OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1580

TITLE UNITED STATES, Petitioner V. JOSEPH INADI

PLACE Washington, D. C.

DATE December 3, 1985

PAGES 1 thru 52

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

V. : No. 84-1580

JOSEPH INADI :

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Washington, D.C.

Tuesday, December 3, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 o'clock p.m.

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

HOLLY MAGUIGAN, ESQ., Philadelphia, Pennsylvania; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in United States against Inadi.

You may proceed whenever you are ready, Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Thank you, Mr. Chief Justice, and may it please the Court, the question before the Court today is whether the Federal Rules of Evidence are unconstitutional insofar as they permit the introduction in evidence in a criminal trial of co-conspirator declarations without requiring the prosecution to produce the declarant or to demonstrate his unavailability.

Now, in terms of potential impact, this may be the most important criminal procedure case that the Court has had to decide in the years that I have been in the Solicitor General's office. While affirmance of the Third Circuit's decision would probably have little impact on the trial as seen by the jurors, the behind the scenes effect on the allocation of criminal justice system resources would be dramatic.

On this case, which was a drug prosecution, the prosecution sought to use five recorded

conversations as evidence against respondent. Three of those conversations he was a party to, and were between him and a co-conspirator, John Lazaro. A fourth conversation was between two individuals who testified as prosecution witnesses at trial, and the fifth conversation was between Lazaro and a co-conspirator named Levin, who invoked the Fifth Amendment privilege and was found unavailable at trial.

Respondent demanded that the prosecution show the unavailability of any co-conspirator declarants, and to accommodate the District Court's practical wishes, the prosecution did subpoena Lazaro to appear for trial, but he failed to appear, allegedly due to car troubles.

Ultimately, the District Court ruled that Lazaro's statements on these intercepted conversations were admissible under the traditional co-conspirator exception now embodied in Rule 801 of the Federal Rules of Evidence. The Court of Appeals reversed. It, too, found that Rule 801 was satisfied, but it found that the confrontation clause was violated because the prosecution had not satisfactorily demonstrated that the co-conspirator Lazaro was unavailable to testify at trial.

Now, in reaching this ruling, it relied almost entirely on dicta from this Court's decision in Ohio

against Roberts. We have discussed at some length in our brief both the historical evolution of the confrontation right of common law and its adoption in the Sixth Amendment and the parallel but distinct development of the hearsay rule and exceptions, including the co-conspirator exception, and I have no intention of repeating that here.

Suffice it to say that the co-conspirator exception emerged simultaneously with the adoption of the confrontation right and the Sixth Amendment, and as it was refined during the period from 1790 to 1980, it was, as far as I know, never suggested by any Court or any legislature that a showing of unavailability of the extrajudicial declarant, co-conspirator, was required.

And the same is true, I might add, of the vast majority of other hearsay exceptions and exemptions. Can it be that the judges, the legislators, the practitioners, and the scholars who have contributed to the evolution of the common law of evidence over this period and who contributed to the Federal Rules of Evidence, and in doing so, who took into account in their consideration of hearsay rules the very same interests that are said to underlie the confrontation clause, can it be that all of these people have so consistently violated fundamental principles of fair

play embodied in the somewhat vague and general language of the Sixth Amendment?

Can it be that for decade after decade, thousands of state as well as federal courtrooms across the land have seen the basic right of confrontation repeatedly violated by the admission of co-conspirator declarations without any showing of the unavailability of the declarant?

We think that is not possible. Far more likely, in our opinion, is the view that the dictum in Ohio against Roberts referred to the class of cases, that is, prior testimony and the like, in which the unavailability requirement in this Court's decisions cited in Roberts parallel a similar development of the hearsay rules.

QUESTION: I am curious, Mr. Frey. You talk about the tremendous significance of the issue. As I understand it, several states have determined as a matter of state constitutional law to require the enforcement of proof of unavailability and reliability to produce evidence such as this in a co-conspirator situation. Has the experience of those states been such that law enforcement agencies have been hampered in their --

MR. FREY: I am not sure that I am aware of

what you are referring to. As far as I know, and as far as I recollect from the respondent's brief, the development of this requirement of production or showing of unavailability is all post-1980, post the dictum in Ohio against Roberts, and it has happened in a number of federal courts, and I believe that when this Court speaks even in dictum, it does have a powerful effect on people.

I can't tell you what the experience has been, but I do hope to address some of the reasons why I think the costs and benefits clearly suggest that it is a bad rule.

QUESTION: Would it depend in part on how strictly one has to prove unavailability?

MR. FREY: That would be only a small part of the problem. That would be a part of the problem, and that would be something that would have to be fleshed out over probably decades of litigation and numerous cases in this Court, as it has taken decades to flesh out the unavailability requirement in connection with prior testimony.

Now, it is not essential, I think, to the Court's decision here, but I want to spend just a minute on the question of whether the confrontation clause reaches so far as to regulate co-conspirator

declarations or other kinds of hearsay generally. We have argued in our brief that it doesn't speak at all to co-conspirator declarations or other kinds of hearsay by and large, and that it is in fact specifically concerned with prior testimony, depositions, affidavits, and those kinds of testimonial, out of court testimonial utterances.

QUESTION: You say in effect that if the declaration of an adverse party can be admitted against in open court, the declaration of an agent of an adverse party can be admitted on the same principal?

MR. FREY: That is a part of the rationale for the co-conspirator declaration, and we would certainly say that, but I think what we are saying is broader in this immediate connection, which is that it was never intended for the confrontation clause to concern itself with most kinds of hearsay. The early cases which are cited at Page 22 of our brief, state cases, suggest that the witnesses that the Sixth Amendment says and the state constitutional provision said the defendant had to be allowed to confront are those people who appear in court and give testimony about the hearsay declaration.

Now, I am not suggesting that that is the limit of the reach of the provision, but in the Mattox case of this Court, which is the first case to really

consider this issue, the Court said that the primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits such as were sometimes admitted in civil cases being used against a prisoner in lieu of personal examination and cross examination of the witness.

Now, that also, I think, is to some extent the view of Wigmore and Justice Harlan's view in concurrence in Dutton against Evans. And the Court indicated in Roberts that that view had not been accepted by this Court, and at the other extreme is the view which I understand respondent to take and which may be supported by dictum in Dutton and Roberts, that all hearsay is regulated by the confrontation clause.

It doesn't mean it is excluded. It means it is regulated. Now, I would propose to the Court that the better view is that out of court declarations of a kind that are retrospective but done in contemplation of trial, that are of a testimonial nature -- when the Sixth Amendment refers to a witness, what it is referring to is somebody who is giving testimony or the functional equivalent of testimony. That could reach so far as to include accomplice confessions under police interrogation, which are retrospective, and in large part obtained for purposes of solving crimes and

litigating cases.

It does not, however, reach business records, present sense impression, co-conspirator declarations, the kind of res gestae exceptions that the main body of hearsay exception law is concerned with. In any event, even if the domain of the confrontation clause does embrace hearsay generally, it seems to us extraordinarily clear that the clause does not invalidate traditional evidence law regarding the exceptions to the prohibition on use of hearsay.

And, of course, why should it do that when these exceptions were developed with consideration of the very same concerns, the importance of cross examination, the necessity in some circumstances of withholding from the jury evidence, or the necessity of making it available, that underlie the confrontation clause.

In cases like Mattox and the Delaney case in 1924 which involved a confrontation clause, co-conspirator declarations, brushed off the suggestion that traditional exceptions to the hearsay rule might run afoul of the confrontation clause, and in both Dutton against Evans and Ohio against Roberts, the Court was at pains to reaffirm that the traditional exceptions were not being called into question by those decisions.

QUESTION: Does it make any difference at all that the rule treats co-conspirator statements as exempt from being hearsay, and the other rules treat exceptions to the hearsay rule?

MR. FREY: In our opinion it makes absolutely no difference, because it is still a judgment of the legal community developed over time that it is better for the jury to have than not to have this evidence, and it is a judgment --

QUESTION: Is the exemption in the case of co-conspirator evidence based on inherent reliability of that evidence?

MR. FREY: Well, we have a long footnote in our reply brief that addresses that question. I would say that the exemption is based on three different considerations. It is based on an agency rationale. It is based on the fact that co-conspirator declarations by their nature often involve verbal acts or other non-hearsay components because they are frequently part of the res gestae of the offense itself.

They involve other kinds of things that may be accepted under Rule 803 exceptions, and so by having a general exception you save the Court a very difficult task of teasing out the hearsay from the non-hearsay and the hearsay exceptions from the non-excepted hearsay.

And finally, because there is an element of reliability in statements that are made by venturers to further the objective of the venture --

QUESTION: Plus the fact that they are against interest, against their --

MR. FREY: They are against interest, but of course we don't know -- my colleague here will tell you that agency is purely the rationale and not reliability. I am not sure why she thinks that helps her. If agency is the rationale, why shouldn't the principal produce this agent rather than the principal's accountant in the litigation? Now, of course, Lazaro may no longer have been Inadi's agent at the time of trial, but the point that I think is important is that the decision has been made consistently throughout time that no showing of unavailability is to be required in connection with co-conspirator declarations.

How would you use the confrontation clause to veto that judgment? I just simply don't see what you would look to as a source of arriving at some different conclusion. Now, I will say with respect to the Roberts dictum, because I think that is the source of most of the holdings that have gone against our position, that I think they misread what Roberts says.

First of all, it seems to me plain that the

dictum in Roberts was meant to be descriptive rather than prescriptive, but it would be a wholly inaccurate description of the state of the law with respect to most hearsay exceptions, including the co-conspirator declaration, but totally accurate as an explanation of the treatment of depositions and prior testimony.

Now, secondly, if you read the dictum literally, it goes too far, because it not only imposes the requirement of showing unavailability and reliability on co-conspirator declarations, but it invalidates all of Rule 803. Now, respondent is going to try to get around that, but the fact of the matter is that if you read it literally, it makes Rule 803 unconstitutional as well as Rule 801. If you don't read it literally, then I don't understand why you should not read it as limited to the proposition established by the cases that it cites, which are prior testimony cases.

Now, let me turn to the question of policy, because I do think that is what concerns us so gravely about the third circuit's rule. The question is, assuming that the Court has the license under the Constitution to do so, whether there is any reason why the Court, concerned as it must be with fair and efficient administration of criminal justice, would want the unavailability rule that the Third Circuit has

adopted in this case.

In other words, can we expect significant benefits to the fairness and accuracy of the criminal trial to be derived at acceptable cost from this requirement. It seems to me the answer is clearly no. Let me look first at the benefits. The first point to notice about the Third Circuit's rule is that it does not keep out evidence that the jury can't be trusted to hear.

The co-conspirator declarations come in if the declarant is shown to be unavailable, and under the Third Circuit's rule, although I think not under the position that respondent was requesting in District Court, they come in if the declarant is available and is produced.

Part of the reason they come in, and the reason why at least that part of the Third Circuit's rule is good, is because the declarations have independent evidentiary value apart from any in court testimony that the declarant may give. There are statements made while the objective of the illegal transaction was being advanced, and for the purpose of advancement.

By the time the witness appears in court many factors may have played on him to affect his

credibility. I am not saying in any given case which -- whether the co-conspirator declaration or the in court testimony is more valuable. However, the co-conspirator declaration is independently valuable, and it comes in whether the declarant is available or unavailable. The only time it doesn't come in, and the defendant gets a windfall, is if the prosecution has been negligent and has let the declarant somehow or another get out of its clutches between the time of the investigation and the time of the trial and it is found culpable or negligent having done so.

A second point, and more important in terms of the lack of benefit is it does not enhance the ability of the defendant to adduce exculpatory evidence. After all, the question in this case is why didn't respondent, if Lazaro's testimony was so important to him, why didn't respondent subpoena him, put him on the stand?

The fact of the matter is that when the issue was raised by the District Court, respondent's counsel said that was a very serious question whether they actually wanted respondent to testify. What they wanted was the government to show that he was unavailable or forego the use of the co-conspirator declarations.

QUESTION: Is it your understanding of respondent's position that if Lazaro had been available,

the U.S. Attorney would have had to call him to the stand and put the declaration to him in kind of a cross examination?

MR. FREY: My understanding of respondent's position, and counsel may be able to testify to that better than I could since she was counsel at trial, but I read Page 18 of the joint appendix, which is where this discussion is held, to mean that if we could produce Lazaro, we could not use these conversations at all.

QUESTION: You would then have to just treat him as a normal witness?

MR. FREY: We would have to put him on the stand or not put him on the stand, but we couldn't use his extrajudicial declaration. Now, that is not the Third Circuit's holding.

QUESTION: You might try to impeach him.

MR. FREY: We might try to impeach him, and then it would be a question of whether it could come in as substantive evidence.

QUESTION: Sure, you have to ask him first.

MR. FREY: I think, Justice Rehnquist's question does reach an important point. What does it mean, what does the Third Circuit mean to say we had to produce Lazaro? If it simply meant we had to bring him

to court so that respondent could call him if respondent thought he had valuable testimony to give, then the compulsory process clause takes care of that.

QUESTION: Mr. Frey, there is a third one. The judge can call him as his witness.

MR. FREY: I suppose that is possible. The judge could have done that here, too.

QUESTION: That is what I mean.

MR. FREY: Oh, I understand that the prosecution could call him if it wished to call him. The defense could call him if they wished to call him, assuming he is available. If he is unavailable, the declarations come in. The court could call him.

Nobody saw fit to call Lazaro. Nobody had any interest in having his testimony. Nobody perhaps knew what he was going to say. Nobody thought he would make a credible witness.

QUESTION: If they hadn't been able to use his testimony, they might have --

MR. FREY: I am sure that if either party had been confident that the testimony would have been helpful, they would have called him as a witness. The prosecution in fact called other co-conspirators as witnesses at this trial. One had a plea bargain. One was testifying under a grant of immunity.

But I want to get back to Justice Rehnquist's point. If all we have to do is produce them in court, then it seems to me not a confrontation clause issue at all, and the defendant's right to compulsory process assures his production. If we have to do more, what is it that we are going to do? We put him on the stand, ask him his name and address, and turn him over for cross examination.

Do we have to put him on the stand and ask him questions? We don't want his evidence in, his in court evidence. The defense doesn't want his in court evidence. What is the purpose of this charade? It seems to me it will simply end up confusing the jury without serving any purpose.

Now, respondent has said a lot about the importance of the right of cross examination, and I don't mean to speak against the value of cross examination at all. It clearly is very important. But respondent has not explained why that right of cross examination is not protected by Rule 806 of the Rules of Evidence which allowed respondent to call Lazaro as a witness and cross examine him.

It specifically says in the case of hearsay declarants, you can do that. So I don't think the problem was an inability to cross examine Lazaro. The

problem was a desire to jerk the prosecution around, which is essentially what has happened here.

Now, the fact is that if the co-conspirator declarant is not already being called by one party or the other as a witness, it is probably because he is in fact unavailable, or is judged not to be a desirable source of evidence, and what the Third Circuit's rule requires is that prosecutors produce or show the unavailability of every co-conspirator declarant even though if produced virtually none of these would be called to testify.

Now, does that rule make any sense at all?

Now, let me turn to the cost side, because Justice O'Connor did ask that question.

QUESTION: On the other hand, in this instance, you have the government having the benefit of capable testimony without cross examination.

MR. FREY: Well, that was defendant's choice, not to call Lazaro and have him examined.

QUESTION: Well --

MR. FREY: We have the benefit of --

QUESTION: Did defendant make the motion to put this evidence in?

MR. FREY: No, we put the evidence in.

QUESTION: Well, that is who did it. You

don't deny you did it?

MR. FREY: Well, we put the evidence --

QUESTION: You put in evidence which was favorable to you, and unable to have it cross examined by the other side.

MR. FREY: I don't agree that the other side could not -- if -- I am not sure what the purpose of cross -- they could cross examine the witness through whom we put on the evidence, that is, to determine whether the declaration was made and what the circumstances of it were.

In this case it was a recording, but they could determine how the recording was made, that it wasn't tampered wit, and all these other things. At that point the evidence speaks for itself. Now it is true that Lazaro might have something to say that would contradict the tendency of the evidence or that would explain the evidence in a way that is favorable to the defendant.

QUESTION: Wouldn't you prefer to have evidence for your side not cross examined?

MR. FREY: Well, that depends on how good the cross examiner is, I suppose. Well, let me turn to the question of costs, and again, I think you have to remember that the witnesses who we are talking about or

the potential witnesses who we are talking about are usually not cooperative individuals or they wouldn't be prosecution witnesses in the first place. Many of them may be in the defense camp or sympathetic with the defendant. They may be afraid of the defendant. They are not people who are totally within our control.

Now, we have to produce these people. Suppose that is the rule. Well, first of all, some of the people, we will know who they are, and we will know where they can be found. That is not always the case, but if that is the case, as it was the case here, production may be relatively easy in many instances, plus, as we have pointed out, particularly since these are co-conspirators, a lot of them will be in jail, and producing them will be quite a costly and burdensome exercise.

But even if they are not in jail, we can subpoena them, as indeed we did in this case, and we may find that they have gone fishing, or that they had car trouble, or that they are sick, and they may not appear in response to the subpoena. Well, then what is to happen? Is the judge to stop the trial while a search goes on for this declarant?

You know, again, maybe this is worthwhile if this is a witness who is actually going to be called

upon by somebody to give testimony at trial, but we are talking about somebody who is to be trotted into the courtroom, who nobody wants as a witness of their own, so it is an awful lot of trouble for somebody who the parties don't want as a witness.

And then, even worse, what happens if we have trouble identifying who the declarant is, or if we have difficulty in locating a declarant who may have made a declaration five years ago that we want to introduce. We may not know where he is, how far do we have to go to locate him. We are going to have litigation, and this is the final point that I want to make, is the effect on the courts of all of this.

The effect of the courts on the unavailability requirement to date has been slight because the number of instances of using prior testimony are relatively few. The number of instances of using co-conspirator declarations are many, and if you just sit back for a minute and think that every time the prosecution wants to use a co-conspirator declaration, they will have to produce or demonstrate the unavailability of the declarant. If they fail to produce him, there will be litigation, endless litigation about whether they are culpable, about whether he is really unavailable. This will be a burden on the trial courts. It will be a

burden on the appellate courts. I think there has been no showing of any justification for such a burden.

I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Ms. Maguigan.

ORAL ARGUMENT OF HOLLY MAGUIGAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. MAGUIGAN: Mr. Chief Justice, and may it please the Court, the government's argument to you this afternoon, like the brief and reply brief which they submitted, overlooks a crucial fact. While they concede that they used the evidence of John Lazaro, they don't speak directly to the fact that by doing so they made him their witness against the respondent.

They do not dispute the finding in the Circuit Court that the five tape recorded conversations on which John Lazaro spoke on four were the lynchpins, the heart and soul of the prosecution's case. Those conversations contained narratives of past historical fact. They were offered for the truth of the matter asserted. The jury was invited to rely on them and to base its verdict on them.

In fact, with regard to one of those tapes, the one that Mr. Frey referred to as between Mr. Lazaro and one William Lavan, the jury after a full day of

deliberation asked to hear that tape again, and that one is replete with recitations of past historical fact uncross examined. It cannot be denied that the evidence of John Lazaro, made a witness against us by the government, was crucial and devastating.

QUESTION: Would you care to suggest what your cross examination would have been?

MS. MAGUIGAN: At a minimum, Mr. Chief Justice, it would have been to highlight the fact that in the tape recorded conversations, John Lazaro made representations of fact which were belied by evidence in the government's own case by the witnesses they did elect to call, and I would submit to you that one of the reasons the government was interested in insulating Mr. Lazaro from cross examination was, they wanted those assertions of fact to go untested by cross examination.

QUESTION: Well, I guess you could have called him on cross examination as a witness.

MS. MAGUIGAN: It would not, Justice, have cured the harm to us from the denial of confrontation in their case. The government said --

QUESTION: I don't think I follow that.

MS. MAGUIGAN: Well, it is because the reason, the reason that it is so important that a person accused of crime get to cross examine the government's witness

is, one, that it is clear he is in fact the government's witness, and two, it is in the context of his being the government's witness that he is compelled to stand face to face with the jury, compelled to answer questions.

QUESTION: Don't you think that even if the government had called him, they could have called him and put him under cross examination as an adverse witness?

MS. MAGUIGAN: There is nothing in the record to suggest that he was in fact adverse to them, Your Honor. It may be that -- but the record doesn't support that.

QUESTION: Well, isn't a co-conspirator inherently an adverse witness and always subject to being called, if at all, on cross examination by the state?

MS. MAGUIGAN: I would say no, not always, because very often, as in this case, the two co-conspirators whom the government did elect to use and subject to cross examination were not called as adverse witnesses, were not examined as on cross examination.

QUESTION: Well, that doesn't mean they might not have been.

MS. MAGUIGAN: That doesn't mean they couldn't be.

QUESTION: Right.

MS. MAGUIGAN: I think really what it boils down to in a way, Your Honor, is that the government and the respondent agree on one thing. What Mr. Frey's argument suggested in their analysis at Page 43 of their brief suggested also is that John Lazaro is a loose cannon. They don't want to take the risk of putting him on. They want to put that risk on us.

QUESTION: Well, Ms. Maguigan, just how would this have proceeded in the trial court if the government had produced Lazaro? Could they simply have announced, here he is at counsel table, and then the recordings go in?

MS. MAGUIGAN: The recordings, sir, would have gone in in our view of 801 as an evidentiary matter whether he was present or not. The implication for the confrontation clause analysis is whether there was an excuse for their failure to produce him, but I think to answer your question --

QUESTION: They would have gone in whether he was present or not?

MS. MAGUIGAN: If they had as a confrontation clause analysis -- from the point of view of the confrontation clause, the issue is whether the government is excused by the necessities of the case

from producing him for cross examination, but as a matter of evidentiary law --

QUESTION: Well, on your view of what the law ought to be -- I take it you are supporting the opinion of the Third Circuit -- what if the government in this case had said here at counsel table is Mr. Lazaro. We now offer in evidence Exhibits A, B, and C, which are the tape recordings or cassettes of his co-conspirator declaration.

MS. MAGUIGAN: In my view, sir, that would not have been sufficient, but it is important to note that they did not even that minimum --

QUESTION: Well, why would it not have been sufficient?

MS. MAGUIGAN: Because if they force us to put him on in our case, assuming they in fact bring him to the courtroom and say, we are not going to use him, here he is, which they didn't do, but assuming that, the difficulty is, if we put him on in our case, we are seen especially in a conspiracy trial as somehow validating the government's allegation, and it is only an allegation, that the ultimate jury question has been resolved.

We are forced to call him. They say we are in league with him.

QUESTION: So what does happen under your hypothesis if the government says here is Mr. Lazaro and we offer Exhibits A, B, and C? Does the District Court exclude those exhibits, the cassettes?

MS. MAGUIGAN: I don't think I understand your question.

QUESTION: Well, so they bring Mr. Lazaro into court and say, here he is, and now they still want to offer the cassettes in evidence. Do you say they simply can't come in because he is not unavailable?

MS. MAGUIGAN: What I say from the point of view of the confrontation clause is --

QUESTION: Well, I mean -- can you answer my question?

MS. MAGUIGAN: I am afraid I can't, because I don't know whether you are asking me to assume that they simply have him at the table but they don't call him. Is that the idea?

QUESTION: They have him at the table. They don't call him. They simply offer what they offered in the District Court, the cassettes.

MS. MAGUIGAN: It is my view, sir, that unless they put him on in their case as a witness and subject to cross during their case, they cannot use the tape recordings. However, it should be made clear that they

did not do what you suggest here in your hypothetical situation. They never turn to us and say, we have got John Lazaro, we are not going to use him, you can have him, so that we are not faced with that issue of what the confrontation clause compels.

This Court has held that the right of cross examination is an essential feature of confrontation, that physical production may not be enough in all cases, but it should be clear here that the physical production aspect of confrontation --

QUESTION: Well, suppose he is there, they get him there, and they put him on the stand. Then what do they do? I would suppose you would argue they couldn't use the tapes at all. They would just have to ask him what the facts were.

MS. MAGUIGAN: Not at all. Not at all.

QUESTION: How would they proceed, then? Would they say, here are the tapes, did you say this, or didn't you?

MS. MAGUIGAN: They could, for instance, say what is your name, have you listened to these tapes, are you the John Lazaro speaking on these tapes? That is it. If they don't want anything else from him, that is all they need to do.

QUESTION: If he says yes?

MS. MAGUIGAN: Well, they can also impeach him if he says no.

QUESTION: What are you going to do?

MS. MAGUIGAN: Then I am going to cross examine him.

QUESTION: About what?

MS. MAGUIGAN: About the fact that what he says on the tapes is inconsistent with what live witnesses say, about the fact that there are internal inconsistencies between his recitations of past historical fact offered for the truth of the matter asserted. I am going to talk about his interest and his bias in the case. I am going to ask him about the code he used.

QUESTION: I suppose you would much rather have the government call him, but this evidence came in, so why didn't you call him on your side of the case? Wouldn't you have rather had him on your side of the case than not at all?

MS. MAGUIGAN: Well, there is a difficulty with having him --

QUESTION: Apparently not. Apparently not.

MS. MAGUIGAN: He wasn't there when the government rested, but there is a difficulty. One is --

QUESTION: You didn't try to get him either.

MS. MAGUIGAN: No, we didn't. We didn't. We had heard all along that he was under subpoena by the government.

QUESTION: And then that his car had broken down.

MS. MAGUIGAN: Yes, then that his car had broken down, although the government never asked for a bench warrant, never asked for a recess. In fact, the case carried over that day. That was a Friday. Carried over into the following Monday, when they rested. We immediately renewed our objection. They never asked leave to reopen. To answer the question --

QUESTION: What prevented you from asking for a bench warrant?

MS. MAGUIGAN: It wasn't our subpoena. The judge could have asked for a bench warrant. The practice in the Eastern District is not that the defense lawyer asks for a bench warrant on the government's subpoena. The government could ask for it or the court could issue it.

QUESTION: Are you suggesting that you could not ask for it?

MS. MAGUIGAN: It is not the practice. What we did was object repeatedly to the fact that he wasn't called.

QUESTION: But you could get a subpoena.

MS. MAGUIGAN: Well, we could have gotten a subpoena. We had no address for him. One assumes we could have gotten a subpoena, but if we had called him, at least arguably we would not have been entitled to the Jencks Act material. The statute by its terms says after a witness has testified for the government on direct, they would get to cross examine him as a matter of right if we had called him, whereas it is not clear they could qualify him as an adverse witness.

It is our view that they used him also. To the extent he is a loose cannon, to the --

QUESTION: And they had no responsibility for him.

MS. MAGUIGAN: That's right, they took no responsibility for him. If they don't want to use him, they shouldn't put on his statements totally insulated from cross examination.

QUESTION: What would they ask him as Justice White has put the question to you, put him on the stand and say, are you this man by name, and did you have some telephone conversations with A, B, and C, and then drop it right there?

MS. MAGUIGAN: That is up to them.

QUESTION: Well --

MS. MAGUIGAN: They could do that, yes.

QUESTION: All right. Then what would be the scope of your cross examination?

MS. MAGUIGAN: It would be the --

QUESTION: You would be confined to that, wouldn't you?

MS. MAGUIGAN: I would be confined in my view, given that they made him a witness through the tapes to the tapes and to anything he says on his direct testimony. Certainly the scope of my cross would extend to what he said on the tape recorded conversations.

QUESTION: You could certainly ask him if what he said was true, what he said on the tapes was true.

MS. MAGUIGAN: Certainly.

QUESTION: That is what you would try to find out.

MS. MAGUIGAN: That's right. You would ask him the traditicnal questions that would be asked on cross examination. One of the issues that has been raised by the government that really is inappropriately put to you here is whether the information John Lazaro would have given was in our view material testimony favorable to the defense.

That is, of course, not the issue. That would be the issue were this a compulsory process case, and I

would submit that if I wanted to ask him questions outside the scope of appropriate direct, including the tapes, it might well be a case properly anaylzed under compulsory process, but our view was not that he was a witness with material testimony favorable.

He was not a witness in our favor. He was a witness used by them against us. And this Court has never held that the existence of compulsory process rights can somehow serve as an antidote to denial of confrontation opportunities.

If that were the case --

QUESTION: My I ask one question? To what extent does your argument rest on the peculiar facts as you describe them here that the statement that they seek to use was a narrative of prior events rather than a statement such as go out to the airport and pick up the marijuana or something like that that isn't offered for the truth of what is said, but is really as a declaration in furtherance of an ongoing conspiracy?

Would you make the same argument with respect to that kind of co-conspirator declaration?

MS. MAGUIGAN: No.

QUESTION: That is what most of these usually are

MS. MAGUIGAN: Many of them are. And in fact

I think to be fair some of the exchanges in the tapes here could be characterized in that fashion. There is, of course, a crucial distinction. In the kinds of exchanges that you just hypothesized, you are in a situation which Mr. Frey discussed during his argument where the statements come in at least for their non-hearsay purposes. They come in to show the conspiracy as alleged, speaking to its alleged members.

It is crucial that in this case there were narratives of past fact because it was the truth of those historical narratives that the jury based its verdict on. It was absolutely crucial. It is important to bear in mind with co-conspirator declarations that they come in not because of any judgment that narrations of past fact are in fact reliable, or that they themselves are reliable.

The advisory committee notes make clear as of Circuit Courts and scholars that they come in because of a fiction, the notion that one co-conspirator is in fact the authorized agent to speak for another. They are often fraught with deliberate falsehood. They are often declarations made by people with really serious motives to lie, and statements of deliberate falsehood come in for the truth of the matter asserted.

In fact, in this case the trial judge ruled

specifically that they would come in whether they were true or not.

QUESTION: But that is quite consistent with the general rule on hearsay, isn't it, that the declarations of an adverse party can be offered on the theory that it is rather likely that an adverse party isn't going to help himself unnecessarily, or rather that he is not going to hurt himself unnecessarily.

MS. MAGUIGAN: That certainly is the fiction, and as a matter of the law of evidence, that is true. The reason why they are exempt from the prohibition against hearsay is that notion, and it is extended from admissions of a party himself through agents and servants to its final most attenuated version, which is co-conspirator declarations, recognizing --

QUESTION: Do you say it is true as a matter of law of evidence. Under what kind of law is it not true?

MS. MAGUIGAN: What I mean, sir, is, as an issue under the rules of evidence, that is the reason why it is not barred. As an issue to be examined under the confrontation clause, it is not dispositive.

QUESTION: Isn't the confrontation clause part of the body of rules of evidence?

MS. MAGUIGAN: They are not the same. With

regard to the Rule -- the sorts of exceptions codified at Rule 803, the confrontation clause and the exceptions to the hearsay rule and the hearsay bar itself often have the same roots, but this Court has recognized on many occasions that evidence which may come in as an exception to the prohibition against hearsay may violate the confrontation clause if it is brought in and the witness who is the declarant is not produced for cross examination.

QUESTION: Isn't that mostly in cases of prior recorded testimony?

MS. MAGUIGAN: Well, it is true that many of those cases are prior recorded testimony and dying declarations cases, but this Court has considered that issue in other contexts.

QUESTION: Has it ever held that something that wasn't prior recorded testimony couldn't come in because of the confrontation clause even though it was acceptable under the rules of evidence?

MS. MAGUIGAN: Yes, confessions, declarations against interest, declarations against --

QUESTION: Well, confessions in a criminal case?

MS. MAGUIGAN: Yes.

QUESTION: Anything else?

MS. MAGUIGAN: For instance, in Douglas. In this Court, has this Court ever held -- I don't know of others. The main situation that has presented itself to this Court has been confessions and prior recorded testimony and dying declarations.

However, this Court has also been clear not to say that well recognized hearsay exceptions are immune from Constitution clause scrutiny, and certainly has rejected opportunities to say that the co-conspirator exemption is immune from confrontation clause scrutiny because of the fiction of agency.

That could have been the basis for the ruling in Dutton, and it was not. This Court carefully considered the application of the confrontation clause, in that case decided that the confrontation clause had not been offended --

QUESTION: Dutton was a plurality opinion.

MS. MAGUIGAN: It was, but both the plurality and the concurring authors concluded that in Dutton there was a confrontation clause issue, and that it would be resolved by assessing the utility of trial confrontations.

It was not a case whether either the plurality or the concurring opinion said we are going to now say that the co-conspirator declarations are immune forever

from this sort of scrutiny.

QUESTION: No, but the ultimate holding in Dutton was that the evidence had been properly admitted.

MS. MAGUIGAN: Because it was held to have been of peripheral significance at most and not crucial and devastating. In Dutton the hearsay declaration, the co-conspirator declaration was offered by one of 20 witnesses and was corroborative and simply cumulative, and the analysis was whether trial confrontation would have advanced the truthseeking process, which is the mission of the confrontation clause, and the conclusion was, although for different reasons, between the plurality and the concurring opinion, that trial confrontation would not have advanced the truthseeking process. But there was there clearly a sense of the interplay between the right of confrontation and the understood admissibility of co-conspirator declarations.

QUESTION: May I ask one other question along the line I did a moment ago? I did not really recall that you brief laid the emphasis that you do today on the historical narrative of past fact. I didn't really catch that point in reading your brief, if I remember it correctly. Did you argue that? Did you make that same kind of emphasis, distinguishing that kind of statement

from ones typical in furtherance --

MS. MAGUIGAN: We referred to the fact that there were historical narratives of past fact. Whether we did it as forcefully as I have done it today, I don't know, Justice.

QUESTION: That is really a critical part of your argument this afternoon. It kind of came as a surprise to me, but you did make that argument below, too?

MS. MAGUIGAN: Yes. Oh, absolutely, we did. And one of the reasons that we made it so consistently was what I said, that there were internal inconsistencies, and inconsistencies between what Lazaro said on the tape and what the government witnesses said on cross examination.

The government, however, took a different view below from the view it takes now for why it should be excused from the unavailability requirement. In the court below, the government said we don't think we should be required to show unavailability, but we will. They never claimed a burden. They never claimed that this witness would take the Fifth Amendment as an excuse not to make himself available.

They speculated that he would go to contempt and violate his parole if he were called to testify.

But the judge said to them, bring him in. And he said to them specifically, you are better off putting on your evidence now than you are having to litigate it later.

Now, it is true, as Mr. Frey pointed out, that at one point the trial judge asked me to consult with my client about whether we were willing to waive our objection. We did, and it is clear 40 pages later that we renewed the objection and insisted that he had to be produced. At no time did they say this is a hardship. There is no record before you to assess their scary predictions about hardship. At no time did they say he could take the Fifth. And in fact that is speculation which may be belied by the record. The U.S. Attorney who tried the case said he has no claim of the Fifth.

QUESTION: Suppose he had come into the courtroom, taken the stand, and taken the Fifth Amendment, refused to answer anything, including his name. What could your cross examination have been?

MS. MAGUIGAN: I don't believe I would have been allowed to cross examine, Mr. Chief Justice. He would have been unavailable.

QUESTION: I beg your pardon?

MS. MAGUIGAN: He would have been unavailable if he had come in and taken the Fifth, assuming the judge sustained his claim of the Fifth. The judge may

well --

QUESTION: You don't mean that you were barred, you would be barred from cross examining him, to test his Fifth Amendment claim, for example.

MS. MAGUIGAN: I could test his Fifth Amendment claim. That is right. I thought you meant could I cross examine him on the merits.

QUESTION: Is that all? Is that all you could do?

MS. MAGUIGAN: If he persists in his assertion of the Fifth and the judge upholds it, I have to live with that. That is a reality with which people who represent people accused of crime have to live. What the Sixth Amendment guarantees is a fair trial, and a fair trial is one where you get to cross examine those people whom the government decides to use as witnesses against you. Sometimes they are excused by the necessities of the case.

The government suggested in their brief at Page 27, their original brief, that somehow Ohio versus Roberts didn't mean what it said, or on the other hand was an offhand embrace of a revolutionary proposition. I submit to you that the Roberts court meant what it said, and that it was faithful to this Court's earlier decisions.

The Roberts court by its terms says this case presents us with yet another instance in which we must review the relationship between the confrontation clause and the hearsay bar and its many exceptions. Those exceptions were in the body of the court's opinion beyond the exception for prior recorded testimony.

It is true that the facts of that case included prior reported testimony, but it is also true that the majority opinion there referred to the usual case and then didn't say in the usual case of prior testimony, or in the usual case where there has been confrontation, but said, in the usual case, including those where there has been prior confrontation.

QUESTION: I thought in your brief you also advanced what is perhaps a little narrower ground than you are advancing now, that even if the government is right that the actual holdings of these prior cases have been generally prior recorded testimony, co-conspirator declarations should be analyzed the same way as prior recorded testimony, and you don't have to call into question any of the other exceptions to the hearsay rule under the confrontation clause.

MS. MAGUIGAN: That is right. That is right. I believe to the extent that co-conspirator declarations are different from prior recorded testimony, they are

less reliable. At least with prior recorded testimony you have a declaration under oath in a judicial setting in the presence of a defendant and his attorney and subject to cross examination.

With co-conspirator declarations, they are not in the judicial setting. They are not under oath. They may be in the presence of the defendant, but as this case demonstrates, they need not be, and they are never subject to cross examination. There is no logical reason which compels the conclusion that a person having to answer to co-conspirator declarations should have less protection of his confrontation rights than a person called to answer to accusations in prior testimony.

QUESTION: I would suppose you would make the same argument -- if there wasn't a confrontation clause, you would be making the same argument about hearsay, that there just shouldn't be an exception to the hearsay rule.

MS. MAGUIGAN: Well, I might. I don't expect I would be real sanguine about it.

QUESTION: I would think you would. Your argument goes right there, because in effect you are negating the exception to the hearsay rule.

MS. MAGUIGAN: No, Justice, we are not, and

what is made clear in the advisory committee notes and in the decisions of this Court is that the hearsay rules do not require admission of those statements that are exceptions. They are written in such a way as to say the bar against hearsay is not a bar in these cases. The advisory committee notes make very clear that when the authors wrote those rules, they expected that there might well be times that evidence which was not barred by the rules might be barred by the confrontation clause.

This case does not present a question of your finding that the Federal Rules of Evidence are unconstitutional.

QUESTION: But at least under the hearsay rules you never had to produce the man to get --

MS. MAGUIGAN: To this day under the hearsay rules. In a criminal case you may have evidence not barred because of the operation of the hearsay rules, and the question is, does the confrontation clause require a different result. That is really the question. The confrontation clause inquiry is a separate inquiry.

QUESTION: Except they really stem from the same general principles, don't they?

MS. MAGUIGAN: With regard to hearsay, yes,

sir. Not with regard to co-conspirator declarations. With regard to hearsay, they stem from the same general principle, which is to advance the truthseeking process in trial. That is absolutely true. And the exceptions now codified in our system in Rule 803 are based on judgements about trustworthiness, about situations in which people can be expected to be reliable in their assertions. That is not the basis of the judgments about co-conspirator declarations.

QUESTION: Would you challenge the basis for admitting, say, a defendant's out of court statements against him?

MS. MAGUIGAN: No.

QUESTION: You say those are sufficiently reliable or --

MS. MAGUIGAN: Those are the same party. There is absolute identity of party there.

QUESTION: How about the defendant's agent?

MS. MAGUIGAN: The defendant's agent is a slightly different situation when you have a clear agency as a matter of fact, a literal agency. I believe for instance with a corporation and employees you have a factual agency, whereas in co-conspirator cases what you have is an agency which may be only a fiction, which the government need establish by independent evidence before

using then tapes only by a preponderance with a standard that varies quite widely circuit to circuit.

In the Sixth Circuit, for instance, they can use the tapes themselves to meet the threshold preponderant showing that there is that relationship.

QUESTION: Aren't co-conspirators generally regarded as agents of each other?

MS. MAGUIGAN: That is the fiction, Mr. Chief Justice.

QUESTION: Fiction?

MS. MAGUIGAN: Yes, sir, and it is reflected in the advisory committee notes and in Circuit Court opinions. And that is why it is so important that the government standard is only by a preponderance. It is worthy, I think, of note in this case that with regard to co-conspirator declarations, this Court has spoken relatively recently in Dutton versus Evans. Delaney is not dispositive. In Delaney the declarant was dead. The court analyzed the co-conspirator exception in two sentences, and in one of the sentences it was that the declarant was not available to the court.

But in Dutton you have an alternative basis for upholding the Court of Appeals even were you to rule that they were wrong in the application of Ohio against Roberts. Now, I do not believe that you will come to

the conclusion that they were wrong, but it is important to note that this Court has precedent in its own decisions for assessing the relationship of the confrontation clause and co-conspirator declarations.

And Dutton applied to this case would require a determination that the Court of Appeals judgment should be upheld, because in this case, unlike Dutton, the evidence adduced by the government, insulated from cross examination, was crucial and devastating. The government has never contended that the utility of trial confrontation would have been remote. The evidence was not of peripheral significance. He was their witness. We should have been able to cross examine him.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Frey? You have four minutes remaining.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. FREY: Yes, I do.

QUESTION: Mr. Frey, before you get started, I want to try to see how far we can go. Am I correct that in the prosecutor's office, state and federal, when it comes time for the prosecution, your investigating group gives you a list of witnesses, saying what they will testify, and how they will stand up on cross examination? Is that true?

MR. FREY: I am not sure. I have never actually prosecuted the case at the trial level, but presumably there has been a grand jury, and we know what some of the witnesses are going to say from that testimony.

QUESTION: What would happen if you as a prosecutor were given the name of a witness, Lazaro, and it says either that this man is an unmitigated liar and he can't be pinned down to anything, or it says he will go along with any question that anybody asks, and on four different occasions has completely collapsed on cross examination, and you had the choice of either putting him on the stand or putting in his statement? Which would you do?

MR. FREY: Put in his statement in any event because his statement has independent evidentiary value. Now, what else I would do would depend on whether what I learned was Brady material, in which case I would turn it over to the defense. If all I learned was that he was going to be a lousy witness at trial, I would simply not use him, and neither would they.

QUESTION: But you would use the statement.

MR. FREY: Absolutely, and the statement has independent value from whatever he might say at trial.

QUESTION: Mr. Frey, your argument sounds a

lot like that espoused by Justice Harlan in Dutton, which wasn't adopted, of course.

MR. FREY: Well, my conceptual approach is a lot like it, but not identical to it. Let me say this. First of all, I do not concede that Lazaro is the government's witness, because we introduced statements made during the course of the conspiracy.

It seems to me the point that I am trying to make is that a witness is somebody who has made a statement of a testimonial character, and it seems to me that a declaration of a co-conspirator in the course of a conspiracy is not testimony. It is an event that is occurring in the course of the conspiracy.

It is quite different from the statement, and Justice Harlan had a little difficulty dealing with Dutton and -- Dutton particularly because of how you deal with an accomplice's confession. Now, I would say that an accomplice's confession is testimonial, and makes him a witness if it is used.

Now, it may be able to be used under the confrontation clause anyway, or it may not, depending on confrontation clause rules, but I think that my approach of asking whether the out of court declaration is testimonial in character and therefore makes him a witness within the meaning of the Sixth Amendment is

different from Justice Harlan's approach, and I think it should commend itself -- I hope it would commend itself to the Court.

Let me get back to Dutton against Evans. Justice Rehnquist asked about that. First of all, the statement of Dutton was clearly inadmissible under evidence law. It was gotten in in a totally imporper way. It has been said by the advisory committee that the -- excuse me, Douglas against Alabama I am referring to now.

It has been said by the advisory committee that that was really a case that was largely concerned with prosecutorial misconduct. When we come to Dutton, which is a co-conspirator declaration not within the traditional rule, I would like to read what the Court said about the traditional co-conspirator declaration. This is at Page 80 of 400 US.

"The argument seems to be rather that in any given case the Constitution requires a reappraisal of every exception to the hearsay rule no matter how long established in order to determine whether, in the words of the Court of Appeals, it is supported by salient and cogent reasons.

"The logic of that position would seem to require a constitutional reassessment of every

established hearsay exception, federal or state, but in the present case it is argued only that the hearsay exception applied by Georgia is constitutionally invalid because it doesn't conform to the federal hearsay exception.

"Appellee does not challenge and we do not question the validity of the co-conspirator exception applied in the federal courts." And in Ohio against Roberts, I think the court again suggested that the traditional co-conspirator exception was not being called into question.

Now, as far as what the government said or didn't say at trial, I believe at the time of trial there was a Third Circuit decision called Gibbs, a panel decision later overruled en banc that did require us to produce or show the unavailability of a witness. As far as what respondent's position was at trial, if you look at Page 17 of the appendix, you will see that they thought unavailability was a condition of admission and production would not do to get the statement in.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 2:57 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#84-1580 - UNITED STATES, Petitioner V. JOSEPH INADI

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nd that these attached pages constitutes the original ranscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)