OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-162

TITLE NEW MEXICO, Petitioner V. RALPH RODNEY EARNEST

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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NEW MEXICO, :

Petitioner :

v. : No. 86-162

RALPH RODNEY EARNEST :

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Washington, D.C.

Tuesday, April 1, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 o'clock a.m.

APPEARANCES:

PAUL BARDACKE, ESQ., Attorney General of New Mexico, Santa Fe, N.M.; on behalf of Petitioner.

J. THOMAS SULLIVAN, ESQ., Dallas, Tex.; on behalf of 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: The Court will hear arguments first this morning in New Mexico against Earnest. Mr. Attorney General, you may proceed whenever you're ready.

ORAL ARGUMENT OF PAUL BARDACKE, ESQ.

ON BEHALF OF PETITIONER

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

The defendant in our case was convicted of a brutal first degree murder. A jury based its decision upon reliable evidence. The question before this Court is whether the defendant must now be released because of the form of one piece of that reliable evidence.

The defendant and two accomplices were picked up the morning after the crime. One of the accomplices, Boeglin, confessed. He admitted having committed first degree murder, for which he was subsequently convicted. He was also convicted of conspiracy to commit murder and kidnapping.

Now, Boeglin also implicated the defendant in this case and he was subsequently called as a witness at the defendant's trial. When he was called as a witness, he refused to testify. He took the Fifth Amendment. Then he was granted immunity and he continued to refuse

to testify.

Then he was held in contempt by court, and he persisted in his refusal to testify. He was --

QUESTION: How long was he in custody on the contempt?

MR. BARDACKE: He was held in contempt, but he had already been in the process of being tried and convicted of first degree murder, and he was sentenced to life in prison.

QUESTION: He wasn't given any separate commitment for the contempt?

MR. BARDACKE: No, he was not, Mr. Chief Justice. But he was deemed to be unavailable as a declarant. His unavailability as a declarant was not contested then and not now. The question became, as the prosecution then sought to have his confession admitted against the defendant in this case, and the judge in that trial properly applied the reliability test, the second prong of Ohio v. Roberts, and in that case the court determined there were sufficient guarantees of trustworthiness to make that confession admissible.

It was subsequently admitted. He was convicted of first degree murder and the Supreme Court of New Mexico reversed. Now, they reversed not on the basis that the statement was not reliable, not on the

basis that there was inadequate corroboration to make it sufficient indicia of trustworthiness. But in fact, the Supreme Court of New Mexico held that statements of this kind are per se inadmissible because they're not subject to cross-examination at a prior judicial hearing.

In ruling that that's what Ohio v. Roberts held, the state's position is that the Supreme Court made a mistake. We seek reversal of the Supreme Court of New Mexico's decision in this case so that the Supreme Court on remand can test the reliability, as the trial judge did, make a determination to see whether or not the statement was in fact unreliable and therefore inadmissible.

The Supreme Court of New Mexico never did that. They just issue a per se inadmissible rule, unlike this Court has ever done. Clearly, the trend of this Court's decisions is a case by case review. In Dutton, in Roberts, in Green, this Court has resisted any per se inadmissibility rule and rather suggested that the courts below look at the -- weigh the various competing issues, interests, look at how badly the state needs this kind of evidence, and look at the rights of the defendant.

And in this case, with the declarant clearly unavailable and with the state needing this particular

evidence, the trial judge properly applied the reliability test set forth in Roberts.

QUESTION: General Bardacke, you would have had a hard time getting this evidence in under traditional evidence rules, wouldn't you?

MR. BARDACKE: Well, it's a statement against penal interest, and there is a rule in New Mexico identical to the federal rule. Clearly, this was a declaration against penal interest.

QUESTION: But the declaration against penal interest was insofar as he implicated himself, but it wasn't against penal interests so far as he implicated his confederate, was it?

MR. BARDACKE: Yes, he implicated himself so much that he was convicted of first degree murder, and he implicated the defendant, in which he said: Look, I slit the guy's throat twice, but the defendant here shot him in the head twice.

QUESTION: But when he talks about the defendant shooting him in the head, the other defendant shooting him in the head twice, that isn't against the declarant's penal interest.

MR. BARDACKE: Well, as a matter of fact it was, because it was in his presence while they were both kidnapping him and while they were both conspiring to

commit murder.

Subsequently, he was convicted of conspiracy to commit murder as well. So there is a nexus between the declarant's declaration against penal interest and the penal interest of the defendant in this case.

There was no admission at any time against the defendant in this case that didn't inculpate the declarant as well at the time that the man was conspiring to commit murder. I mean, historically the confrontation clause was closely tied to the compulsory process clause.

QUESTION: Well, does the New Mexico rule apply as well, the rule you cite, to custodial statements? This is post-arrest.

MR. BARDACKE: Yes. I think that custodial statements require close scrutiny, but I believe under state law, as under federal law, they are never per se inadmissible. And in all the cases cited by amici and the Respondent in this case, I can find only one state case, and that's because of an anomaly of the Georgia state declaration of penal interest which applies a per se inadmissible rule.

In my review of the federal cases, I can find no case which offers the brittle per se inadmissible rule that the state of New Mexico Supreme Court offered

in this case.

QUESTION: Well, they purported to be applying the federal rule, is that it?

MR. BARDACKE: Yes. What the New Mexico Supreme Court said was that Ohio v. Roberts, the applicability of that case applies only to prior testimony that is subject to prior cross-examination. And I think that there's nothing in the Roberts opinion and nothing in confrontation clause decided by this case -- after that point, that in fact would limit the applicability of Ohio v. Roberts to just prior testimony subject to cross-examination.

QUESTION: If Ohio against Roberts was not on the books in this Court, could they have reached the same result on the state law?

MR. BARDACKE: I think that if the New Mexico Supreme Court had reached the state law, they would have determined that in fact the statement was reliable and admissible, and upheld the conviction. But I think that with Ohio v. Roberts on the books, an excellent approach was given by this Court to determine whether or not this hearsay that was uncross-examined at a prior judicial hearing should be admissible.

QUESTION: Mr. Attorney General, you rely on the reliability test, which I think is correct. And

yet, is it not true that Boeglin, if that's the way you pronounce his name, had a selfish motive in giving the confession he gave? Because my understanding of it was that he said all he did was try to cut the man's throat, but his knife was dull and he didn't cut deep enough to kill him, so he did not die from the efforts of Mr. Boeglin. He died, however, from the two shots to the forehead.

So he was trying to save his own neck, and the question in my mind is whether that can be viewed as reliable.

MR. BARDACKE: Well, Justice Powell, it's an excellent point. I don't know that this Court needs to reach reliability. I think that a remand to the New Mexico Supreme Court would then give that court the opportunity to test the reliability of what the trial judge admitted.

However, I don't think there's anything in which Boeglin attempted to minimize his involvement. He admitted that he voted to murder the defendant. He admitted that he brutalized the defendant. He admitted that he slit his throat twice.

He did say he did not know how deeply he had cut the throat. But one day after this crime, he had no way of knowing whether his slitting of the throat twice

killed the victim in this case or whether Earnest's two shots to the head.

But in any event, he was convicted of first degree murder. He was offered no deal of any kind. He was sentenced to life imprisonment. So I think that clearly we have a valid declaration against penal interest that our rules of evidence recognize as being admissible.

QUESTION: May I ask you, you just talked about Ohio against Roberts. Do you have anything to say about Douglas against -- what is the case?

MR. BARDACKE: Douglas v. Alabama.

QUESTION: Douglas against Alabama.

MR. BARDACKE: Yes, Justice Stevens. I think that case is not analogous to this case in that in Douglas v. Alabama we did not have an exception to the hearsay rule. As a matter of fact, all we had was the statements of a prosecutor who, under the guise of refreshing the recollection of the defendant, tried to get in his own testimony.

Now, how could the testimony of a prosecutor be tested for reliability?

QUESTION: Well, but he was just trying to prove what the co-defendant had said.

MR. BARDACKE: Well, but he did it through an

improper way, and I think that Douglas v. Alabama is more a case of prosecutorial misconduct. But in any event, the issues that are before the Court in Ohio v. Roberts and in this case are not issues that were before the Court in Douglas v. Alabama, because here it cannot be contested that in fact we do have a valid exception to the hearsay rule that was admissible and found admissible by the trial judge under the two-pronged test of Ohio v. Roberts.

And I think that that two-pronged test in the name of good policy, in the name of common sense and good judgment, is the kind of test that this Court has been seeking to have trial courts utilize in deciding whether hearsay should be admissible.

Even in the per se -- excuse me. Even in Manson v. Braithwaite, where we have the suggestive pretrial identifications with their inherent problems of reliability, I think this Court refused to issue a per se inadmissibility kind of rule, but said that the Court should examine each case and examine the state's interest in law enforcement, the state's interest in developing evidentiary rules, and not supply a brittle, hard and fast per se inadmissible rule.

And clearly, that's what the court in this case did in the Supreme Court of New Mexico. I think

what the Supreme Court did was they just wiped out a whole class of hearsay, without any gauge to the reliability --

QUESTION: What whole big class did it wipe out?

MR. BARDACKE: It wiped out statements out of court, third party confessions. I mean, clearly the confrontation clause doesn't allow cross-examination in all cases. But if you read the holding of New Mexico versus Earnest, you would wipe out all prior out of court statements not subject to cross-examination at a prior judicial hearing.

In other words, that was the fact --

QUESTION: Haven't they already been wiped out?

MR. BARDACKE: I don't believe --

QUESTION: Under the regular rules of evidence?

MR. BARDACKE: I don't believe so. I think there are exceptions to the hearsay rule, and I think there is an interrelationship between --

QUESTION: Out of court statements, all out of court statements are admissible in New Mexico?

MR. BARDACKE: Not admissible. They are admissible if, for instance in our case, if a declarant

is unavailable.

QUESTION: Let's leave our case. I'm talking about this great big group of cases you're talking to.

MR. BARDACKE: Well, certainly dying declarations have been admissible without implicating the confrontation clause since the time of Mattox, I believe, an 1895 decision of this --

QUESTION: That exception is as hold as this country.

MR. BARDACKE: Yes. I think there are other exceptions.

QUESTION: But so this case wouldn't wipe that out, would it?

MR. BARDACKE: I don't believe so. But certainly the language of this case would implicate not only the facts of our case, but also situations where witnesses have fled the jurisdiction, situations where witnesses have died.

So the ramifications of the holding in this case go far deeper, and would overrule many longstanding decisions of this case. This case was decided by the New Mexico Supreme Court in 1985, and I believe it has significant ramifications, and that's why we're asking this Court to remand and have the New Mexico Supreme Court determine whether the trial judge in this case

abused his discretion in determining there was sufficient reliability and sufficient corroboration to make this admissible.

I think --

QUESTION: General Bardacke, do you think the confrontation clause as interpreted by this Court in Ohio against Roberts allows the states to admit into evidence things that perhaps would not have come in under traditional hearsay law and that perhaps wouldn't come in under the federal rules of evidence?

MR. BARDACKE: I think it does. I think that in Ohio v. Roberts, once the first prong of unavailability is decided, this Court puts forth a rule that says, if it's a firmly rooted exception to the hearsay rule, then we will infer reliability; if it is not, then we will rule that the evidence is not admissible unless there are sufficient indicia of reliability that would make the testimony helpful and make it promote the cause of the confrontation clause, which is in fact to promote the accuracy and truth-finding process in a trial.

So it's conceivably by applying that test you might admit something that would not be admissible through the traditional rules of evidence. But certainly that's not the circumstance in this case. The

circumstance in this case is that it is admissible as a valid declaration against penal interest.

It is clear that the defendant in this case -- I'm sorry -- the declarant in this case was unavailable. It is clear that the state went through every possible motion that it could have to provide a live witness who would take the oath, who would be subject to cross-examination.

But that was not available in this case, and the only way the state could get this probative, reliable evidence to further in this case the state's interest in law enforcement was the method in which it did.

We would urge this Court to reverse the New Mexico Supreme Court and in fact ask the court then to determine whether or not it was sufficiently reliable and whether the trial judge did his job and determined that in fact it was admissible and good, probative evidence upon which the conviction of this defendant could be based.

Thank you very much.

CHIEF JUSTICE BURGER: Mr. Sullivan.

ORAL ARGUMENT OF

J. THOMAS SULLIVAN, ESQ.,

ON BEHALF OF RESPONDENT

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

I can think of no more important trial right for a defendant in an American courtroom than the right to cross-examine the witnesses who are brought by the prosecution to testify against him. In this case, the defendant, Respondent in this Court, was tried for a capital offense and he risked suffering the death penalty.

The conviction in this case rests almost exclusively on the custodial unsworn, uncounseled statement given by an alleged accomplice, Philip Boeglin, who had earlier in the afternoon made two statements in which he denied any participation in this offense whatsoever.

The state argues that this is a statement which should be admitted even if the declarant is not available for cross-examination because, since it was against Boeglin's penal interest to make the statement, it falls within the declaration against penal interest exception.

Now, the state pins its argument of Ohio versus Roberts, and I think there are two different considerations that I want to focus on. First, the idea of cross-examination and what Ohio versus Roberts means

in the continuity of Sixth Amendment cases emanating from this Court; but second, I want to look briefly an the end of my argument at some problems which may arise from the language used by the New Mexico Supreme Court in its opinion.

I think basically that Ohio versus Roberts follows that line of cases -- California versus Green, Pointer versus Texas, Barber versus Page -- in which the Court has had occasion to consider when prior cross-examined testimony could be used where the declarant is not available at the time of trial.

And it seems to me that Ohio versus Roberts follows consistently those prior decisions if one assumes, as the Court found, that counsel in that case had an opportunity to cross-examine that key prosecution witness and in fact vigorously cross-examined her at the preliminary hearing.

That's not what happened in this case. Boeglin was never cross-examined by trial counsel in this case. In fact, he was --

QUESTION: What was the bar to the cross-examination?

MR. SULLIVAN: Boeglin refused to testify at trial. He had not been tried yet himself. He was given an order of immunity by the trial court which immunized

his truthful testimony. But at that time he was counseled, and I suppose he understood that he was going to have to present some kind of defense later on in his own case.

He refused to testify, Mr. Chief Justice. There is no question that the trial court found that he was in contempt of court. It assessed a punishment, I believe, of 26 1-2 years for that contempt, which was subsequently reversed in the New Mexico appellate courts twice. Boeglin was subsequently tried after Earnest was convicted and was convicted himself.

The trial court found he was unavailable because he refused to testify despite an order to do so. I think there is a separate line of Boeglin cases in the New Mexico courts, which I have not cited -- I believe the American Civil Liberties Union cited them in their brief -- which deal with the immunity order itself.

But I believe at the time of trial Boeglin had a very real fear that if he testified his testimony would somehow subsequently be used against him.

It's important, it seems to me, for me to note that the Respondent did testify in this case. Forced to present a defense after the trial court admitted the statement and denied the motion for instructed verdict,

the defendant took the stand. He testified in his own behalf. He subjected himself to cross-examination and to the admission of a prior conviction for burglary.

But he also testified that he believe if Boeglin had testified in the case he would have exculpated him. Now, I'm sure that's not binding on this Court in any real sense, but I would ask the Court to consider what might have happened to Boeglin had he testified and exculpated the Respondent, contrary to his initial statement while in custody which implicated the Respondent.

If he had testified for the Respondent at trial, his trial testimony would not have been immunized because the state would have claimed it wasn't truthful testimony. So that when Boeglin ultimately testified in his own trial and claimed essentially a defense of duress and went beyond even the testimony, the statement that was given -- and it's reproduced in the joint appendix.

He testified: You know, Earnest held the gun on me and forced me to cut this man's throat, and I didn't want to do it. And Earnest and the other fellow were really the people who perpetuated this killing.

Now, it seems to me that --

QUESTION: How would that affect the claim,

the charge of kidnapping?

MR. SULLIVAN: I think that Boeglin was still admitting participation in the kidnapping, Your Honor, although he was attempting to do so as a reluctant victim under the circumstances.

QUESTION: He wasn't claiming that he participated in the kidnapping because he was forced to do so?

MR. SULLIVAN: I believe that was his trial testimony, Your Honor. He attempted in his statement to the police to shift the burden for this offense off on two other people.

The third co-defendant testified at Respondent's trial and testified Respondent had nothing to do with the act. He testified to his own version of the facts as they happened, and he named himself and Boeglin as the killers. He was subjected to cross-examination.

The only person at Respondent's trial who never had to be cross-examined was Boeglin, the man who had every motivation when he was in police custody to do anything he could to shift the burden away from himself and to others.

The best argument I could make for the unreliability of this kind of statement, a custodial,

uncounseled, unsworn statement, is to look at the statement that's reproduced in the joint appendix. It's replete with Boeglin's efforts to make a deal with the police officers.

And the police officers tell Boeglin: Look, you've given us two statements already today; neither of them admitted anything; we're not going to make a deal with you until you tell us what happened; and once you tell us what happened, then we'll talk to the DA about making a deal.

And so Boeglin began to talk and told the most favorable version of these facts that he could. He said in the text of his statement: I expect to get off of this, I expect to maybe do some county time; I don't expect, basically, to do a serious sentence because I'm confessing.

And this is what separates this kind of statement from all those other hearsay statements that may fit within the traditional exceptions.

QUESTION: Mr. Sullivan, I suppose New Mexico had a body of evidentiary law long before Ohio against Roberts was decided.

MR. SULLIVAN: Justice, it's very slim.

QUESTION: Is it?

MR. SULLIVAN: The public defenders' amicus

brief sets out the cases, and in fact there is a case on point, State versus Self, which says that only those portions of a declarant's statement that are against his personal interests are admitted under this kind of an exception; that those portions of his statement naming someone else, that are tangential to his involvement, are not, do not fall within this penal interest exception.

QUESTION: Was this case cited to the Supreme Court of New Mexico at the time it decided the present case?

MR. SULLIVAN: No, Your Honor, I have to admit that I did not cite this case. I talked about Douglas versus Alabama as the constitutional underpinnings of cross-examination and I attacked it in an evidentiary sense as an unreliable statement. But I did not cite State versus Self.

The state didn't cite State versus Self that I know of, and the Supreme Court opinion below doesn't cite State versus Self.

I think there's a good argument, as the ACLU has made, possibly that this case could have been better decided under New Mexico law. But I think the very real concern, and the way this case was argued in New Mexico, was is this a Douglas versus Alabama question or is this

an Ohio versus Roberts question.

QUESTION: That's one of the problems, is that if you had argued it as a State versus Self question it would have ended at the Supreme Court of New Mexico.

MR. SULLIVAN: Unless, Your Honor, the court had said that, we're going to hold that Self doesn't apply factually and then deal with the constitutional question. It seemed to me that the New Mexico Supreme Court had before it the argument that this doesn't come in under our rules of evidence. And our briefs are reproduced in the joint appendix, but that's, you know, that's clearly my error in that court.

The case was actually argued as one of cross-examination and confrontation, and I think that the New Mexico Supreme Court clearly looked at the decisions of this Court in at least reaching its result and found that Douglas was most on point.

Now, the Attorney General says: Look, Ohio versus Roberts says a firmly rooted hearsay exception is what we look to to determine those situations where evidence is admitted when in fact there is no cross-examination possible. Yet, in avoiding the logical implication that Bruton versus United States and Douglas versus Alabama necessarily have to be overruled to get to that position in this case, the Attorney

General says: Yeah, but those decisions predated the adoption of the federal rules; it's the federal rules where we finally find recognition of a declaration against penal interest exception.

Now, number one, it's wrong as a matter of historical development of evidence. There were people talking about penal interest exceptions long before the adoption of the federal rules.

But the Attorney General it seems to me cannot have it both ways. Either this is something that's novel, that post-dates the Douglas and Bruton decisions, with the adoption of the federal rules in 1975, or it's not going to be a firmly rooted hearsay exception. A firmly rooted hearsay exception in the decisions of this Court are those exceptions that have been recognized, many back to the common law, over the course of time: dying declarations, prior cross-examined testimony where a witness dies or is unavailable at trial.

QUESTION: Are you saying that a declaration against penal interest is not a firmly rooted hearsay exception?

MR. SULLIVAN: I'm saying, Your Honor, I believe that either it is, in which case you have to look at Douglas and Bruton substantively -- you can't just say there were no hearsay exceptions involved -- or

it's not.

QUESTION: Well, but one could quite well argue, I think, that Ohio versus Roberts does not leave Douglas against Alabama intact.

MR. SULLIVAN: I think that is the argument that the Attorney General is making, and our position is that there is no body of case law where custodial statements of accomplices have ever been recognized as reliable for purposes of admission, as admissions against penal interest against third parties.

There just are no cases, with the exception of the one Colorado Court of Appeals case, in which courts have held that those things are reliable.

QUESTION: But declarations against penal interest generally are recognized. You wouldn't say there is a separate class of cases, I think, dealing with declarations against penal interest by people who were under drugs. You would say that that individual fact may affect the reliability of the case.

But declarations against penal interest generally have been recognized. You're saying that there is a separate subclass of declarations of penal interest of people in custody that should not be recognized.

MR. SULLIVAN: Well, I think I'm saying, Your

Honor, that those statements have traditionally been recognized as so inherently unreliable that they are not traditionally admissible as exceptions under that rule. Clearly, that exception encompasses a broad range of statements, and we cited the cases that we could find there they have been admitted.

Not one of those cases is a statement made by someone in custody who has a motivation to shift burden of blame to someone else in order to curry favor with the authorities.

And as support for that notion, I've cited, to whatever extent I've done it correctly, the House and Senate Committee reports when Rule 804(b)(3) of the federal rules was under consideration, in which the Senate and House conferees states on the record: We in no sense mean to abrogate the rule of Bruton. They were clearly aware of what the Court had held in Bruton.

And it seems to me that what the Attorney General asks today is to clearly overrule Bruton substantively, and not even by implication, because in Bruton the Court said: Look, the statement is not admissible against the defendant if it's made by the co-defendant; and second, an instruction does not cure the problem or the possibility that the jury is going to consider that statement substantively.

I find no decision of this Court looking at the use of co-defendant or accomplice confessions in which the Court has held that those could be used substantively against an accused, unless the declarant is available to be cross-examined.

And in fact, last term in Tennessee versus Street we had a situation where there were two confessions, the defendant at trial claimed that he had been forced to give a confession mimicking his co-defendant's confession, and the Tennessee trial judge gave an instruction to the jury: You may consider that statement, but for a limited purpose. And he instructed the jury: Don't even consider the truthfulness of the statement.

The question is whether or not the Attorney General is correct is saying this kind of statement can be used substantively against an accused where there is no opportunity for cross-examination. There is not one decision of this Court that I could find where the Court has sanctioned the use of these kinds of statements.

In fact, the decisions are replete with the suggestion that there is a limited use that can be made of a co-defendant's confession, the Parker versus Randolph situation, for rebuttal, or where the defendant has placed in issue some aspect of his own confession,

but that substantive use of that confession as a basis for conviction is improper.

QUESTION: What is the co-defendant's out of court confession would have been beneficial to your client?

MR. SULLIVAN: In that case --

QUESTION: And you called him. You called him and he refused to testify, and then you wanted to introduce his statement, his out of court statement to the police, where he fully implicated himself but exonerated your client.

MR. SULLIVAN: Your Honor, that's a good question. Under the New Mexico and federal rules --

QUESTION: Well, I know.

MR. SULLIVAN: -- number one, we would have had to have been able to corroborate that statement. It would not have been admissible independently of corroboration.

QUESTION: Well, suppose there was corroboration.

MR. SULLIVAN: I think in that case then the question becomes one of what interest is compelled by due process.

QUESTION: Why, the state just objects to the introduction of that as hearsay. It's just hearsay.

MR. SULLIVAN: Well, I think that it may be --

QUESTION: And what would be your answer?

MR. SULLIVAN: -- the state in that case would be arguing a good position. I would say the statement has to be admissible because, if we err at all, and if there is corroboration, at least in these matters, we should err on the right of the defendant.

QUESTION: And yet you defend the decision in this case, which is a per se rule.

MR. SULLIVAN: Yes, Your Honor, because there's no way to test these statements. I think it's --

QUESTION: You mean the state, in my other example, the state doesn't need to? It just doesn't have the protection of the Sixth Amendment?

MR. SULLIVAN: I don't think it does.

QUESTION: Do you concede that this witness was unavailable?

MR. SULLIVAN: He was unavailable in the sense that the trial court found that he had been ordered to testify. We think that order was defective, but I think he was unavailable, as the trial court found him to be, because he refused to testify despite the court order to do so.

I think the state could have gone to further lengths to make him available, first, as trial counsel

pointed out, by trying Boeglin first and not holding his trial over until after the Earnest trial.

Second, I think that the state could have done what it does in numbers of cases, a policy which is recognized in New Mexico: It simply could have entered into some kind of agreement with Boeglin in return for his testimony. I know those kind of agreements aren't favored, but in our law we understand that often the police make agreements with one witness in order to obtain his testimony for use against another witness at trial.

And if Boeglin was in fact the least culpable of these people because of his statement, it seems logical to me that the state should have been required, perhaps, to go forward with attempting to make such an agreement with Boeglin. There's no record on that point in the trial court.

The New Mexico Supreme Court opinion I think is overbroad, but I think it's overbroad because of the way we argued the case in that court. We argued Douglas, the state argued Ohio versus Roberts. I think that the New Mexico Supreme Court read Ohio versus Roberts and said: Number one, there's no cross-examination; and maybe, number two, this isn't even a case where there's prior testimony, since the

statement was not given in the context of a judicial proceeding.

But the New Mexico case law subsequent to Ohio versus Roberts has recognized the admission on uncross-examined testimony given by out of court declarants. In State versus Owens, as cited in the brief, the Supreme Court of New Mexico, after deciding Earnest, denied the petition for cert filed by the defendant in that case.

So within New Mexico's jurisprudence there is no evidence that New Mexico reads its Earnest decision to exclude all out of court statements. That's simply an overbroad statement, and I think it emanates from the language used by the New Mexico Supreme Court in its opinion.

If you read the two briefs that the parties filed in that court, it's very clear we're relying on Douglas, they were relying on Ohio versus Roberts. The New Mexico Supreme Court said: Ohio versus Roberts doesn't apply because you've got to give some right of cross-examination to this defendant before you can admit that inculpatory statement made by the alleged accomplice.

QUESTION: Now, what would the Supreme Court of New Mexico have said, given this opinion they wrote,

about the sort of dying declarations that the Attorney General is talking about?

MR. SULLIVAN: Admissible, under the traditional rules of hearsay. You see, Ohio versus Roberts was used by that court, I believe, as the cornerstone of its opinion, but I don't think the court ever intended that case to be read as limiting prosecutorial use of statements which do fall within traditionally firmly rooted exceptions.

QUESTION: But here the Supreme Court of New Mexico in its opinion in this case cites the Tenth Circuit Rothbart case is saying that Ohio against Roberts is limited in its application to statements or testimony made at an earlier judicial proceeding.

MR. SULLIVAN: And I think on the facts it is. I think it's the language in Ohio versus Roberts which to me indicated a clarification. It said, other exceptions are also --

QUESTION: But the Supreme Court of New Mexico doesn't say the holding. It says the Ohio against Roberts test. And it seems to me that your opponent is right, that if we read the New Mexico Supreme Court as approving the Rothbart case, which it seems to me it did, that that would cast a lot of doubt on things that are not statements in prior judicial proceedings, like

dying declarations.

MR. SULLIVAN: Well, Justice, the only way I can respond is that in a subsequent case involving another recognized hearsay exception, the New Mexico courts applied the hearsay exception and did not reverse and exclude that evidence because there was no cross-examination. That's State versus Owens.

QUESTION: What was that exception?

MR. SULLIVAN: There was a communication, I believe, between the defendant and another person in a wiretapped conversation. It was a gambling transaction, and I believe that statement probably came in as a declaration against penal interest. Maybe it's the same exception.

But it was a statement made -- when I said other exception, it's a statement made by the defendant himself, as opposed to a statement made by a third person which arguably inculpates him.

I cannot really defend the language of the New Mexico Supreme Court opinion, which I think does suggest a departure from the decisions of the Court. I think, though, that the decision must be read strictly on the facts, and that in this case what we've really got is a classic case of a statement that has never been considered reliable, the custodial statement of an

accomplice, who has every motive to try to shift the burden from himself to another.

And the state says: Look, this statement's reliable because the accomplice is admitting a capital offense. But in fact, if the accomplice knows that much law he knows that he's also putting forth his claim to mitigation, and he's also cooperating with authorities. And in a death penalty trial in New Mexico, the fact that you say you were on drugs, the fact that you say you were operating under the influence on another, the fact that you say that you were in a confused mental state, and the fact that you give a statement to the police are all statutory mitigating circumstances, and the jury has to be instructed on those.

So to say that Boeglin was really inculpating himself and subjecting himself to a possible death sentence, you must look at the evidence and look at the statute and realize he was also doing exactly what he intended to do in this situation, which was to save himself at the expense of someone else.

He never identified Earnest as the person he was talking about. The references in that statement are sketchy. And if you look to the statement and the circumstances that occurred in the making of that statement, it's the officer who first suggests to

Boeglin: Look, you might testify or you might say -- and I'll read it:

"Now, for example, you say, okay, I'm going to tell you the truth if you'll let me go. And I say, fine, Mr. Boeglin, we've got a deal."

QUESTION: What page are you on?

MR. SULLIVAN: I'm on page 13 of the joint appendix, at the top.

"And you tell me, okay, I was the one that cut his throat. Now, what kind of a deal is that? That's stupid, isn't it? I don't have any idea what you're going to say to me, sir."

And then Boeglin proceeds to say: Yeah, I was the one who tried to cut his throat, and my knife failed. And so, as it turned out at trial, the fatal wounds were the gunshot wounds, not the throat cutting.

Boeglin attempted to mitigate his participation in this offense, and I think he was led all the way through this by the officer. Now, that's my interpretation from the statement, but I believe the best argument I could ever make for unreliability is the text of this statement, where the officer tells Boeglin: You've got to tell us something before there's any deal possible. And then Boeglin grudgingly begins to tell some kind of story.

He never identified Earnest in court as the person he's talking about. The references to the name are close, but he calls him "Rob" throughout most of that statement. And the indication was in that statement that there were multiple characters coming and going at these residences on that evening.

I want to point out to the Court, I think the problem with these kind of statements is not that the state's interest in law enforcement requires their admission, but that our interest in justice requires that we don't let somebody be convicted on this kind of evidence -- uncross-examined statements made while in custody, while the declarant is afraid, he's scared to be in jail.

He testified he was coming down off a methamphetamine high. He tried to make a deal. He had tried earlier in the day to get out of jail by saying: I don't know anything about this.

All of those factors are things that trial counsel would logically have wanted to cross-examine him about. What kind of state of mind were you in, Mr. Boeglin? How well, if you were on a drug-induced high, do you even remember these events? How well did you know this individual? Are you even talking about Mr. Earnest when you make this statement?

And finally, the most critical area of cross-examination that would have been possible: What was your motivation? Did you think that by blaming someone else you could take yourself off the hook for this murder?

And that's exactly the kind of thing that any skilled trial attorney I believe would have wanted to get at in cross-examination with Mr. Boeglin. And that would have been the circumstances, his opportunity, and his motivation for giving this statement.

I can't think of any greater problem that we would have than to say that, because the state has an interest in law enforcement, we're going to allow someone to be convicted of a capital crime and possibly be executed on the basis of this kind of statement.

QUESTION: You're basically asking the Court to affirm the Supreme Court of New Mexico on a different ground than the Supreme Court of New Mexico took.

MR. SULLIVAN: I think, yes, Your Honor. I think the Court should basically say these statements are unreliable, they don't fall within any firmly rooted exception to the hearsay clause and never have; if you're going to talk about a custodial statement made by an accomplice, there has got to be a right to cross-examine that accomplice in order for that

statement to be admitted, particularly in light of the evidence in this case, which shows why this kind of statement is inherently unreliable.

The body of federal decisions, decisions of this Court, and state decisions support that point of view. We're not talking about a statement that's been made to another civilian. We're not talking about a statement made by a defendant, as in the Perez case, to a person that he doesn't realize is a police officer. We're not talking about a defendant's statement to a girlfriend.

We're talking about custodial statements made to police when there is both the opportunity and motivation to curry favor with the police, to try to make a deal, to at least mitigate the declarant's participation in the offense at the expense of someone else.

You know, if in fact as a moral principle Mr. Earnest is innocent of this offense, the only evidence which convicted him was Philip Boeglin's statement. It's not simply a part of the case and it's not defective because of form. It's the crux of the state's case, and that's why we're here.

And second, it's a defect that goes to the very heart of the Sixth Amendment confrontation

guarantee. And I believe, as the Court articulated in California versus Green, that cross-examination is the best tool available to discern the truth, to require the jury to look at Mr. Boeglin and decide if they could believe him, not his statement, but could they believe this witness and could they believe that what he said was both accurate and truthful.

In this case, the jury was deprived of virtually any opportunity to assess the demeanor of Boeglin. And in fact, they never had to listen to him say: That is or is not my statement, and that is or is not true, that Earnest participated in this murder.

The jury was instructed in this case that they are the tryers of fact and it is their duty to weigh the credibility of the witnesses after judging their demeanor. Yet, with regard to the most important piece of evidence that the state had, and in fact the critical, crucial piece of evidence, the jury never had the opportunity to weigh the demeanor of the witness.

QUESTION: How was it decided who was tried first in this case?

MR. SULLIVAN: I think the prosecution made the decision.

QUESTION: And you have -- there was no way you could influence that, I take it?

MR. SULLIVAN: I don't believe the defendant could have. The defendant Earnest in fact --

QUESTION: If he'd have been convicted, he probably couldn't have refused to testify, I take it?

MR. SULLIVAN: Well, I think that he might well have refused, just as the declarant did in Douglas. But he would have had less legitimate reason. He would have had less fear that his statement would be used against him, I think.

QUESTION: Would he have had a Fifth Amendment right not to testify?

MR. SULLIVAN: I think as long as his case was on appeal, he would have had to assert his Fifth Amendment right. If his case had not been appealed and if he were subjected to no more liability, I think he might well have not really legitimately had that claim.

QUESTION: Are you suggesting that the prosecutor should have anticipated that the gentleman would take the Fifth Amendment and refuse to testify?

MR. SULLIVAN: Well, they knew about it by the time of this trial, Judge, because they had already tried the case once and it had been mistried. And in that trial, the trial judge excluded the statement. And then, Mr. Chief Justice, what happened was there was an intervening New Mexico Supreme Court decision which

suggested that the statement might be admissible.

They went back to trial after the double jeopardy motion, which is the subject of our own cert petition, had been denied. And the trial judge ruled prior to trial that that statement was going to be admissible based on that decision.

So the prosecution clearly knew, based on the first trial, or should have known, Boeglin was going to take the Fifth. And I submit that they could have tried Boeglin in the intervening period before trying Earnest.

You know, Earnest was out on bail during all this time. He stayed out, it was his testimony, seven, eight months, free on a capital offense, which is not even really permitted under the New Mexico Constitution, after the mistrial was declared. And he showed up for trial, because, he said, I'm innocent and I want to go to trial.

Now, maybe that's just a self-serving declaration. But if it's the truth in this case, then he was unjustly convicted on the Boeglin statement. And we ask that the judgment at least of the New Mexico Supreme Court be affirmed in this case, because we believe that that's what the confrontation clause requires.

CHIEF JUSTICE BURGER: Mr. Attorney General.

REBUTTAL ARGUMENT OF

PAUL BARDACKE, ESQ.,

ON BEHALF OF PETITIONER

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

The entire thrust of the Respondent's argument is that the statement that the trial judge admitted was unreliable. The Supreme Court of New Mexico never reached that issue. The Supreme Court of New Mexico, if it applies the second prong of the Roberts test correctly, can in fact test the reliability of that statement and determine whether the trial judge abused his discretion in admitting that statement. That was never done.

We seek that this Court reverse and remand to the Supreme Court and have the Supreme Court of New Mexico apply the proper test.

Counsel for Respondent assures us that: Well, in New Mexico jurisprudence they in fact are not applying this case in terms of what it says; everyone understands that in fact that the court didn't really mean that.

Certainly that's not what happened in Owens. In Owens, the case cited by Respondent, the court

determined that the statements were not hearsay. And in fact, on January 26th the Court of Appeals in granting -- or putting on its calendar for summary reversal, for summary reversal, took a case where an accomplice gave an implicatory confession to a police officer and cited this case, New Mexico versus Earnest, for summary reversal.

QUESTION: Mr. Attorney General, do you have a lot of case law support for your position?

MR. BARDACKE: State case law support for my position?

QUESTION: Any kind.

MR. BARDACKE: Yes. I think in fact you can find that there is absolutely no federal case of any kind that would support what the New Mexico Supreme Court has done in this case.

QUESTION: Give me one that supports you.

MR. BARDACKE: Ohio v. Roberts, Dutton, Green.

QUESTION: That didn't involve a statement of a co-defendant in custodial interrogation.

MR. BARDACKE: A third party custodial interrogation, People versus Moore, which is cited in the brief.

QUESTION: What state's that from?

MR. BARDACKE: Colorado.

QUESTION: But you don't have any federal case?

MR. BARDACKE: I don't have a federal case. But there is absolutely no federal case which would support a per se inadmissible rule.

QUESTION: Well, I know. But do you have -- there are a lot of cases that say you can't introduce the custodial statement of a co-defendant.

MR. BARDACKE: But after the courts give --

QUESTION: Isn't that right?

MR. BARDACKE: Justice White, that is correct. But the courts only reach that result once they test the reliability, once they give the close scrutiny the --

QUESTION: I know, but the reason they give is that this is a custodial statement by an accomplice who has some motive to implicate the other person.

MR. BARDACKE: But that motive didn't exist in this case --

QUESTION: Well, I know, but that's the reason they give, isn't it?

MR. BARDACKE: That may be the reason they give, but they in no case say that, and because of that they're per se inadmissible. They say because of that

these statements need to be given close scrutiny. And that's all we ask. We ask that these statements be given close --

QUESTION: But those cases just don't go any farther. They don't --

MR. BARDACKE: No, I think that in fact those cases do go farther. They test in terms of what was promised to the declarant, and in this case nothing was promised to the declarant. In fact, in those cases they determine whether the declarant was trying to minimize his participation and in fact inculpate someone other than himself.

Those problems inherent in third party custodial confessions do not exist in our case. In all of those cases where they reject third party custodial confessions, they do not do it on the basis of per se inadmissibility.

And the commentaries, by the way, to the federal rules of evidence do not suggest at any point that third party custodial confessions are inadmissible per se.

QUESTION: Mr. Attorney General, what's your answer to the Respondent's position that this was the crux of the case?

MR. BARDACKE: It was indeed the crux of the

case, Justice Marshall, and I believe that supports the state's position that they are in need of this testimony.

As this Court recognized in Ohio v. Roberts, there is prejudice to the state involved in the confrontation clause as well as prejudice to the defendant, and that the state has a dire interest in probative, reliable statements, however they happen to come into a courtroom.

QUESTION: You want to use your statements -- use this statement to prove that the defendant here shot and killed the fellow?

MR. BARDACKE: That's what the statement says, and in fact there is a tremendous amount of corroborative evidence, both physical and testimonial, that substantiates this confession in every way.

QUESTION: Well, Mr. Attorney General, what independent evidence at trial corroborates the fact that Respondent was in the truck and actually fired the shots?

MR. BARDACKE: There is no independent direct evidence of the defendant's guilt. However, there is evidence, testimonial and physical, testimonial that he was seen with the gun next to the victim, who was tied up; that he said that he was a narc; that they said they

were going to kill him; that in fact there is eye witness testimony that the three accomplices in the victim's own car, taking him away.

In fact, they found the gun where he said that he gun was, was found. They found the body where he said the body would be found. That in fact all of the testimony from the ballistics expert would indicate that the gun jammed, as he said that the gun jammed.

There is evidence that would indicate that the defendant in this case was involved in the drug deal, said that he believed that in fact the victim was a narc.

QUESTION: Yes, but there does not seem to be direct independent corroboration of the firing of the fatal shots or the presence in the truck.

MR. BARDACKE: There is not, Justice O'Connor, and that's why this evidence is so crucial to the state.

QUESTION: Would you say that, at the very least, there is a presumptive unreliability of a co-conspirator's statements while in custody?

MR. BARDACKE: If it is presumptive, it's certainly rebuttable, and certainly the trend of these courts -- of this Court's cases is that we should test each of the statements by terms of their reliability and

not hold them per se inadmissible.

If this Court were to support the New Mexico Supreme Court case and hold that these kinds of in custody confessions are per se inadmissible, it would be a first for this Court or any federal court to hold that.

QUESTION: Well, of course it might be possible we might read the record and say: Well, there may be no per se rule, but as we read this record this statement shouldn't have been put in, just on the facts of this case.

MR. BARDACKE: I think this Court, Justice White, has that option. I would urge this Court, however, to reverse and remand to the New Mexico Supreme Court so the New Mexico Supreme Court can made that determination as to whether the district judge abused his discretion in determining this was sufficiently reliable and corroborated by sufficient physical and testimonial evidence that it was worthwhile and in fact enhanced the cause and purpose of the confrontation clause to aid to the fairness and accuracy of criminal trials.

Thank you very much.

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

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-162 - NEW MEXICO, Petitioner V. RALPH RODNEY EARNEST

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BY Paul A. Richardson

(REPORTER)