was a general denial of actually everything.

Q We have already interrupted you. When you last argued this case, you conceded, as I remember it, that this death sentence imposed in this case cannot be carried out.

A No, sir. I am somewhat confused, frankly. In the companion case the district court ordered the state court to

commute it to life imprisonment. Now at that time, I assume -- and it may still be, I can't really say -- I assume that the district court might well take the same procedure here. If it does not, it is my understanding that the option in the district attorney to have a new trial purely on the question of punishment.

I believe everything Mr. Thompson said was accurate on that.

Q Well, then I am right in my understanding. This death sentence imposed by this jury could not be carried out?

A Yes, sir, that is absolutely so. That is absolutely so.

I might point out, however, that I must take exception to the comment which the Solicitor made for a new trial. It would be necessary, whatever this Court does. I do not believe that is so.

In the companion case there has been no new trial. It was remanded to the state judge for a review of the evidence to see if there is a Brady-type situation as to the question of evidence.

It was reviewed and they found no suppression of evidence, but there was no new trial.

In connection with the Solicitor's recent argument, we of course greatly appreciate the support of the proposition that the state should not be bound to any particular set of

hearsay rules.

We welcome the argument that the co-conspirator exception has merit and ought not to be thrown out. We particularly appreciate the Government's support of the proposition that all that should be asked is that the categories of admissible evidence of hearsay be generally trustworthy.

In his oral argument the Solicitor pointed out that to allow evidence in, if the states abolished all hearsay rules, the entire hearsay rule, the test should really be nonrelevance and trustworthiness. I reiterate what I said earlier, but I really believe it has both relevance and trustworthiness concerning the particular testimony in question here.

The final point I really have is that the one inconsistency that I find in the Solicitor's position is his suggestion that the evidence was admitted under the wrong vehicle, but could be admitted under some other exception. It seems to me ---

Q Mr. Evans, I am not so sure that he said "could be." He said "might be."

A I assume from his argument that he said it could be consistent with the confrontation clause if the court of Georgia said it was admissible under Georgia rules of evidence.

Q That it constitutionally could be?

A Yes, sir, that is my point. We are talking the Constitution at this point.

Now what I would like to say here, does this not show when he says that it should not come in under this vehicle, but could come in under some other vehicle, does that not show that we really here arguing rules of evidence and not arguing the confrontation clause at all?

Furthermore, does it not show that the very elementary rule that if evidence which is admissible under A or B erroneously comes in under C is the clearest possible case of crimo seri.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Evans.

MR. GRISWOLD: May I say a sentence about the mechanics and answer a question Mr. Justice Brennan gave me?

MR. CHIEF JUSTICE BURGER: Yes.

MR. GRISWOLD: We did say at the conclusion of our brief, Mr. Justice, that the judgment below should be reversed. I think that was wrong. Now I think it was wrong.

I think that the judgment should be affirmed with an opinion from this Court which lays out what the law is. That would result in a granted habeus corpus by the district court and the state would then be free to retry the defendant under the law with respect to the Constitution as established by this Court.

Q Retry him and not merely give him final case of trial and punishment?

A It would be our position that it would have to be

a retrial, because we think that the Georgia Supreme Court has not passed on the question which is fundamental as to whether this evidence is admissible consistently with the confrontation clause.

Q How can they do that without a new trial?

A That is the mechanics. I don't know how you get a decision from the Georgia Supreme Court except by reviewing a Georgia trial court. If there is some way to refer it to the Georgia Supreme Court, then that could be done.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General. Thank you, Mr. Evans and Mr. Thompson.

The case is submitted.

(Whereupon, at 2:25 p.m. the argument in the above-entitled matter was concluded.)