Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

LOUIS S. NELSON, WARDEN,

Petitioner

vs.

JOE J. B. O'NEIL,

Respondent

Docket No. 336

Place Washington, D. C.

Date March 24, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

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C O N T E N T S

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BENHAM

IN THE SUPREME COURT OF THE UNITED STATES

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LOUIS S. NELSON, WARDEN,

Petitioner

vs

No. 336

JOE J. B. O'NEIL,

Respondent

The above-entitled matter came on for argument at 10:10 o'clock a.m. on Wednesday, March 24, 1971.

BEFORE:

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

APPEARANCES:

CHARLES R. B. KIRK
Deputy Attorney General
State of California
San Francisco, California
On behalf of Petitioner

JAMES S. CAMPBELL, ESQ.
900 17th Street, N.W.
Washington, D. C. 20006
On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Number 336: Nelson against O'Neil.

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

ORAL ARGUMENT BY CHARLES R. B. KIRK, ESQ.

ON BEHALF OF PETITIONER

MR. KIRK: Thank you, Mr. Chief Justice, and may it please the Court:

The central question in this case is: was the Respondent O'Neil given the opportunity to cross-examine a co-defendant, Runnels, who in a confession implicated O'Neil?

Or, to perhaps phrase it as the Court of Appeals did: was there an opportunity for effective cross-examination?

I think, central to the determination of this question is an examination of the purpose of confrontation and as this Court recently said in Dutton v. Evans, and I quote: "The decisions of this Court make it clear that the admission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the tryer of fact has a satisfactory basis for evaluating the truth of a prior statement."

Now, before looking to the options available when the confessing co-defendant takes the stand, as Mr. Runnels did in this case, let's see what this case does not

involve. This case does not involve a pointer-type issue where the witness never takes the stand and is never cross-examined, never available. This is not a Douglas-type issue, where the co-defendant takes the stand, but by invoking the privilege against self-incrimination, removed himself from any possibility of either direct or cross-examination.

So, when the --

Q Did Runnels, on any ground, attempt to remain silent?

A Mr. Runnels?

Q Yes.

A No, Your Honor; he voluntarily testified. He was on the stand at his own request and own defense.

Q Respondent's counsel simply passed up his opportunity to cross-examine?

A That is my viewpoint, Your Honor; he had the full opportunity. He could have done so if he wanted, but he did not.

Q Well, they were both quoting an alibi, weren't they?

A Yes, they were, indeed, Mr. Justice B Brennan.

Q Well, why would Respondent's counsel want to cross-examine?

A Well, this is part of my point: I think

that --

Q Well, but why would he? Why would he want to -- their defense was alibi; wasn't it?

A That's right. Thisis precisely my point. I think that the Respondent confuses the technique of cross-examination with the purpose of cross-examination. The technique is assuredly to make the fellow develop some kind of conflict if you want to, or prove inconsistency if you want to. But if that man is on your side -- if that man is on your side and fully supporting your --

Q W Well, ordinarily, I take it, if a witness is testifying in a way that helps the State against you that obviously you want to cross-examine him. But if he is testifying in a way which doesn't help the State, but helps you, why would you want to cross-examine him?

A That's part of the issue here.

Q Well, I suppose you could get him to tell his story again.

A You certainly can --

Q You could get him to tell this story in your favor again. You may call it cross-examination, but you can still get him to tell precisely the same story again: no, I didn't make the statement --

A This is -- Mr. Justice White, this is precisely what happened when the State prosecutor

cross-examined Mr. Runnels. He went back and said: well, didn't you talk to Officer Traphagen? And

And Mr. Runnels said: "Sure I did."

Didn't Office Traphagen ask you if you did this and so? "Sure he did."

And didn't you say he did?

"No, I didn't; one I found out that I had a right to an attorney I clammed up and didn't say anything further."

And then the prosecutor said: well, didn't you really do this? Didn't you commit this crime? And he said:

"No; I didn't do any such thing."

This was -- these options were all available to Mr. O'Neil's counsel. He complains that perhaps he couldn't bring out the fact -- because he couldn't bring out the fact that maybe O'Neil was -- had some kind of motive -- had some kind of dislike -- maybe Runnels had some kind of dislike for O'Neil because O'Neil had sort of a hold on him, as Officer Traphagen had told Mr. Runnels.

But, he could have gotten Runnels -- he could have said: do you dislike O'Neil? Runnels would have said, "No."

Would your dislike for O'Neil have caused you to make this statement? "I didn't make any statement at all; I like O'Neil. We didn't do it."

This was available, but it wasn't done.

Now, so I think that you have really pointed out perhaps the ultimate question, the bare question here: why should O'Neil have attacked the statement at all? Cross-examination is a tool, but you don't use tools unwisely. You don't use tools if you don't need tools, and they didn't need tools.

Now, I myself, have wondered how the Court of Appeals could say there wasn't any effective cross-examination, or wasn't -- the Court of Appeals didn't say, and Mr. O'Neil has proffered a few explanations in his brief before this Court and we have touched on some of them with our answers. Namely: he says that you can only have effective cross-examination with a witness if he can bring out qualifications in his testimony or other things.

Again, this is confusing the technique with the purpose of cross-examination. I mentioned again that there is nopoint to probe Runnels' anger. He could have asked Runnels if he was angry at him, but he didn't. He says you can't probe the statement for omissions or errors or inconsistencies. Well, you don't want to. This statement -- what more could he want than what Runnels gave him on the stand, as the dissenting judge below pointed out: the best O'Neil could hope for would be for Runnels to testify that the confession was false and that O'Neil did not commit the crime. Here Runnels gave O'Neil

all that and more. He denied that he confessed and said that O'Neil was not at the scene of the crime.

Q Well, I gather that Runnels did admit he did have a conversation with the detective?

A He did admit --

Q And he just said he just disagreed with what the content was in the conversation?

A Yes, he did, Mr. Justice White; and not only that, but he said --

Q And the circumstances of the conversation were available for investigation? I mean, under what circumstances did you have this conversation? Was there any violence or threats or promises or anything else?

A This was available for exploration. In fact, this is one of the points that was brought out; and in the closing arguments remember they brought in one witness who said: "Well, I talked to Officer Traphagen and he said that he was going to give Runnels five to ten years if he told me something and one year to life if he didn't, so I told Runnels and then Runnels confessed."

This kind of thing was all available for exploration, but it wasn't done.

Q Let me ask you this question, Mr. Kirk: suppose the State had not called Runnels at all -- let me get the setting now of the cross-examination. Excuse me -- suppose

the State had called him and he simply related that he had conversations, but denied the content, as it was. What would the situation be in your case?

A You mean when he admits having made the statement?

Q No; admits having had a conversation with the policeman but denies the policeman's version of it.

A Well, this is what he did in the case, Your Honor.

Q But on whose call?

A This was on -- he was appearing as his own witness and at the same time as a witness for Mr. O'Neil. It makes no difference, so far as I can see, who called him when this particular -- this is the result of his testimony.

Q Well, it makes a difference in terms of the key points of the testimony and whether he is being cross-examined or not; doesn't it?

A Well, insofar as who is cross-examining, that is indeed true. In fact, although here the cross-examination came by this co-defendant who was being tried at the same time, so we still have cross-examination by a defendant as opposed to cross-examination by the prosecutor.

Q Well, if the defendant himself had called him, could he have given any testimony more favorable to the Respondent here than he gave, as it appears in this record now?

A I don't think so. Certainly alternatives -- well he could have said: "I said that but I was beaten."

Q And that's one of the reasons why it was Mr. Justice Brennan's suggestion that there was no occasion to cross-examine him.

A Because he had the perfect -- the most favorable results from his direct cross-examination come out. "I didn't say it and we weren't there." This was the ultimate kind of response you could get from a witness as to these particular facts. This is exactly what O'Neil got. There was no reason to cross-examine.

Now --

Q Well, did I ask you: this was pre-Bruton, I take it?

A This was, Your Honor.

Q And that if this co-defendant had never taken the stand there would have been a Bruton there?

A Yes; yes there is.

Q But he did take the stand?

A He did take the stand.

Q Since there was availability for cross-examination, if the trial were held today I suppose the prosecution, after Runnels had taken the stand, was available for cross-examination, could -- well the evidence was inadmissible against the defendant, wasn't it, on the merits?

A On the merits; yes.

Q I mean, the limiting construction was no longer necessary?

A Today it would not be. I think either under the decisions of this Court in Green, suggesting that this is available as substantive evidence -- certainly under California law -- or in Harris v. New York, whre it could be used at least for the purposes of impeachment to -- against Mr. Runnels' testifying in behalf of O'Neil. This certainly militates against any claim of harm, assuming for purposes of argument it would even reach.

I don't have a great deal to add but I would like to briefly touch on the last argument which Respondent has categorized as a pro forma argument. This is in relation to the concept of exhaustion. Perhaps it's pro forma to the Respondent; it's certainly not pro forma to us in this case. It's a rather short argument because there is not really much to say.

When -- the point is this: when new principles are announced by this Court, some court must examine -- when it's a retroactive principle, must examine all cases. This is new remedy -- there is a new remedy under Roberts. It was a new decision; it was a remedy presently available. And in the interest of comity (?) which this Court has just recently emphasized in Harris v. Younger and Broad v. Lander(?) and

other cases -- in the interest of comity and in the interest of preserving the dual nature of Federalism it would seem that it would be better to refer cases such as this back to the state courts for an initial look. The point is this: now, I agree that you could argue that, while you are already in Federal Court why go back to the state court? That's not really a questionhere. The trial transcript had not even been submitted to the Federal Couart at the time we argued exhaustion.

Some court must examine this transcript. This on one is, I would say, relatively short by some standards of trials in our state, but I think that it would be -- it would further the concept of Federalism and certainly reduce the burden on the Federal judiciary if exhaustion were utilized when a new decision creates -- is, in effect, a new remedy and makes it --

Q You are suggesting now that the Federal District should have done that with this case?

A Should have done with this case. And unless there are any further questions from the Court I will submit.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kirk. Mr. Campbell.

ORAL ARGUMENT BY JAMES S. CAMPBELL, ESQ.

ON BEHALF OF RESPONDENT

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

This case involves evidence in an oral, unrecorded statement reportedly made by a suspect during custodial interrogation; a statement that accuses another person of participation in a crime; a statement reported in court by an investigating officer who conducted the interrogation.

This is unreliable evidence, one of the most unreliable forms of evidence known to the law, yet it is also --

Q I'm not sure I have that clear. Which is the unreliable evidence?

A The unreliable evidence is the evidence of this statement, this alleged statement.

Q Well, you are going to develop for us why that's unreliable?

A Yes; yes, I will, Mr. Chief Justice.

This evidence, in addition to being unreliable, was also devastating; its colloquy incriminating evidence, as this Court described it in Bruton. This unreliability and this devastating impact are the two most important factors to keep in mind in determining whether O'Neil in this case had an adequate opportunity to cross-examine his accuser.

In other kinds of cases involving other kinds of evidence, dying declarations, spontaneous declarations,

documentary evidence of one kind or another, business records, it may well be that something less than the fullest and most effective cross-examination would suffice to satisfy the requirements of the confrontation clause. But if there is any evidence as to which a defendant is entitled to have the true and full measure of cross-examination, it is the highly unreliable or powerfully incriminating evidence which went before the jury which convicted O'Neil.

Now, O'Neil did not have a fair and effective opportunity to cross-examine all the witnesses against him or the alleged maker of this devastating out-of-court accusation, flatly denied having made the statement.

Fully effective examination of an out-of-court examination of this type can occur only when the witness to whom the statement is attributed, affirms this statement in court so that the accused can probe its truthfulness by all the many lines of attack that we include under the head of cross-examination.

This principle is established in cases governed by the decisions of this Court in Douglas against Alabama and Bruton against the United States.

Q Supposing Runnels had testified: "Yes, I did make the statement as reported by the officer. What would you say then?

A Ifhe admitted the genuineness of the

statement?

Q And his lawyer would go on to --

A But he denied the truthfulness of the --

Q That isn't anything that's anybody's fault; it would be the witness's own testimony.

A I'm just trying to recall my hypothetical situation. I see you posing the case where the witness --

Q If Runnels had got on the stand in his own defense, and said: "Yes, I made the statement that was attributed to me by thepolice officer."

A Well, then there would be two further facts which may change the result. Does he then say: "I deny now what I said then; what I said was not true." Or does he say, "And furthermore what I said was true."

Q Well, I mean he just said he made the statement. Then did he expose himself to cross-examination by counsel for O'Neil?

A Well, to the extent that he admits making the statement but denies the content of it. Now, he says it's genuine, but it wasn't true, then you have the situation in which the United States, as amicus curiae in Green, said there would be effective cross-examination in this case. The United States, in Green, took the position that where there is a flat denial of the statement, as to genuineness and truthfulness there can be no effective cross-examination.

That's our case here. A further case is the one where the witness admits the genuineness of the statement but denies its truthfulness. That is somewhat more like the Green case, but still not too Green.

The third situation is the one where the witness affirms making the statement and he affirms the truthfulness of what's contained in there. Then he essentially incorporates and reproduces the accusation in court. And at that point the only -- again, not our case -- the only remaining argument against the admission of the statement under those circumstances would simply be a straight due process argument, that despite this fact the evidence is still so unreliable that the traditional exclusion of evidence of this sort is required as a constitutional matter.

Q Would you agree that very narrowly the purpose of cross-examination is to persuade the jury that one of the witnesses is not telling the truth or that his memory is faulty or that for some other reason his testimony should not be accepted. Would that generally be the purpose of cross-examination?

A Well, the purpose of cross -- I would hesitate, Mr. Chief Justice, to try to encapsulate here for you all the purposes of cross-examination as --

Q But those are three of the purposes that --

A Yes; these are certainly among the purposes

One is to attack the credibility of the witness through the various devices which are encompassed under the head of --

Q If a witness is called and gives direct examination which has -- just has no real impact on the particular case at all, just not a bit harmful -- doesn't help; doesn't hurt; just largely irrelevant. Does a wise lawyer usually not elect simply to let that witness alone?

A That is correct. That's correct. He would probably not cross-examine.

Q Defendant's counsel here, Respondent's counsel at trial, made that kind of a decision, a tactical decision here; didn't he?

A Yes; he -- O'Neil's counsel did not cross-examine Runnels.

Q Then why would you think he made that decision?

A I think he made that decision because he realized he could not fully effectively cross-examine the really damaging evidence in this case by injecting questions to Runnels. The most that he could hope to do would be to elicit from Runnels a cumulative repetition of the denial of the statement which Runnels had already made on examination by his own counsel.

The notion that this denial --

Q How was Runnels' testimony damaging?

A The denial which Runnels offered in Court was of some very, very limited assistance to the defense. It was a necessary part of the defense. Obviously the co-defendant also had to deny making this statement if he's going to plead not guilty; a statement which incriminates him as well as his co-defendant.

But the evidence that we're concerned about, the evidence, the accusation which has not been cross-examined, and which couldn't be cross-examined by addressing a question to Runnels, is this out-of-court, in-custody accusation which was reported, this alleged accusation that's reported in court through the testimony of the police officer.

Q Isn't the proper way to attack that by cross-examining the officer when he testifies about it?

A No; this --

Q Was it permitted?

A Yes. There was an opportunity to cross-examine the officer.

Q Was he cross-examined?

A He was not questioned; he was not cross-examined by O'Neil's counsel.

Q And you say that was a denial of --

A No, I do not.

Q -- of cross-examination?

A No, I do not; I simply say that that

opportunity to cross-examine the officer and the opportunity to address further questions to Runnels denying the statement, do not amount to a full and effective opportunity to cross-examine the most damaging evidence in this case, this out-of-court accusation is particularly incriminating and particularly unreliable kind of evidence.

Q Mr. Campbell, you emphasize it's particularly unreliable, and I have difficulty putting that together with the fact that you didn't cross-examine the person who I think you are charging with giving an unreliable report: the officer.

A No, this witness Runnels, stated that he never made such a statement. He denied having made the statement.

Q Well, would --

A He could not be effectively examined on this statement that was attributed to him by another.

Q Well, couldn't you probe the officer as to whether he did or did not?

A There were some lines of questioning which would be addressed to the officer and there were some lines of questioning which were addressed to the officer by Runnels' counsel. And -- that is no substitute --

Q But he's not here; O'Neil is here; right?

A Correct; correct.

Q Did O'Neil ask the officer, for example: did he make the statement? He didn't ask him anything.

A That's correct.

Q Why?

A Because he did not feel that he had anything to gain by attempting to question --

Q So that was his tactical refusal to exercise his rights?

A But if that had been the case --

Q Are you complaining about that?

A No; I'm not complaining about that, but if that had been sufficient cross-exaination of this out-of-court accusation both Bruton and Douglas would have had to have been decided otherwise. In Douglas there were officers on the stand --

Q Why argue at all? This man had the chance to cross-examine the two people involved in the statement; only two, right? The man that allegedly made the statement, and the officer who heard the statement. Two people are the only two people that could get to whether or not this was a correct statement or not; am I right?

A In the context of this trial that's correct.

Q Right. And he didn't cross-examine either one.

A That's right. He did not exercise his

opportunity address questions to either of those witnesses. The point is that that opportunity which he had, which he admittedly had, was not an opportunity to cross-examine his accusers on the accusations made to them. It's not a fully effective --

Q Well, how could he accurately cross-examine his accusers?

A He could accurately cross-examine his accusers if his accusers come into open court and give their accusation in open court, either directly at that point or by affirming the accusation and incorporating it in their testimony, pledging their credibility to it and standing behind it in the court.

That is confrontation and that is cross-examination and I urge again that this requirement of full and effective cross-examination is one that is approprate to evidence of this kind. And if I may turn for just a moment to the nature of this evidence. In the recent case here of Dutton again Evans, the plurality opinion was able to identify a number of indicia of reliability which attack the spontaneous remark that was there held to be properly admitted despite the fact that the person who made it was not called as a witness at all.

In this case, by contrast, one can identify numerous indicia of unreliability that attach to this

statement. This is an accomplice's testimony; the accomplice was under arrest; he was facing prosecution; he made a self-serving -- he allegedly made a self-serving, blame-shifting statement; he was in the coercive atmosphere of custody; a common interrogation strategm was used against him; giving him a motive to accuse his fellow.

The statement was reported in court by an interested party, the investigating officer who allegedly received the statement. There was no other officer present; there was no other person present and the statement is all an --

Q Are you now attacking the officer's testimony or Runnel's testimony?

A I am here pointing out these indicia of unreliability which attach to the evidence which was the decisive evidence in this case.

Q Well, to Runnels or the officer?

A This is the officer's evidence of a statement attributed to Runnels. It is his evidence of a statement by Runnels. That evidence -- that evidence has these indicia of unreliability attached to it.

Q Now, you are now arguing that the officer's testimony should not have been admitted at all; aren't you?

A Yes; I'm saying the evidence which we are complaining about is this evidence of the statement which is

the officer's evidence.

Q But you don't argue that there was any denial of opportunity to cross-examine that officer as effectively and as long as he wanted to?

A And tothe extent that he is not reporting statements of this kind then he can be cross-examined.

Q Your argument you are really making now is not a confrontation argument; it's a due process argument?

A I think it has a close affinity to due process.

Q Well, you do have confrontation; that's obvious. Confrontation, both of the officer and of Runnels.

A Only in the sense that they were physically in the court. There was not confrontation --

Q Well, in the sense that it was open to counsel, O'Neil's counsel to try the case any way he wanted on this issue, by asking appropriate questions.

A No; he --

Q You can't have any more confrontation than that?

A He could have had -- he could have had an effective opportunity to cross-examine this accusation against him.

Q At what stage? You mean at the time at the police station or something?

A If the statement had originally been given at a time when it was subject to full and effective cross-examination as the statements were in Green, that would have sufficed.

Q But there were other statements in Green.

A The statement: "Dogs are waiting."

Q Yes.

A The court didn't reach that statement.

Q But there were other statements in there.

A The statement that the Court held to have been admitted --

Q But didn't Green hold that if a prior statement is submitted and the witness testifies and admits making the statement but denies the truth of the statement, there was a different version in court than he gave before, didn't Green dispose of that issue?

A No. In Green the witness conceded giving the testimony at an earlier hearing and he further insisted in court that the testimony that he gave was the truth as he then believed it. And he further insisted at the time of the trial that he was now telling the truth and said he couldn't remember what happened.

But Green is a case that is quite different from this one. This is a flat denial that any statement was made.

Q Wholly aside from Green let's take a

situation where the witness does say "Yes, I made the statement, but I deny that it was true, and I now give a different version of the events." Would your argument then say -- would your position then be that the prior statement is inadmissible?

A My position on that would be that that is not this case. There is a further opportunity; you come closer to full and effective cross-examination in that case.

Q Well, what would be your position on it, then? Under confrontation.

A Under confrontation given in this kind of statement I would be inclined to say that that cannot come in under those circumstances.

Q Because I made the statement but then I deny it's true.

A And if we're talking about this kind of statement. If we're talking about all unrecorded statements given in custody or reported to police officers by accomplices with the motive to incriminate others, that we have here --

Q Then what would be --

A This kind of evidence, I would take that position.

Q Well, it seems to me that Green at least -- you can call it different if you want to -- settled that kind of case I just gave you.

A Well, but Green was -- Green involved -- Green, some of the discussion would have to be more closely limited to the facts if the position that I have urged were to be held to be still open; that's correct.

Q Correct.

A However, there was in this case a very different kind of statement --

Q In terms of confrontation what real difference do you see between the case I just gave you, where he admits making the statement but now denies it's true and where he denies having made the statement at all, when on cross-examination you can ask him whether the facts that the officer claims he related are true or not. You can not only ask him whether he made those statements, but you can say: are these facts true?

This is precisely what you would ask him if he admitted making the -- statement.

A This gets very precisely to the point that was urged by Petitioner here, that this denial is the best thing you can hope for on cross-examination. That just simply isn't true.

For example in this case: Runnels' self-interest in denial that he made this statement, whether it's true -- either way, he is far less persuasive to the jury in many of the results that cross-examination might have achieved. For

example, by showing that the statement was motivated by anger, was full of errors and inconsistencies.

Runnels' denial has no more right in the jury's eyes than his not guilty plea. He has to deny this statement. But denial is no substitute for cross-examination.

Q But you certainly want the jury to believe what he now says?

A We certainly do; we hope that it will, but that does not substitute for cross-examination; it does not substitute for what you can get in terms of an effective holding of an accusation that's made in court by an accuser who is there in court.

Q Well, how would you probe --

Q You wouldn't be any better off than you were here. How would you be any better off?

A If one were to have an accuser in court and subject him to a probing cross-examination --

Q Well, is Runnels an accuser?

A According to the police officer he is.

Q But, when he's sitting on the stand.

A He's not an accuser then; he's one of the defendants.

Q Then what are we talking about?

A He stands at that point in the box, accused, side-by-side with the defendant and he can't -- the accuser

can't be cross-examined by addressing questions to Runnels.

Q Aren't you really saying that if the man denies the statement it's inadmissible?

A That's correct.

Q What authority do you have for that?

A Pardon?

Q What authority do you have for that?

A I have the rationale of Douglas against Alabama and Bruton against the United States.

Q Rationale?

A The holding.

Q The holding. I don't think you heard my question correctly; that any statement that if the man denies it can't be admitted. You don't want to say that?

A No; I want to bring this case back to the kind of statement and kind of evidence we're talking about here. We're talking about a classical form of unreliable, devastating accusation, and that's the --

Q But, at the stage of this case how could you get the probing, to use the word that you wanted? How under the sun?

A You can get the probing if the witness who makes the accusation --

Q In the case the witness has made the accusation; the testimony is in. Now, once that's there how can O'Neil

probe?

A He can't.

Q What you are really saying is that the statement should not have been admitted. That's all you can say; isn't it?

A That's right; now, the error could be cured conceivably if the -- if, for example, Runnels had pleaded and had then taken the stand as a witness for the prosecution and had repeated the accusation, had been probed, had incorporated, acknowledged its --

Q In this particular case once he has said that "I didn't make the statement," the state had nothing they could do about that. They couldn't produce the statement; right?

A That's right; they should not have put it in under the circumstances; that's right, without allowing the accused his right of confrontation or cross-examination; that's correct.

Q I still have trouble with this right of cross-examination and confrontation.

A Well, if I may, the procedure that should be followed in cases like this is the procedure that Mr. Justice White outlined in his dissent in Bruton and the one of the American Bar Association on minimum standards for criminal justice is recommended and it's the recommendation, in fact,

that was made before Bruton, and that is where a defendant is incriminated by a co-defendant's out-of-court statement and a motion to sever is made, as it was in this case, that the prosecutor must elect between severance or nonuse of the confession or effective dilution of the references to the incriminated defendant, the other defendant in the confession.

And this is the procedure which should have been followed in this case. It may happen that if the procedure is not followed that the constitutional error could be cured under other circumstances, as I noted. As, for example, where the co-defendant pleads and then takes the stand and admits making the statement. That's the unusual case.

The normal procedure which the position urged by Respondent would mandate is the one that this Court laid out in Bruton.

Q Did the American Bar Report say that was a constitutional requirement or merely a good idea of how to handle the problem?

A I think that the discussion indicates that it is a constitutional problem.ent.

If I may turn briefly to the question of harmless error and exhaustion. The standard of Chapman and Harrington as to constitutional error to be harmless must be harmless beyond a reasonable doubt, and that clearly can't be true here. The prosecutor relied heavily on Runnels' statement to

corroborate the victim's identification. His identification had been somewhat impaired by the evidence of the victim's limited opportunity to observe his assailants and his subseugent statement about the uncertainty about the identification.

And there was presented through six witnesses an unshaken alibi defense. There is no basis here for a claim, as Petitioner would have it, that this was harmless error.

Finally, on exhaustion O'Neil has presented to the State Court on both direct and collateral review the same claim ever since the first day of his trial. And this was a trial that occurred after Douglas against Alabama had been decided.

Surely the fact that Bruton was handed down after O'Neil's Federal habeus proceeding had begun and thus providing additional authority for his claim, is no reason to terminate the Federal habeus proceeding and send O'Neil back to the State Courts.

Thank you very much.

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

Mr. Kirk.

REBUTTAL ARGUMENT BY CHARLES R. B. KIRK, ESQ.

ON BEHALF OF PETITIONER

MR. KIRK: Just a very few brief comments, if I may, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: You have ten minutes left.

MR. [illegible] I would like to bring out something I believe is a misunderstanding of the record on the part of Mr. Campbell. When he was asked by one of the Members of this Court whether or not there was any examination of Officer Traphagen. There was voir dire of Officer Traphagen by Runnels' Counsel, not by Mr. O'Neil. And he went into the possibility of coercion. He asked him the usual things about threats and so on. He went into the possibility that there had been some kind of inducement through pressures brought upon the common law wife of Mr. Runnels.

Now, I am just mentioning this to point out that this aspect of attacking Officer Traphagen's testimony was equally open to Mr. O'Neil,but he didn't use it.

Now, this -- really what the Respondent's talking about is nothing more than what happens in any trial: One witness says one thing and another witness says another. Ther There would be no difference insofar as the right to confrontation and the need for confrontation -- there would be no difference between the case now before this Court and one where Officer Traphagen had seen them commit the robbery and was testifying and Runnels took the stand and said: "No; that wasn't else; we were someplace else." You wouldn't cross-examine him about that either. This is exactly the same kind of thing. There was just no need.

Now, Appellant has mentioned what he claims harmfulness in this so-called error. I'm now going to reiterate what I have said in my brief. I would like, however, to point out one thing, and that is to refer the Court to the closing arguments, because contrary to the Respondent's assertion, the prosecutor did not heavily rely upon this statement by Mr. Runnels. He heavily relied upon the fact that the eyewitness testified, that they caught them in the car that belonged to the eye witness. They had this gun that the eyewitness saw and were seen throwing it out of the car when the police officers started driving behind them. He did refer to Runnels' confession as corroborating this identification by the eyewitness, but he heavily emphasized all these facts, pinning Mr. Runnels and Mr. O'Neil, pinning the crime on them and further, he pointed out the absurdity, the patent absurdity of their defense that some strange man, this phantom Jim Garrett would come up and give them this Cadillac and that suddenly, while riding along they discovered this gun and said, "Oh, my, a gun." And threw it away.

This is what the prosecutor emphasized. And, interestingly enough in his closing argument O'Neil never even mentioned Mr. Runnels' statement.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kirk. Thank you, Mr. Campbell.

Mr. Campbell, you served at the appointment and request of the Court in this case. We thank you for your assistance to the Defendant, the Respondent here, and to the Court.

(Whereupon, at 10:50 o'clock a.m. the argument in the above-entitled matter was concluded)