OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RANDALL D. WHITE, Petitioner V. ILLINOIS

CASE NO: 90-6113

PLACE: Washington, D.C.

DATE: November 5, 1991

PAGES: 1 - 41

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IN THE SUPREME COURT OF THE UNITED STATES

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RANDALL D. WHITE :

Petitioner :

v. : No. 90-6113

ILLINOIS :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, November 5, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

GARY R. PETERSON, ESQ., Springfield, Illinois; on behalf of the Petitioner.

ARLEEN C. ANDERSON, ESQ., Assistant Attorney General of Illinois, Chicago, Illinois; on behalf of the Respondent.

STEPHEN L. NIGHTINGALE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-6113, Randall D. White v. Illinois.

Mr. Peterson.

ORAL ARGUMENT OF GARY R. PETERSON

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether the Confrontation Clause permits the prosecution to substitute hearsay for the live testimony of a child witness, absent a showing that the child is unavailable to testify at trial.

The issue arose in this case at the defendant's trial on the charges of sexual assault and other related offenses. The alleged, victim. S.G., who was 5 years old at the time of trial, did not testify.

Instead, the prosecution relied upon hearsay testimony that merely related S.G.'s unsworn, out-of-court accusations against the accused. Based on this evidence, the jury found the defendant guilty of the offense as charged. The Illinois appellate court affirmed the defendant's conviction. The Illinois supreme court denied the appeal and this Court granted certiorari.

This case presents conflicting considerations. On the one hand, it is the defendant's constitutional right to be confronted with the witnesses against him. The defendant's convictions were premised on the out-of-court accusations of a single witness.

Because the child did not testify, the defendant did not have an opportunity to cross-examine his only accuser.

QUESTION: These two declarations were both admitted by the Illinois courts under what? One was considered, one set was a spontaneous declaration, and the other was statements made by while submitting yourself for a medical examination?

MR. PETERSON: That's right, Your Honor. On the other hand, it's the State's interest in the welfare of the child witness. It is a difficult experience for a child to testify in a criminal proceeding. Of course, the same can be said for the elderly, the mentally impaired, victims of sex crimes, victims of violent crimes, and others.

However, since our adversary system expresses a strong preference for confrontation at trial, this Court has held that competing interests must be closely examined, and any exception to the confrontation right must be narrowly construed.

QUESTION: Mr. Peterson, I understand that in this case the child victim was actually in the courtroom.

MR. PETERSON: That's right, Your Honor.

QUESTION: And I suppose that in Illinois the defendant's attorney could have called that child for cross-examination.

MR. PETERSON: Under Illinois law he has the right to call witnesses as if under cross-examination.

QUESTION: Yes. And that was not done.

MR. PETERSON: No, it wasn't.

QUESTION: Do you think there is a waiver here, then, of this so-called right of confrontation? I mean, that could have been asserted at the time.

MR. PETERSON: No, Your Honor, there is no waiver. All the hearsay testimony was objected to at trial. The defendant moved for a mistrial based upon the fact that the child did not testify. The waiver argument was presented to the Illinois appellate court and the Illinois appellate court found it necessary to reach the constitutional issue in what, I must say, is a very forceful opinion. That constitutional opinion is now the law in the State of Illinois, and it's persuasive authority in other jurisdictions as well.

And I submit, it is the constitutional issue that is now presented here. It must be remembered that

the State is the proponent of the hearsay evidence in this case, and the burden is on the proponent of that evidence to establish the proper predicate for its introduction.

QUESTION: What exactly did you want the State to do that it did not do? It had the child in the courtroom. The defense could have called the child for cross-examination.

The State apparently made some sort of an attempt to get the child on the stand, and the briefs simply refer to the child as failing to take the stand, and I am not sure why. I can guess, but I don't know why.

What should the State have done that it did not do?

MR. PETERSON: Your Honor, the predicate for establishing the admissibility of hearsay evidence under these circumstances is prior to introducing the evidence, the State must either establish that the child is unavailable or elicit that child's testimony from the stand.

What we suggest the State should have done is to prior to introducing this evidence, requested a hearing and presented evidence on the issue of unavailability so the trial court could make a finding, at which point the record would clearly show one way or the other if the child was available to testify or not.

QUESTION: If that statement, that the child failed to take the stand had been supplemented in effect by a court finding that the child could not testify for whatever reason, as a matter of capacity, emotional condition and whatnot, that then would have satisfied the unavailability requirement.

MR. PETERSON: Certainly, by a trial court finding, that's correct.

QUESTION: Now what if the child had been available and the only thing the State wanted was to use the hearsay statements. Was the State supposed to call the child to the stand, say we have no questions, you may cross-examine?

MR. PETERSON: The Confrontation Clause requires that the defendant be confronted with the witnesses against him. I suggest that that indicates that the evidence against the defendant must come from the witness stand, under oath, and be subject to cross-examination. I suggest --

QUESTION: You don't mean that they can't introduce hearsay at all?

MR. PETERSON: No, I don't. If the child testifies, certainly the hearsay is properly admissible, or if she is unavailable, the hearsay is admissible.

QUESTION: What then would be satisfactory to

you? Would the State have had to call the child and simply attempt to get the child to repeat the hearsay statements or in effect, to testify from the stand what the child had said to the third parties?

MR. PETERSON: Exactly, Your Honor.

QUESTION: And the State has no option? It has got to do that?

MR. PETERSON: The Confrontation Clause requires that the prosecution produce the witnesses against the defendant, and I suggest that means that they produce the testimony of those witnesses.

QUESTION: Mr. Peterson, you are assuming that even though there is a well-recognized exception to the hearsay rule and the law of evidence, nonetheless, the Confrontation Clause requires that the witness speak from the stand. Certainly in Inadi, we would held that was not true of declarations of coconspirators.

MR. PETERSON: That's correct, Your Honor.

QUESTION: So that is one place where the Government would not have to show that they are unavailable.

MR. PETERSON: That's correct, and --

QUESTION: And aren't these well-recognized exceptions to the hearsay rule too, the spontaneous declarations principle and the testimony or declarations

made while submitting yourself for a medical exam?

MR. PETERSON: They are well-recognized exceptions. I would submit in this case that the appellate court applied a broad interpretation of those exceptions.

QUESTION: So what is your authority from this court for saying that any time the State or Government wants to offer hearsay, they have to show either that the witness is unavailable or bring the witness to the stand?

MR. PETERSON: The Confrontation Clause, sir --

QUESTION: But I mean, what case is interpreting it?

MR. PETERSON: I would suggest Maryland v. Craig, where this Court balanced the competing interests that are at issue in this case. Craig, of course, concerned a closed-circuit television procedure wherein the child was permitted to testify outside the presence of the defendant.

QUESTION: Well, Craig involved a residual hearsay exception. That was the basis on which the State offered the testimony.

MR. PETERSON: I believe that was Idaho v. Wright. Craig --

QUESTION: Oh, we have -- Craig was the television set?

MR. PETERSON: Yes, Your Honor.

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QUESTION: Right.

MR. PETERSON: And in Craig, even though the child was under oath and subject to cross-examination, this Court nevertheless held that the procedure infringed upon the defendant's confrontation right because he was denied the opportunity to personally face his accuser, and this Court held that this exception to the confrontation right could be justified only upon a case-specific finding of necessity.

QUESTION: I am still not sure how you answer the Chief Justice's question, and how you would distinguish Inadi because here -- this case, it seems to me is closer to Inadi because we have a well-recognized, firmly-rooted hearsay exception, and Inadi makes it quite clear that unavailability is not a requisite.

So are you saying that we should cut back on Inadi somehow?

MR. PETERSON: No. In Inadi, this Court balanced the competing interests, but the competing interests in that case were much different. Inadi dealt with the testimony of a coconspirator. Of course, a coconspirator is often antagonistic to the prosecution. Because he is often facing indictment himself, he is likely to lie under oath in an attempt to save his own skin.

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Under those circumstances, the necessity of the case indicates that the coconspirator's testimony would not aid the truth-seeking process, and perhaps more importantly, the prosecution cannot realistically be required to vouch for the credibility of the coconspirator. On the other hand --

QUESTION: Mr. Peterson, don't you have similar reasons at stake here? Isn't it more likely that the excited utterance made at the time of the traumatic event is more likely to be true than the subsequent testimony in court, months or perhaps years later, and the same with statements made to obtain medical treatment, speaking generally --

MR. PETERSON: Generally --

QUESTION: I think the justification for both of those hearsay exceptions would be that those statements are more likely to be true than anything that would be produced in the courtroom.

MR. PETERSON: Certainly the hearsay rule recognizes that these exceptions, hearsay is more reliable than hearsay generally. However, the Confrontation Clause does not guarantee the defendant reliable evidence or even the best evidence. It guarantees him the right to be confronted with the witnesses against him, and no matter how reliable the evidence is, there is no justification

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for denying the defendant his right to present a defense.

QUESTION: Well, the defendant here had every opportunity to call this child.

MR. PETERSON: He could call the child under the Compulsory Process Clause, but there are two separate rights. There is compulsory process for calling witnesses in your favor, and then there is the confrontation right which requires that the defendant be confronted with the witnesses against him.

QUESTION: I suppose if you were correct, then it wouldn't even be possible to offer business records in any criminal case. That would never come in.

MR. PETERSON: Well, business records, I don't think you can characterize that as a witness against. In this case, the child witness, upon whose accusations the State is relying to obtain the defendant's conviction is certainly a witness against the accused. We are dealing with accusatory testimony.

In dealing with business records and some other exceptions, we are not dealing with accusatory testimony, and it's questionable whether the Confrontation Clause is even applicable in those situations.

QUESTION: Mr. Peterson, you are seeking to rely on the constitutional provision, but the constitutional provision doesn't say that you have a right to be

confronted with the witnesses against you except where the information is reliable.

MR. PETERSON: That's right, Your Honor.

QUESTION: If it means what you say, I don't know how we get the right to balance the interests that you are talking about and say, well, some hearsay exceptions are okay because although we don't give them the right to confront the witnesses against them, that is okay because we think the information is reliable.

Where do we get that kind of a right from?

MR. PETERSON: Personally, I tend to agree with you, Your Honor. However, the decisions of this Court such as Maryland v. Craig indicate that the hearsay rule is not absolute and --

QUESTION: Well, but they go back a long way, and it has always been the tradition in our courts that there are hearsay, that there are exceptions to the hearsay rule and those exceptions, many of them were in existence when this provision was adopted.

There is no reason to believe it was intended to overrule them. Maybe the solution lies in the word witnesses. What constitutes a witness?

MR. PETERSON: Well, certainly a witness against the accused must include the person whom whose out-of-court statements the prosecution is relying to

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obtain the defendant's conviction.

QUESTION: Why? Why couldn't witness against you mean the person who testifies before the jury, and there is a lot of other evidence against you, but the only witnesses against you are the people who appear in court, and you have the right to confront them and to cross-examine them.

MR. PETERSON: The Confrontation Clause was intended to prohibit trials by affidavit, and this Court has held that the Confrontation Clause was intended to prohibit trials by anonymous accusers and absentee witnesses.

QUESTION: Let's add that. Any witness who appears in person or any witness who provides an affidavit for the specific use of the court at this trial. This still wouldn't fall within that.

MR. PETERSON: Well, in essence, an exception to the hearsay rule is similar to testimony that comes under oath because they are both considered reliable. But in this case, we say affidavits can't be relied upon, but yet here we have unsworn verbal hearsay that is being relied upon to obtain the defendant's conviction.

That is no more reliable than an affidavit.

QUESTION: It depends on whether it is a witness against you or not. It doesn't say all evidence against

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him, it says the witnesses against him, and you are saying that anything that somebody says outside of court which is used against you at a trial renders that person a witness against you. That doesn't seem to me self-evident at all.

MR. PETERSON: Well, again, Your Honor, I would note that as we have recognized, the hearsay rule was intended to prevent trials by anonymous accusers and what we have in this case --

QUESTION: We wouldn't throw away the hearsay rule. We would still have the hearsay rule in Federal courts and the State courts would still have the hearsay rule in their trials. We are not talking about the hearsay rule. We are talking about the Confrontation Clause. What is the minimum guarantee of the Confrontation Clause?

And I suggest it may extend to nothing except witnesses in the formal sense, somebody who appears at trial or someone who makes a deposition or signs an affidavit in preparation for the trial. That would make the Confrontation Clause make sense, and the States could continue to apply the hearsay rule. We wouldn't stop that, of course.

MR. PETERSON: Let me suggest a possibility. If that were the interpretation adopted by this Court, a State could pass a statute that said, all hearsay is

admissible in a criminal prosecution, including rumor, innuendo, double, triple, quadruple hearsay.

A conviction obtained under such a statute would be exempt from Confrontation Clause scrutiny unless the person who made the rumor was considered a witness against the accused. And of course, rumors are usually not made in contemplation of litigation.

QUESTION: We do have a due process clause too, don't we?

MR. PETERSON: Rather vague.

QUESTION: Well, no vaguer than what you have turned the Confrontation Clause into.

MR. PETERSON: The Confrontation Clause does say that the defendant shall be given the right to be confronted with the witnesses against him. The State is relying upon the child's out-of-court accusations to obtain the defendant's conviction. This is the primary evidence against the accused and is it the evidence upon which the conviction is based.

QUESTION: Mr. Peterson, can I ask you a question? Justice O'Connor suggested that you could have called the child to the stand yourself. Could you have done that during the prosecution's case or could you have only done that during the defense case as a witness on your own --

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MR. PETERSON: The defendant could only have done that during his case in chief, and --

QUESTION: The defendant could only do it during the defense case.

MR. PETERSON: That's right.

QUESTION: I see. So that if you wanted to file a motion for acquittal in the close of the prosecution's case, you would not have had an opportunity to cross-examine the child at that point.

MR. PETERSON: That's correct, Your Honor, and of course, the logical extension of such a procedure where the defendant is not permitted to call the witness until his case would be the prosecution could put on the direct testimony of all of its witnesses and prevent the defendant an opportunity of cross-examining any witnesses until his case in chief.

And such a procedure would certainly be unfair, and I suggest violate the Constitution.

For these reasons, I would ask this Court to reverse the judgment of the Illinois appellate court and remand this case for a new trial.

Thank you.

QUESTION: Thank you, Mr. Peterson.

Ms. Anderson, we will hear now from you.

ORAL ARGUMENT OF ARLEEN C. ANDERSON

ON BEHALF OF THE RESPONDENT

MS. ANDERSON: Mr. Chief Justice, and may it please the Court:

The State of Illinois submits this morning that the Court's reasoning in United States v. Inadi applies to this case as well. The petitioner proposes that the rule of necessity laid out by the court in Maryland v. Craig is applicable to this case, and we submit that its reliance on Craig is misplaced.

Craig involved a procedure used by the State which was intended solely to replace in-court testimony, so as to avoid live, face-to-face confrontation with the defendant.

And it makes sense that a rule of necessity would apply in a situation like that, and the Court has in fact held that a rule of necessity does apply to hearsay which is intended solely to replace live, in-court testimony and specifically that is former testimony.

But most admissible hearsay is not simply a substitute for live testimony. It has independent probative value which is derived from the circumstances under which is it made.

For example, let's look first at spontaneous declarations. Because of their immediacy and the stress the declarant is under after experiencing a startling

event, the statements are such that they are irreplaceable as probative evidence. The value of that evidence cannot be duplicated on the stand.

With respect to statements made for purposes of medical treatment or diagnosis, a person speaks differently when consulting a doctor for treatment or diagnostic purposes than when testifying on the stand, and those statements also are irreplaceable as substantive evidence.

QUESTION: Do you think that is as true of a 5-year-old child, Ms. Anderson, as it would be of an adult making a statement to a doctor in the course of getting treatment?

MS. ANDERSON: Mr. Chief Justice, I believe that a child, even at a young age such as 4 or 5, understands that when he or she is going to the doctor they are going to an authority figure and that they are going for a certain reason, that is, to obtain help.

The Court has under the Confrontation Clause put some restrictions on this particular type of hearsay that does have independent probative value, and mainly the Court has focused on the reliability of the statement, and the effect that any cross-examination might have.

QUESTION: The State of Illinois has a hearsay exception for child testimony --

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MS. ANDERSON: Yes, they do --

QUESTION: -- that was not invoked in this case, is that correct?

MS. ANDERSON: That is correct, Your Honor.

QUESTION: Can we draw any inference from that, that the unavailability could not be shown?

MS. ANDERSON: No, I don't think that is the case. I think that the prosecution just decided that they had statements that were squarely within these particular exceptions and didn't feel that it had to resort to the -- it is more or less a residual exception just for children in abuse cases.

QUESTION: And I would take it that it would cover kinds of testimony that would not be covered by spontaneous declaration or medical testimony, i.e. --

MS. ANDERSON: That's true.

QUESTION: -- if the child made the report 2 weeks later when it couldn't be a spontaneous declaration.

MS. ANDERSON: That's true.

QUESTION: Don't you have some -- I know that your opponent hasn't differentiated among the five statements here, but wouldn't you have some difficulty with a police officer's statement under a spontaneous declaration, if he came in and questioned the child? That is hardly spontaneous.

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MS. ANDERSON: Well, it was still made during the period when this child was still under the stress of this event. All of the statements were made within 45 minutes of this event, and I submit that this child, especially at this young age, was still under stress and trauma of the event.

QUESTION: You think responding to questions from a police officer 45 minutes after the event falls squarely within the spontaneous declaration exception?

MS. ANDERSON: I think that there are other indications of reliability. The statements were all consistent.

QUESTION: But do you think for the admissibility of statement A, you can rely on the fact that it is consistent with other statements that are admissible, can they buttress admissibility in that way? Maybe they buttress probative value.

MS. ANDERSON: No, I am --

QUESTION: In other words, could you have had one 3 or 4 weeks later, a whole series of statements that were all consistent but not within any exception other than being consistent -- no exception for consistent statements.

MS. ANDERSON: I agree with you, Your Honor. There are certain cases where the State courts have

expanded the exceptions and in cases such as that, it does probably bring the reliability of the statement into question, and in cases like that, the defendant would probably want -- want to cross-examine the child and he has every right to do so.

QUESTION: Would you agree with your opponent's answer to my question, that the defendant could not have cross-examined the child during the prosecution's case?

MS. ANDERSON: I agree with that, yes.

QUESTION: Ms. Anderson, I would like to get your response to the same question I asked Mr. Peterson. If you acknowledge that the child, when making these declarations to the policeman or to the physician or whoever, is a witness, where do we get the authority to allow that to come in so long as it is reliable, since as I read the Constitution, you are entitled to be confronted with the witnesses against you, unless of course the witnesses are reliable, in which case, you are not entitled to be confronted.

Where do we get the authority?

MS. ANDERSON: It is just based on prior case law, Your Honor. And the State of Illinois assumes for purposes of argument today that there is some sort of a reliability requirement that is derived from the Confrontation Clause.

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A literal reading of the Confrontation Clause, as you are speaking about, would call into question whether or not S.G. was actually a witness for purposes of the Confrontation Clause, and the State of Illinois probably -- if we weren't taking the position of assuming that she was a witness -- would probably agree with you that there is a question there as to whether the Confrontation Clause does actually apply to a hearsay declarant.

QUESTION: It is not just reliability. Assume that someone's deposition is taken right after a crime, that there is even cross-examination where that memory is fresh. I think you could make a very good argument that that is more reliable --

MS. ANDERSON: That is reliable --

QUESTION: -- than the person's testimony 2 years later, but certainly I think it would be inconsistent with our Confrontation Clause analysis and our sense of what it ought to mean to permit that. So it is not just reliability.

MS. ANDERSON: That's true. It is not just reliability. It's actual face-to-face confrontation, and as long as the State is not trying to submit evidence which is intended solely as a replacement for live in-court testimony, say, as the situation was in Maryland

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v. Craig with the closed-circuit television procedure, then we are not going to have a problem with the Confrontation Clause.

QUESTION: Well, but it's always a replacement for the out-of-court declarant.

MS. ANDERSON: It's a replacement, but it is not intended solely as a replacement. When the statement is made, that is not the purpose in mind. The statement is admissible and -- the statement comes in because it is made under circumstances that give it independent probative value that can't be duplicated on the witness stand.

If I could just go on, this Court has specifically held that once reliability is shown with a hearsay statement, either because it comes in under a firmly-rooted exception or particularized guarantees of trustworthiness are found, that statement -- it's sufficiently clear that that statement is trustworthy enough that cross-examination would probably be of marginal utility.

Now if that's the case and these hearsay statements are going to come in, what would be the purpose of a blanket rule requiring the State to produce the declarant each and every time it wants to admit a hearsay statement?

As the Court noted in Inadi, such a rule wouldn't actually work to keep any evidence out. The statement will come in if the declarant is shown to be unavailable or it will also come in if he is available and produced for trial.

The Court also noticed -- noted in Inadi that such a rule wouldn't enhance the rule-seeking process over and above what exists without it. If the prosecution doesn't call a declarant, and for all practical purposes I want to make it clear that the prosecution will by and large call a complaining witness or an eyewitness to help prove its case, but there are going to be certain circumstances where the State may feel that the witness would not be exceptionally effective, or in the case of small children, possibly the prosecutor would want to keep the child from being put in a traumatic situation.

And if that is the case, but the defendant still feels that he needs to call this witness, he can certainly do so under the Compulsory Process Clause. But the State submits that these cases where the State does decide not to call a complaining witness or a victim as in this case, and the defendant does feel that the testimony will be of some value to him, those cases are so small, so small in number that it doesn't justify changing the law as it now stands to require the State to produce the declarant with

these particular types of statements each and every time it decides to enter one of these statements into evidence.

Finally, I would like to make one last point, and that is the effect that such an unavailability rule would have on the courts. The effect on the courts up to this time has been minimal because the necessity rule has only applied to cases involving prior testimony. But if --

QUESTION: Would you argue that the same result would obtain here if the child hadn't been available? I mean, you did make the child available?

MS. ANDERSON: The prosecution did try to put her on the stand, yes.

QUESTION: Well, you would be arguing, and making the same argument, I suppose, if the child hadn't --

MS. ANDERSON: It would be the same argument, yes.

QUESTION: -- hadn't even been in town.

MS. ANDERSON: Basically, yes, it's the same argument, that the Compulsory Process Clause would provide the defendant enough protection if he decided that he did want to call the witness.

QUESTION: So the fact that the child was in the courtroom doesn't help your case very much?

MS. ANDERSON: It certainly helps our case.

QUESTION: It does help. How?

MS. ANDERSON: It shows that the State made a good faith effort to call this witness. It demonstrates that by and large and for all practical purposes, the State will call witnesses of this type.

QUESTION: How is that relevant to the Confrontation Clause issue?

MS. ANDERSON: It is relevant in the sense that the defendant is -- it's implying that the State is trying to get in certain evidence, hearsay statements of this kind just to avoid putting these witnesses on the stand, and that's not the case.

QUESTION: But if I understand the position in your brief, even if the State were doing that, evidence would still be admissible.

MS. ANDERSON: That's true --

QUESTION: Even if the State could have put the person on, but just decided technically it would be better not to, and even arranged for the child to be in Europe or someplace, what would be the result of those facts? Would the hearsay come in or not?

MS. ANDERSON: Under our position, yes, the hearsay would come in.

QUESTION: Right.

MS. ANDERSON: But I want to assure you that for all practical --

QUESTION: Illinois wouldn't do anything like that, no --

(Laughter.)

MS. ANDERSON: No, Illinois wouldn't --

(Laughter.)

QUESTION: We should consider it as though the State had hid the witness.

MS. ANDERSON: Had hid the witness?

QUESTION: Yes.

MS. ANDERSON: No. I don't -- I don't believe that you should consider the case from that perspective.

QUESTION: All right.

QUESTION: Are you sure it would come in if the State had actually taken the -- if the State is hiding the witness, the witness is not unavailable. I mean, as I understand your position, if the witness is either there or unavailable, it should come in, but if the witness is neither there --

MS. ANDERSON: That's true.

QUESTION: Nor unavailable --

MS. ANDERSON: That's true, if we are assuming that an unavailability requirement applies --

QUESTION: If the State is hiding the witness,

the witness is not really unavailable.

MS. ANDERSON: Right.

QUESTION: And I think the witness is not really unavailable if the State has spirited the witness off to some foreign country.

MS. ANDERSON: That's true. That's true, but also that's speaking from the assumption that an unavailability requirement is necessary in order to comply with the Confrontation Clause.

QUESTION: The point is, if there is no unavailability requirement, there is no reason, at least in the Sixth Amendment, to prevent the State from doing precisely that. We just discard availability as any relevant -- for any relevant -- relevant purpose under Sixth Amendment analysis of hearsay exception.

QUESTION: I thought that was your case.

MS. ANDERSON: That's not our position. Our position is that the unavailability requirement is constitutionally mandated if the evidence is intended solely to replace live testimony, and I think that's what the purposes of the Confrontation Clause demand.

QUESTION: If the State were to spirit a witness away, there might be a violation of some other principle of the Sixth Amendment, I suppose the right to call a witness.

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MS. ANDERSON: That's true. That's true.

QUESTION: But that wouldn't be a confrontation issue, would it?

MS. ANDERSON: I don't think so.

The State of Illinois submits that there has been no showing by the defendant of a sufficient justification for a rule such as he proposes, and we therefore ask this Court to affirm the judgment of the Illinois appellate court.

QUESTION: Thank you, Ms. Anderson.

Mr. Nightingale, we will hear from you.

ORAL ARGUMENT OF STEPHEN L. NIGHTINGALE

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE RESPONDENT

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

The Federal Government's submission in essence is that this case is indistinguishable in every meaningful sense from Inadi. Inadi makes clear that the rule of necessity that the Court had outlined in Ohio v. Roberts is reserved for the situation in which the Government attempts to admit hearsay which is essentially a less-desirable substitute for live testimony, and that rationale is just as inapplicable to the statements before the Court today as it was to the coconspirator statements

involved in Inadi.

The decisive feature of the statements involved in Inadi, the Court said, was that they were made in a context very different from trial which gave them special evidentiary significance, and the same can fairly be said of the two hearsay exceptions before the Court today.

State and Federal rules of evidence firstly provide for the admission of excited utterances. After many years of experience with those sorts of statements, a consensus has emerged that statements made while a person remains under the emotional influence of a startling event have special reliability.

Those statements are made at a point when the person's memory is as clear as it will ever be, and before there has been an opportunity for conscious revision or external influence.

QUESTION: Well, Mr. Nightingale, what about the statement that was made 45 minutes later to the policeman. Suppose it had been 3 days later or whatever scenario you might imagine. At some point, I guess, one could say that perhaps excited utterance exceptions shouldn't cover it, but that is a matter of State law.

How do you deal with that in the context of the Confrontation Clause challenge?

MR. NIGHTINGALE: At some point, certainly, a

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State court finding that a statement was an excited utterance would take it so far beyond the accepted core definition of that hearsay exception that it could no longer be regarded as firmly-rooted.

The Court has dealt with similar situations, for instance, in Dutton v. Evans where a State was admitting coconspirator statements that were not in furtherance of the conspiracy, but rather during the so-called concealment phase of the conspiracy.

There was also, actually the name of the case escapes me right now, but the point is that if a State application of a hearsay exception takes it outside the accepted firmly-rooted definition, then the Court could appropriately consider the particular application.

QUESTION: And I suppose there is some question here about statements of a very young child to a doctor. It is not clear that a child would see the same need for honest statements to obtain treatment that an older person might experience.

MR. NIGHTINGALE: I wouldn't think so, Your Honor. Every parent who has told a child that the doctor has instructed the child to eat his or her vegetables knows that a doctor has a particular standing in a child's life. It is an authority figure, a benign figure who is viewed as someone --

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QUESTION: Do you think that is true of a child of, let's say, 2 years of age?

MR. NIGHTINGALE: Again, there comes a time when -- when the child is incapable of perhaps making a reliable statement, but certainly that is not the case here. And I think that a child of very young years -- children, many children are taken to the doctor beginning at a point when they are days old and continuously, and I think by 2 years old, most children recognize the role that the doctor plays in their lives.

I would like to return briefly to the police officer statements, statements to the police officer here. I don't think that there is any indication that that, the admission of those statements was in any way outside the mainstream of excited utterances.

QUESTION: As I see it, as the case comes here, we judge it on the basis that all these statements were within some recognized hearsay exception because that -- that is, the case isn't challenged.

MR. NIGHTINGALE: I agree with Your Honor, and not only that, within the core of the accepted hearsay exceptions there was evidence here that the child had been awoke, had been awoken at 4:00 a.m. in the morning, that she had been restrained in a way that caused injuries to her face, that she had been crying very hard, and

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accepting as well her account of what happened to her, I think it was well within the trial court's discretion to conclude that the state of excitement, which is essentially the guarantee of reliability, persisted for 45 minutes.

QUESTION: While I have got you interrupted, would you think the prosecution would have to have -- make the child available in the courtroom?

MR. NIGHTINGALE: I don't believe it's required. In Inadi, the holding was that it is not necessary as a precondition.

QUESTION: What if the defense says, well, we notice that the child isn't in the courtroom. We would like to ask the prosecution, is the child available? And the prosecution says, I don't know.

MR. NIGHTINGALE: The defendant has the right to secure a subpoena and the State then has an obligation to use reasonable efforts to secure the child's production at that point. So that that is the mechanism through which the child is brought to the courtroom if the defendant desires.

QUESTION: Let me ask you a question, Mr. Nightingale, in this case we have got two exceptions. One is the well-recognized spontaneous one and the other is the physician exception which as I understand it, in

Illinois it was pursuant to a 1988 statute.

What leeway does the State have in creating new exceptions to the hearsay rule?

MR. NIGHTINGALE: Your Honor, the State had, before the statute was passed, a case law --

QUESTION: Assume they didn't --

MR. NIGHTINGALE: So that this was not in any sense a novel application even in Illinois --

QUESTION: Well -- the doctor, which is a little bit novel --

MR. NIGHTINGALE: But again, the hearsay rule has undergone a relatively constant period of evolution.

QUESTION: That's right.

MR. NIGHTINGALE: And over time certain exceptions which are widely recognized, many times codified --

QUESTION: The real question, to get to the heart of it, do you think it has to be historically recognized, or is it sufficient if you come up with a new exception that seems to be totally reliable and sensible? What would your views be?

MR. NIGHTINGALE: I think when the new exceptions achieve some general degree of acceptance, I wouldn't put any great weight on any particular set of hearsay exceptions that existed at an arbitrary point in

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the past.

I think that recent developments in which rulemakers have made efforts to codify the best of what experience has brought forward are the best indications of --

QUESTION: So there is an evolving definition of what is admissible.

QUESTION: I thought it was the Government's position that this material is not really covered by the Confrontation Clause anyway. Are you abandoning that?

MR. NIGHTINGALE: No. It's our position that the case can be decided within the framework of Inadi and in addition, we think that this case presents the Court with an opportunity, if it's inclined to do so, to consider whether every out-of-court hearsay declarant is in fact a witness.

It is our position that the language of the clause and the historical context from which it emerges supports the view that it was designed essentially to prevent the occurrence of an abuse that had characterized some notorious English trials.

QUESTION: So this is really an independent argument from the line of reasoning you were pursuing with Justice Stevens?

MR. NIGHTINGALE: That's true. There are two

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grounds available. Perhaps the narrower ground is simply to apply Inadi to these facts. These hearsay exceptions admit evidence having the same sort of independent evidentiary significance as in Inadi.

QUESTION: If we adopted your suggested formulation in this second respect, this broader formulation, I take it we would render irrelevant much of the analysis in Inadi and Green?

MR. NIGHTINGALE: Green, no, because I think Green involved out-of-court statements that were prior testimony and statements to authorities in a legal context. But certainly in Inadi, yes, under our view, the threshold question would be, were the statements made the absent coconspirator made by a witness?

Under our analysis, the answer would be no, and it would be unnecessary, therefore, to consider other issues.

QUESTION: Suppose the prosecution offers, and it has admitted an out-of-court statement that no one would claim was within the recognized hearsay exception. Well, that person who made the statement is no more a witness for Confrontation Clause purposes as some other one.

So the limit on that sort of evidentiary error is the due process clause?

MR. NIGHTINGALE: That and the fact that the

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rules of evidence are a two-way street --

QUESTION: I know, but this is a State court and the State court has got a rule of evidence, for example, they just admitted it, and they, for some reason, the State supreme court affirmed the conviction.

If we were going to reverse it, it would have to be on the due process issue, I suppose.

MR. NIGHTINGALE: That would be so. Thank you very much.

QUESTION: Thank you, Mr. Nightingale.

Mr. Peterson, do you have rebuttal? You have 12 minutes remaining.

REBUTTAL ARGUMENT OF GARY R. PETERSON

ON BEHALF OF THE PETITIONER

MR. PETERSON: Thank you, Your Honor.

I would like to respond again to the suggestion that the child was not a witness against the accused. Under the Solicitor General's approach, someone is a witness against the accused if they give testimony or they give statements in contemplation of litigation.

And I would suggest, even under that approach, the child in this case was a witness against the accused. A police officer interviewed the child 45 minutes after the alleged incident. At that time the police officer was aware than an allegation of a crime had been made.

The child at this point was no longer excited, and the police officer testified that she was calm. He asked the child leading questions and she responded. I would suggest that these statements fit the definition of being made in contemplation of litigation.

In addition, last year in Idaho v. Wright, this Court applied Confrontation Clause analysis to almost the exact situation we have here, statements by a child to an examining physician.

In this case --

QUESTION: Excuse me, you think the child was contemplating litigation?

MR. PETERSON: No.

QUESTION: I mean, when you say, when the Government says in contemplation of litigation, I think it means to say that the declarant is contemplating litigation, and so it is at a deposition, the declarant knows the deposition is going to be used in later litigation or something of that sort.

There is no question here that the declarant was not contemplating litigation, is there?

MR. PETERSON: I would agree with that, and under that approach, I would suppose that a child would never be considered a witness against the accused, as children -- most of their statements, I would suggest, may

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never contemplate that they will be made in contemplation of litigation.

And I would also note, and in this case the doctor who interviewed the child testified that he took notes in contemplation of litigation, that is at volume 6, page 63 of the record.

There has also been much discussion about the inherent reliability of the statements admitted in this case. As I mentioned before, the statements to the police officer which were admitted under the spontaneous utterance exception, the basis for that is the child is excited. As I mentioned before, the child was no longer excited at this point. The police officer said she was calm and certainly the statements were not spontaneous. They were made after she had talked to two others, and in response to leading questions.

Also, the statements to the nurse and the doctor. Under similar circumstances in Idaho v. Wright, this Court held that statements such as these were unreliable. The basis for that exception relates to the details relating to medical treatment.

However, in this case the appellate court made a broad interpretation that allowed the details of the alleged offense, and under these circumstances, I would suggest that the statements in this case do not fit the

historical hearsay rationale.

If there are no other questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Peterson.

The case is submitted.

(Whereupon, at 10:55 a.m., the case in the above-entitled matter was submitted.)

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BY alan friedman

(REPORTER)