Supreme Court of the United States

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In the Matter of:

Docket No. 21
10

A. L. Dutton, Warden, Georgia State Prison, Reidsville, Georgia,

Appellant;

vs.

ALEX S. EVANS,

Appellee.

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Place Washington, D. C.

Date October 15, 1969

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia, Appellant;	:	
vs.	:	No. 10
ALEX S. EVANS, Appellee.	:	

Washington, D. C.
October 15, 1969

The above-entitled matter came on for argument at 10:07 a.m.

BEFORE:

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

APPEARANCES:

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- - -

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: No. 21, Dutton against Evans.

Good morning gentlemen. You may proceed whenever you are ready, Mr. Evans.

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

ON BEHALF OF APPELLANT

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

This case presents the question of whether the hearsay rule is to be read into and equated with the confrontation clause of the Sixth Amendment.

The factual setting in which the question arose was petitioner Evans trial for murder in connection with the slaying of three police officers in Gwinnett County, Georgia. The principal witness for the State was Wade Truett, an accomplice who turned State's evidence.

Truett testified as an eye witness to all material details of the triple slaying. Truett's testimony is not here in question, and I will not go into it in great detail. However, I do think it may be appropriate to touch upon the highlights of his testimony.

After relating the essential elements of a car theft conspiracy, Truett testified how, along with the petitioner Evans and one Venson Eugene Williams, they stole a car in

Atlanta, Georgia. The stolen car was driven to a rural location in nearby Gwinnett County, where they decided they would change the license plates and the ignition switch.

While in the process of changing the plates and the switch, they were apprehended by the soon to die police officers. Unfortunately, the youngest officer, while bending over the front seat of the car examining the ignition switch, put himself in such a position as to enable Evans to remove his revolver.

Evans ordered all three officers to raise their hands. They were then disarmed and manacled with their own handcuffs. At this point, Truett took the police car and drove it off into the woods for concealment. As he was returning to the spot where Evans and Williams were with the three police officers, he heard what sounded to him to be -- he described it as "a nickel pack of firecrackers going off."

Upon his arrival, he saw the police officers on the ground, still handcuffed together. One police officer was making a peculiar sound. He then saw Williams bend over and fire two or three more times into the police officer, while Evans held the flashlight.

Truett's testimony was corroborated by physical evidence as well as the evidence of other witnesses. It was the testimony of one of the corroborating witnesses which gives rise to the questions which are presented to the Court today. The witness in question is Lynwood Shaw. Shaw was a fellow

inmate of Venson Eugene Williams in the Federal Penitentiary at the time Williams was arraigned for the murder. On the day following his arraignment, Shaw asked Williams how he made out. The rather spontaneous exclamation in reply was, "If it hadn't been for that dirty s.o.b. Alex Evans, we wouldn't be in this now."

The testimony was admitted over objection. The trial court based its ruling on the fact that the State, in the opinion of the trial court, had made a prima facie case of an auto theft conspiracy, and the statement was, therefore, admissible under the exception to the hearsay rule for co-conspirators, an exception which is provided by statute in Georgia.

Q Evans was tried separately?

A Yes, sir. In Georgia, when you have a situation like this, it is a matter of right that the accused can have separate trials.

Q That is, it is the right of the accused.

A Yes, sir.

Q So Evans was tried separately.

A They were tried separately.

Q And Williams was tried separately?

A Yes, sir.

Q And Truett was not tried at all?

A Truett was not tried.

Q He turned State's evidence.

A He turned State's evidence and there was a grant of immunity. There was a full disclosure of that fact to the jury.

Q Would you mind stating again what the exception to the hearsay rule was that was invoked?

A The exception was that the State had shown a prima facie conspiracy to steal automobiles. The rule in Georgia, as I think in virtually all other States and in the Federal system, is that the statement of a co-conspirator is admissible as an exception to the hearsay rule. It was admitted on this basis, but it was an exception to the hearsay rule.

Q The statute to which you refer appears at the bottom of page 3 of your brief, I think.

A Yes, sir. There is one printing error in that. It should read "upon the showing of the fact." I think in the printing of it it came out "facts". It should be singular, of course.

Q "After the fact of conspiracy shall be proved."

A Yes, sir.

Q How about the prevalence of that rule that this conspiracy exception continues after the crime has been committed.

A Yes, sir. This is a distinction between what I believe is a majority rule in the States and the rule in the Federal courts.

This Court, in cases such as Krulewitch, decided that the pendency of a conspiracy is at an end upon the last overt act. In Krulewitch, this Court expressly noted that the view was to the contrary in many States, including Georgia. The Court noted that Georgia's rule was different. There was no criticism of the Georgia rule, and the Court clearly, as I see it, that it was ruling on a rule of evidence to be applied in the Federal courts and not a constitutional standard.

Do you know what the new Code of Evidence promulgated by the Judicial Conference Committee says about this?

A No, sir; I am not sure what the new code of the Federal Committee has to say. I know the trend in most of the model codes has been to either terminate, abrogate or greatly restrict the present hearsay rule. The trend has been against the exclusion of hearsay. That has been the trend in most model codes.

In any event, this evidence was admitted. Petitioner Evans was convicted. He raised the issue, among others, in his appeal to the Supreme Court of Georgia, his conviction was affirmed by the Supreme Court of Georgia, and this Court denied certiorari.

Having exhausted his direct appeals, Petitioner Evans turned to the United States District Court, where he petitioned for a writ of habeas corpus. The District Court denied the writ, citing Wigmore to the effect that the evidentiary rule and

the constitutional standard are not the same, and that the confrontation clause does not prescribe what kinds of testimonial statements may be given by a witness who is on the stand and is available for cross-examination.

Upon appeal, however, the Court of Appeals took an entirely different view of the matter. Unlike Wigmore, unlike the District Court, and I think unlike the prior decisions of this Court, the Court of Appeals viewed the constitutional standard as one which incorporates the exclusionary rule of evidence when it is hearsay.

Nor did the Court of Appeals stop where the generally recognized exceptions to the rule begin. To the contrary, it said that in the future, all State --

Q What did Bruton hold?

A There is a very interesting footnote in Bruton.

Q Yes, but Bruton applied the confrontation clause to statements of a co-defendant, didn't it?

A Yes, sir; it was the statement of a co-defendant and it was a confession, if you will, of a co-defendant in a joint trial, which we think is a situation quite different from this, and Bruton expressly pointed out in a footnote to that decision -- I think a very important footnote -- where it stated that the evidence there in question was not admissible under any recognized exception to the hearsay rule, and in Bruton the Court went on to say that it did not mean to imply in any manner

whatsoever that exceptions to the hearsay rule necessarily raise problems under the confrontation clause, and in so doing it cited Wigmore, the particular section on which we rely in Wigmore, and it also cited the prior decision of this Court in Mattox, on which we also rely.

Q Bruton at least said that in some situations the confrontation clause is not satisfied simply by confronting a witness on the stand.

A Yes, sir. I think there probably is some overlap. This Court -- it is a difficult task, but I think the task of this Court is to delineate the scope of the confrontation clause. Of course, this was all somewhat an academic matter prior to Pointer when the Sixth Amendment was applied to the States. Until that time, it really didn't matter too much to the Federal criminal defendant whether his reversal was based upon a procedural rule, hearsay, or the confrontation clause.

In any event, the Court of Appeals stated that henceforth all State exceptions would have to be continually scrutinized and re-evaluated and that the State exceptions would be permitted only where supported by salient and cogent reasons.

Being of the opinion that the reasons in the case at bar were not sufficiently salient or cogent, the Court of Appeals reversed, saying that the Georgia statutory exception, as construed by the Supreme Court of Georgia, and as applied under the facts and circumstances of the case at bar, violated Evans'

confrontation rights.

In our brief, we set forth four reasons why we think the Court of Appeals was wrong and ought to be reversed. First and foremost, we think the Court of Appeals erred when it elevated that ancient and much maligned exclusionary rule known as the hearsay rule to the level of a constitutional mandate.

The view stated by Wigmore, which we think to be the correct view under prior decisions of this Court, is that the Constitution does not deal with the questions of what kinds of testimonial statements must be given infra-judicially, this being dependent upon the law of evidence for the time being, but only upon what procedure shall be followed, which is, of course, a cross-examining procedure, as to that testimony which is required by the ordinary rules of evidence to be given infra-judicially.

This appears to be the view which this Court followed in Mattox versus United States, where it pointed out that the confrontation clause was designed primarily to exclude ex parte affidavits and depositions, but not to go to the competency of testimony of the witness who does appear in court and is available for cross-examination.

I have already pointed out that in Bruton, the Court pointed out that the evidence there in question was not recognized by any exception to the rule and that the Court intimated no view whatever that hearsay exceptions raise questions under

the confrontation clause, and it cited the particular provision of Wigmore to which I refer, and also to the Mattox decision which we cite in our brief.

We urge the Court not to read the hearsay rule, with or without exceptions, into the confrontation clause. We think it is a rule singularly undeserving of the honor. It is unknown, as far as I am aware, in any system of jurisprudence other than the Anglo-Saxon system. To the best of my knowledge, it has been roundly criticized by every scholar of our system.

Q Do you think if these two men had been tried together, Williams and Evans, that Williams' statement would have been admissible at the trial if he hadn't testified under an exception to the hearsay rule?

A Yes, sir.

Q Bruton just wouldn't cover that sort of situation.

A No, sir. I think Bruton applies -- in the first place, Wigmore and the other authorities usually distinguish between a confession which is an admission as to every material element of the crime, and other admissions.

Particularly, of course, you have the situation in Bruton where the confession was to police authorities. I think it was a postal authority in Bruton, as I recall it.

We think that the situation respecting a confession, particularly a confession to public authorities, is quite

different from an admission -- actually I don't know how much of an admission this statement was. To me it is a rather cryptic statement, but presumably admission against penal admission at best. We think the situation is quite different.

Q Is this an argument, Mr. Evans, that if Williams had taken the stand, if they had been tried jointly and Williams had taken the stand and had testified, as he did here, put these words in Evans' mouth, that Bruton would not have applied?

A No, sir; I don't think that Bruton would have applied because as I read Bruton it applies to confessions, and particularly confessions to police officers.

Q All right, let's put it this way, then: Williams did not take the stand, but they introduced a confession of Williams against Williams which contained this statement of Williams about Evans. Would Bruton there have applied?

A I think it would possibly apply if the confession had been made to police officers. I think the distinction is this, Mr. Justice Brennan: A confession made to police officers obviously cannot be consistent with the conspiracy. It is in negation of the conspiracy. It ends the conspiracy.

I don't think this is necessarily the same as a confession to a fellow inmate in a prison who one might assume would not, as it were, "spill the beans." I think there is a distinction between the two situations, plus the fact that here this statement by no stretch of the imagination could be

considered a full confession.

Q So if Williams had told Shaw, "Yes, we did it; I was party to it," and then had said what he did about Evans, of course, this was not said to a police officer, but Shaw, then Burton would not apply.

A Of course, this issue has never been decided. I personally would urge that rule. Yes, sir; because I would urge that comes in the co-conspirator conception. If it is made to a prisoner during the concealment period, when the conspiracy is still in effect, I would urge that as a distinction.

Q Bruton didn't address itself to this situation.

A No, sir.

Q You say it didn't. If there had been a conspiracy shown in Bruton, then that would be a different matter.

A If the confession were made, I would say, during the pendency of the conspiracy, and if it were made to a person other than a public authority, such as -- I think you would have to get into the facts of the particular situation, but I think it would be possible that it would be admissible under Bruton.

Q What is the basis of the distinction, Mr. Evans, whether the confession is made to a public officer or someone else? What is the basis for that?

A The basis for the distinction would be that in a conspiracy situation, it is consistent with continuation of the conspiracy to have a statement made to another individual. It

is consistent with the continuance of the conspiracy. However, if there is a confession to a police officer, I think that is obviously inconsistent with the continuance of the conspiracy.

Q Is there not also another factor, that a police officer in that circumstance has or is thought to have sometimes, by some, a special interest in helping to convict the man; whereas a co-conspirator would not be in that category.

A Ordinarily, you would think it would be the other way.

Q What do you think the basis for the co-conspirator exception to the hearsay rule is?

A The traditional rule has been along an agency theory; that when people are acting together to accomplish an illegal purpose, the acts and statements of one party are admissible in evidence against all other parties because they are working together as agents. Of course, the law has always taken the view that there is something inherently more evil about a combination to commit crime than the perpetration by a single individual.

Q All that means is that you can ascribe the co-conspirator's statement to the defendant himself.

A Yes, that is the rule of evidence.

Q And you don't think there is anything in the fact that there is some substitute for cross-examination in this exception, namely, that there is some indicia of reliability

so that you don't need cross-examination?

A Yes, sir.

Q Such as an admission against interest?

A I think in this particular statement, to go into the question of trustworthiness, which of course is one of the usual justifications for an exception to the hearsay rule, I think that this statement is probably trustworthy for several reasons.

In the first place, it is not a long narrative in which the danger of error in the retelling would be very great. It is a specific response to a very specific question.

If the witness had testified as to a physical impression, such as anger, flushed face, I think no one would question that that would be admissible. Is there any good reason for discriminating against auditory perceptions in favor of a visual perception when the statement is so brief, so short? I think not.

Secondly, it is a statement which is against the penal interest of the declarant. This is a statement which ordinarily would not be made, I think, unless true.

Finally, when you compare it to the other recognized exceptions --

Q So this is another exception entirely, isn't it, in addition to the co-conspirator exception?

A Yes, sir; but I am saying that this particular

statement in the case at hand is trustworthy, for what it is worth.

Q You think Williams' testimony would have been admissible -- say the rule in Georgia were the rule in the Federal Court, as far as the co-conspirator is concerned. Would this statement by Williams to Shaw have been admissible anyway on the basis that it was a declaration against penal interest?

A I really cannot answer that. That was not the grounds urged by counsel and, therefore, I cannot answer.

Q Your argument goes in that direction.

A My argument goes in that direction for purposes of demonstrating, I hope, to the Court that the statement was trustworthy; only for a demonstration.

I might point out that this Court has consistently recognized exceptions such as dying declaration. I think a statement like this is at least as trustworthy as a dying declaration.

Q But Mr. Evans, doesn't this really border on an argument that any hearsay statement of which it can be said their indicia of trustworthiness is admissible without regard to whether it is within any of the exceptions?

A Well, sir, if there is an error in hearsay, I agree. I do not think it necessarily reaches a problem of constitutional dimensions, if there is an error in the admission of hearsay.

Of course, it is always true in hearsay that hearsay, per se, relates to an out-of-court declaration, so to that extent, any time there is any hearsay --

Q Well, the trend you mentioned earlier to admit hearsay, I gather, rests at least in part, doesn't it, on questions of the trustworthiness, the reliability of it?

A Trustworthiness and also the general feeling that, after all, the purpose of evidence is to shed light and many judges have written that they feel that the suppression of hearsay, more often than not, keeps light off the matter under investigation and causes more damage than good.

In any event, the test has been roundly criticized by all legal scholars and we feel it would be a pity if the reformers have to fight a constitutional standard as well as what we think are far too many years of inertia.

While we think the primary legal error of the Court of Appeals was its equating of the evidentiary rule and constitutional standard, we feel that the far greater mischief potential in its decision it set forth for review by Federal judges of the application of State exceptions.

According to the Court of Appeals, no matter how settled a State exception might be, its application by a State judge in a State criminal proceeding is subject to reversal by a reviewing Federal judge if the Federal judge is of the opinion that the reasons in the particular case for the adherence to

State law were not sufficiently salient or cogent.

In reality, this is just a pure second-guessing test. The entirely subjective nature of this test, we think, can contribute only further to the lamentable trend for State criminal proceedings to be conducted as ping-pong matches between State and Federal tribunals.

We hope, first and foremost, that this Court will decline to elevate the hearsay rule to a constitutional standard, but should the Court disagree, we hope at the very minimum that the Court will provide some intelligible, objective standards so the trial judges, State trial judges, may have some idea how to conduct criminal trials when the question of hearsay arises.

We think this much is necessary to the orderly disposition of State criminal trials.

I have already dealt very briefly with the distinction between --

Q How would you think the situation that was involved in Pointer against Texas would fit into what you are suggesting here should be the case?

A Of course, the decision in Pointer versus Texas is perfectly consistent with the Wigmore rule. The Wigmore rule is that confrontation relates to the procedure by which evidence is placed before a jury. Pointer involved a transcript. This Court has always said that the fundamental purpose of the

confrontation standard is to prevent trials upon depositions and ex parte affidavits.

I recognize that even to this rule, the confrontation rule, there are exceptions. That is the purpose of the rule.

Q To insure that there will be a live witness, who can be confronted and cross-examined.

A Yes, sir; but not going to the question of the competency of his testimony. That is what I call the Wigmore rule, which I think is the traditional rule which this Court has followed in past decisions.

In Stein versus New York, it said it would not read the hearsay rule into the Fourteenth Amendment.

There is, of course, if we are wrong, if this Court decides that the hearsay rule and the confrontation clause are to be equated, we then reach, I think, the exceedingly difficult problem of how to treat long-standing State exceptions to the rule. Particularly this problem is acute where the State and the Federal rule vary. This is the situation with respect to the co-conspirator exception to the hearsay clause.

I have already mentioned that in Krulewitch this Court took the view that the conspiracy ends upon completion of the last overt act of the conspiracy.

Q Perhaps I am mistaken, but my impression is that the rule doesn't come into play at all in the Federal system unless the charge is a conspiracy charge, and here there was no

charge of conspiracy.

A No, sir. Until one year ago, there was no general crime of conspiracy in Georgia.

Q Right.

A It is an evidentiary rule; no question about that.

Finally, I would say that even if there has been constitutional error, we think in this case it is beyond all reasonable doubt harmless error. This man was convicted upon the testimony of Wade Truett, an eye witness. The record shows ample corroboration, both by physical evidence and the testimony of other witnesses.

We think that even under Chapman, the ruling of Chapman, the error here, if error existed, was harmless error beyond all reasonable doubt.

I would like to save what remaining time I have for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Thompson?

xxxx

ARGUMENT OF ROBERT B. THOMPSON, ESQ.

ON BEHALF OF APPELLEE

MR. THOMPSON: If it please the Court, I would like to, for purposes of placing this issue in what I consider to be the context of the matter, describe what the Georgia statute is held by the Supreme Court and by the Appellate Courts of Georgia to mean.

This statute, as applied by the Supreme Court of

Georgia, the Appellate Courts of Georgia, differs from the Federal rule substantially, and differs, we submit, from the rules of all of the States that we are acquainted with.

The statute provides that once the fact of conspiracy has been established, the acts and declarations of all conspirators are admissible in evidence against each other.

One of the flagrant things that is missing from that statute, as construed by the Supreme Court of Georgia, that is present in all of the other interpretations of similar exceptions, is that the statement or declaration must have been made in furtherance of the conspiracy; that is to say, that, for instance, where two might conspire to burglarize a grocery store, if one of the conspirators was sitting in the automobile outside the grocery store, and the other one entered, I am satisfied that the evidence of the acts of each could be admitted against the other to prove the conspiracy itself and to prove the concert of action.

Likewise, if some declaration was made in furtherance of the conspiracy once it has been established, that is, using a similar example, if one of the conspirators had been designated the function of going to purchase a gun, and maybe the two of them went together to purchase it, and one of them did all of the talking, the testimony with regard to what this man stated to the gun merchant would be admissible against both of them if the two were otherwise connected, because these acts or these

declarations would have been, or could be construed to have been in furtherance of the conspiracy.

The Supreme Court of Georgia -- I refer to the Supreme Court; I could refer to the Court of Appeals, we have a Court of Appeals and a Supreme Court in Georgia. These two appellate courts have, in the past, recognized the rule as we have stated it, similar to the Federal rule; that is, if the act or if the declaration were in furtherance of the conspiracy which had been proved, it would be admissible against any co-conspirator who was shown to be a member of the conspiracy.

The older Georgia cases -- we have cited some in our brief -- have gone along with this rule. But somewhere along the line, without ever overruling that rule, the appellate courts of Georgia have dropped the "furtherance" requirement and recognize only that if a statement is made during the course of a conspiracy, during its pendency, then it is admissible against all of the co-conspirators, whether or not it was in furtherance of the conspiracy.

Q How long has this statute been on the books?

A If it please the Court, the statute has been on the books since the Parks Annotated Code, which is our oldest code, I believe, in Georgia. It came from decisional law. Our criminal code in Georgia is based on decisional law, basically, and it has grown from that, and this is one of the basic statutes that we have in Georgia.

Q This is an enactment of the Georgia Legislature, I assume.

A Yes, it is an enactment of the Georgia Legislature in this sense, if it please the Court: A Code Committee was appointed, and I can't tell you when it was. It formulated a code for the State of Georgia.

Q It codifies the decisional law in this area and then submits it to the Legislature.

A And the Legislature enacted it more or less in bulk, as a code.

Q The statute as written is the conventional co-conspirator rule, is it not, as written, and it is only the judicial gloss that is put on it that says the conspiracy runs to the point where the concealment period as well as the operational period of the conspiracy is not over; isn't that right?

A Yes, sir. I understand the Court's question. I cannot state whether it is the typical co-conspirator rule. I don't know of one, actually. The Georgia statute and the --

Q I meant the Federal rule. This accords with the Federal rule that statements of one co-conspirator made during the course of a conspiracy are admissible against the other.

A I believe the Federal rule includes in it, "made during the course of and in furtherance of the conspiracy."

Q Right, and the statute here says "during the

course of" but "during the course of" is, by judicial gloss, extended to the period of concealment, so-called, as well as the active operation of the conspiracy.

A Yes, sir. The question of concealment is a second vice that we have not urged as broadly as we have the question of furtherance in this case. The Court of Appeals recognized both of these problems in its opinion. We were at that point, however, dwelling on the question of furtherance.

Under the Georgia rule, of course, the courts have construed a conspiracy to continue so long as the co-conspirators are attempting in any way to conceal the fact of the crime, and as we understand the decisions of the Georgia court actually up until the time the co-conspirators are electrocuted, so long as one or more of them denies the crime.

We have labored the point, however, in our brief and in our argument, not attacking so much that facet of the law, although we do attack it, but attacking the facet that makes the declaration admissible although it not be in furtherance of the conspiracy. We think that this is much more important for this reason:

We think that a statement made during the course of a conspiracy which is not in furtherance of the conspiracy could be much more harmful than a statement made during a period of time when the conspiracy is being concealed, if it were in some way in furtherance of the conspiracy.

We depict the situation there where, during the concealment period, one of the defendants or one of the co-conspirators continues laying the groundwork for future evidentiary matters which would attempt further to conceal it, or for that matter does some act that would attempt to conceal it.

Q What if this statement of Mr. Williams had developed in this way: Suppose in a fit of remorse after these events he had slashed his throat, or had cut his arteries somewhere and lay dying on the floor of the cell and uttered these same words to either one of the co-conspirators or to someone else. Would it be admissible?

A No, sir; I think not. We have there, as I see the Chief Justice's question, a question of whether or not a dying declaration would be admissible. However, a dying declaration would not be admissible under even the dying declaration exception unless pertinent to the facts or otherwise admissible.

Here, what if he had said, for instance, that "Evans and I have robbed every bank in the country"? This would not be relevant to the murder issue and it would not be in furtherance of the conspiracy, and we submit that even as a dying declaration under the facts that the Chief Justice stated, that it would not be admissible because it would not have been in furtherance of the conspiracy.

Q But the Chief Justice's example is quite a different and distinct exception to the hearsay rule, that is, the

dying declaration exception.

A Yes, sir.

Q It doesn't purport to come under the conspiracy exception, and your answer was that that would be inadmissible because of the Sixth Amendment?

A No, sir. It would be inadmissible for the reason that it would not be relevant. It would not have been in furtherance of the alleged conspiracy.

Q Well, in the hypothetical, Williams dying on the floor would have said exactly the same words as he said here, and if these words are relevant, then the same words would be equally relevant, wouldn't they?

A I think that is the very point that I am making. It would not have been in furtherance of the conspiracy. We submit that these were not in furtherance of the conspiracy and that would not have been.

Q But the dying declaration exception is a different exception, as Mr. Justice Stewart has pointed out.

A Yes, sir.

Q Do you regard it as any more or less reliable than the statement made here?

A Under the concept of the law as I understand it, it has some reliability and trustworthiness because a man, under the dying declaration statute, does not make a statement until such time that he is in extremis and knows that he is, and

therefore he is about to meet his Maker and would not lie. This is the theory of it.

I think, though, we go very far afield from what we are talking about here.

Q Necessarily what we are talking about here is not that -- you have to argue more than that the Georgia exception to the hearsay rule is, as a matter of policy, too broad. You have to argue, necessarily, since you are in a Federal Court here, that it violates some provision of the Constitution.

A That is correct, and we contend that it violates, of course, the Sixth Amendment right to confrontation.

Q Would you, in answer to the Chief Justice's hypothetical question, also think that the dying declaration exception, under the circumstances that he described, that the Sixth Amendment would prevent the admission of a statement made under the conditions he described?

A If it please the Court, I think that the exception as to the dying declaration is so well established in our law, both in our Federal and our State law, that I would have difficulty attacking that.

I notice in his argument, the Solicitor General, of course, would do away with the hearsay rule. We are familiar with the textual authorities that would. Of course, we would disagree with that. But in this situation, the dying declaration situation, since we do not have that case here, I am not

prone to argue it and I am not prepared to argue it.

I would say that I would not be on as firm ground, since the exception is so ancient and well recognized.

The Court -- and I again point to the decisions of this Court which we think are relevant, although all of them are not directly in point with the issue we have here -- Pointer has been mentioned and I would, just by way of refreshment as much as anything else, say that in Pointer, testimony of a witness given at a preliminary examination, at a time when the defendant did not have an attorney present, was admitted against Pointer at the primary trial of this case.

This was admitted under the theory that the witness had since left the State and did not intend to return to the State.

The Court held that this was a denial of confrontation. The question was asked during the course of the argument of the Attorney General with regard to the distinction between the transcript that was admitted and oral testimony. Actually, we think there is none. The Court did not point out any in its decision in the Pointer case. As a matter of fact, we would think that the transcript would be much more reliable than the oral testimony of one who heard the testimony or one who put the transcript in the form that it was in, the court reporter, for instance.

In most States, I think in the Federal Courts, where

a witness has since died and has previously testified and been subject to cross-examination, his testimony might be related during a subsequent trial to the jury from the memory of one who heard it, and this is a further exception.

What I am pointing out here is that in Pointer we were talking about confrontation, as we are talking about confrontation here, and it was not significant, we submit, in Pointer that this was a transcript as opposed to oral testimony. We think the fact that something is reduced to writing, and some distinction has been attempted by the Attorney General, has no significance, whether it be oral or in writing. It is a question of confrontation, nevertheless.

In any event, that was the situation in Pointer.

In Douglas versus Alabama, cited in our brief, the Court will recall that the co-defendant was placed on the witness stand. He was asked some questions and refused to testify on the grounds that his testimony might incriminate him, and significantly, or interestingly, the situation was somewhat like the situation we have here. The co-defendant had been previously tried and convicted in a separate trial from the defendant on trial.

In any event, the District Attorney was permitted to read to the co-defendant a confession that the co-defendant had given which involved the defendant on trial, and as he read it from line to line, or from phase to phase, he would ask the

co-defendant who was physically on the witness stand whether or not he had made such a statement, and on each occasion the co-defendant would state, "I refuse to testify on the grounds that it might incriminate me."

After thus having placed before the jury, actually not in the form of evidence, the confession of the co-defendant, the District Attorney put a witness on the witness stand to prove that the co-defendant who had refused to testify had given a confession, had it identified, but the confession itself was never introduced into evidence, and indeed, under the law of Alabama, apparently was not admissible.

So here again we have a situation where we have oral testimony. We are not dealing with something necessarily physical -- a writing, a transcript, a written confession. The Court, of course, in that case held that the co-defendant, the one on trial, although the witness against him was physically on the witness stand, was denied the right of confrontation.

In Bruton versus the United States, this was a case that arose in the Federal courts and it is so recent that I am satisfied that the Justices remember the facts of the case, but in substance, a confession of one co-conspirator or co-defendant was admitted in the course of the trial under the then approved instructions that it would be considered only as to him and not as to the co-defendant who was mentioned in it, but who did not give it.

Q Was it a co-conspirator?

A A co-defendant, as I understand. I don't recall whether it was a conspiracy issue or not. As I recall Bruton, it was a confession of a co-defendant.

Q As I understand your argument of the rules, the one in issue here, it really applies whenever there are co-defendants. There dcesn't need to be a conspiracy charge.

A That is correct, sir, and I will get to that in just a moment. I wanted to get to that in the context of the decisions of this Court, and there are only two others that I wanted to discuss briefly, and Bruton is the one.

I would state that under Bruton, under the Georgia rule, under the statute that we have here involved in Georgia, that the confession in the Bruton case in a Georgia court would have been admitted without error. It is admissible under the rule that we have here in question, and we have again cited a case or two in our brief where a confession of a co-conspirator, co-defendant, not on trial, was admitted against the defendant on trial.

Unddr this particular rule, the Court said in the Evans case, and the one we have here under review, the Court said under this rule it was a statement made during the pendency of a conspiracy and the conspiracy continued until the men finally were brought to justice; as long as one or more of them are denying their guilt, there is a conspiracy; therefore, this is

admissible, even though under Bruton, and actually under the decisions prior to Bruton, it would not have been admitted in Federal court, and we contend under the confrontation clause.

Q Had the Bruton case been decided here at the time this present case was considered by the Georgia Supreme Court?

A Yes, it had.

Excuse me, sir. I think that it had.

Q Do you remember if it is discussed and distinguished in the Georgia Supreme Court?

A If it please the Court, I will apologize to the Court. It had not been, because I recall actually writing a letter to the Clerk of the Court calling the Bruton case to the Court's attention while this case was pending in the Fifth Circuit Court of Appeals, so it would not have been decided at the time the Georgia Supreme Court made its decision.

As a matter of fact, I might mention at this point, so fixed in Georgia law is the concept of this statute as it is applied in this case and would have been applied in Bruton, that I could not get the Supreme Court of Georgia to even comment on the argument that I am making here before the Court today.

I attacked the constitutionality of the statute in the District Court, and I attacked the constitutionality on the same grounds we urge here in the Supreme Court of Georgia while this case was on appeal. The Supreme Court just cited this code section, and said the conspiracy was pending, and therefore

this was admissible, and let it ride.

On a motion for rehearing before the Supreme Court, in order to get down to the real issues involved, eliminating argument on many of the other issues, hoping that the Court would comment, at least, on this issue, the Court denied the motion for rehearing without comment on the constitutional issue.

In any event, we submit that under Darden v. State, which is cited in our brief, a Georgia Supreme Court opinion, the confession in Bruton would have been admissible in Georgia under the Georgia rule.

Brookhart v. Janis, I believe, was the first of these decisions chronologically that I have recited to the Court, but whether or not it was, in that case the defendant had waived counsel and waived certain rights at the preliminary hearing, and on the trial of the case the testimony that was given at the preliminary hearing was introduced in evidence against Janis.

The Court there held that this was a denial of confrontation. Janis did not have an attorney, or Brookhart, whichever one was the complaining party, did not have an attorney at the preliminary hearing and had not intelligently waived his right to cross-examination, as we recall that case.

Roberts versus Russell, which is also cited in our brief, merely holds that the Bruton rule is applicable to State Courts.

With regard to the Georgia statute, and answering Mr. Justice Stewart's question, at the time this case was tried, there was no conspiracy law, as was stated by the Attorney General. There was no general conspiracy statute in Georgia. One might be indicted. In this case they were indicted in an indictment charging the offense of murder without the mention of any conspiracy. However, as the decisional law of Georgia had developed, conspiracy as we know it was a rule of evidence and the fact of the commission of the crime could be proved b what the Court would call, or what we might refer to, as conspiracy evidence.

In the particular indictments in this case, no conspiracy was mentioned, but the case was tried on the theory of conspiracy.

I have already alluded to the Federal rule with regard to the Federal rule of evidence in conspiracy cases. This is the rule that requires that the statement must have been made during the course of the conspiracy and in furtherance of the conspiracy to be admissible.

The Attorney General, in his brief, gives some recognition to the fact that the rule is this. He gives lip service, as we understand it, to the proposition that the rule is that in order to be admissible, and to meet constitutional standards and to actually be an exception to the hearsay rule -- constitutional exception, I might say; not a constitutionally provided

exception, but an exception which would meet the constitutional standards -- the evidence must be in furtherance of the conspiracy.

Of course, we have submitted that in this case, and under the facts of this case, there is no concept under which the statement attributed to Williams could have been made in furtherance of the conspiracy or could have furthered it in any way.

Q What is the purport of this statement, as you understand it?

A As I understand the statement, it is an accusatory statement in the nature of an accusation and perhaps a confession, as far as Williams is concerned. It is a rather cryptic statement.

Q Do you understand it as implying that Evans was the ring leader?

A He was either the ring leader or the murderer.

Q I mean the statement itself. Is that its impact, "If it hadn't been for that dirty s.o.b. Alex Evans, we wouldn't be in this now"?

A The impact is that he was the instigator or the moving party.

Q The other evidence was, as I glanced over it, that while Evans was certainly a participant -- I am talking now about the eye witness testimony of the participant who turned

State's evidence -- it was actually Williams who was the trigger man; isn't that right?

A According to the evidence disclosed in the record. We might state that this points up why we needed to cross-examine the author or the utterer of that statement, to see just what he did mean.

Q Could you have called Shaw? Shaw testified, didn't he?

A Yes.

Q Could you have called Williams?

A We could have called Williams to the witness stand as a witness; yes.

Q You had that right under Georgia law.

A We had the right to call him.

Q And call him for purposes of cross-examination?

A I might state in that connection, if it please the Court, that he had been tried one week earlier.

Q And convicted.

A And convicted. Whether or not he would have testified, I do not know.

Q But you had at least the right, the power, to call him as a witness.

A Yes, sir.

Q Have him subpoenaed.

A We had subpoena right.

Q And did not exercise it.

A No, sir; we did not.

Q Why not?

A There are a number of reasons. As a criminal practitioner, I follow the practice not to use co-conspirators as witnesses in a case generally because I feel a jury will not accept their testimony. Certainly if they will not accept the testimony of the defendant himself, they will not accept the testimony of Williams.

Secondly, I was aware of the fact -- this was a well publicized transaction in Gwinnett County, Georgia. I recognized the fact that I had an uphill struggle in selecting a jury to try my case, and I was aware of the fact that 12 men had only a week earlier sentenced him to death. I thought from a strategy standpoint that it would not be well to call Williams.

I might add also that Williams has a rather "raunchy", if that is a good term to use, criminal record. He could be very successfully impeached by the use of his criminal record. We thought it would not be availing to use him both from a strategy standpoint and a practical standpoint.

Q Could you have called him on cross-examination as an adverse witness?

A No, sir; I would not have had that right.

Q You would not.

Q Mr. Thompson, what do you say about the State's

argument about the Chapman case? Harmless error.

A I wanted to get to that and I was saving that until last and I am about to approach that unless the Court would like me to approach it at this time.

MR. CHIEF JUSTICE BURGER: Let me remind you, counsel, that you have only about two minutes.

MR. THOMPSON: All right, sir. I will make it in two minutes, then.

I will point out that actually what the State is attempting to do in this case is to get the Court to reverse Pointer, overrule Pointer, Douglas, Brookhart, Bruton and Roberts. We think that in order to rule as the State would have the Court rule in this case, it would be necessary for the Court to overrule those decisions, to certainly diminish their effect substantially.

Under the harmless error rule, as decided by this Court in Chapman versus California, the Court would have to declare a belief that it was a harmless error beyond a reasonable doubt before that would be applicable here.

This Court, incidentally, as we understood Brookhart v. Janis, as we understood the Court in that case, it said that this error is so fundamental -- that is, the denial of confrontation is so fundamental -- that prejudice need not be shown; that it will be presumed. Since that time the Court has decided very recently the case of Harrington versus California in which

it held the denial of confrontation to be harmless error, but I will hastily run over reasons why I think this is not harmless error.

First of all, under Georgia law, in order for a conspiracy to be proved by the testimony of a single witness -- by an accomplice, I should say -- the testimony must be corroborated. This was a corroboration of the testimony. We think that this tended to corroborate the testimony of Truett and, therefore, could not have been harmless.

Truett was the only real evidence in the case, what he testified to. Under the evidence in the case, he had been given immunity from prosecution for a triple murder and also had been promised assistance in securing a parole from a Federal sentence that he was serving, and perhaps also other inducements. We think that this was a close case from that standpoint, and that Shaw's testimony as to a statement made by a co-defendant might well have turned the tide.

The statement, as we stated, is an accusatory statement. We are satisfied of that. The State thought so at the time and brought Mr. Shaw from the Federal Penitentiary in Atlanta to Gwinnett County to testify solely to this.

Q Is that all that Shaw testified to?

A Yes, sir. This was the only testimony that Mr. Shaw testified to.

The light is on, and I assume under the rules I am through.

Q One other question.

Is your client now under sentence of death?

A Yes,sir; he is.

MR. CHIEF JUSTICE BURGER: Mr. Evans?

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

ON BEHALF OF APPELLANT

MR. EVANS: May it please the Court, I would comment only on two matters.

First, dealing with the last question, I think there is no doubt that if the case should be remanded, Witherspoon would be applied and, therefore, it would not be a death penalty.

Secondly, I would like to comment briefly --

Q You are conceding that there were violations of the Witherspoon doctrine in the qualification of the trial jury?

A Yes, sir. It was held in the case. This has already been held in the Williams case and we would concede that there would have to be commutation of the penalty to life imprisonment.

Q Has it been commuted?

A No, sir.

Q Why not?

A Because in the Williams case the Court of Appeals remanded for the application of Witherspoon. In this case, they held that a new trial was required because of the denial of confrontation and said, therefore, they did not reach Witherspoon.

However, they suggested upon retrial that the Court consider this.

Q It is my understanding that the Attorney General of Georgia agrees that the Witherspoon case requires that the sentence be commuted. Am I right?

A Yes, sir. This will be applied.

Q My question is, why hasn't it been?

Q If the defendant wins, it would be much more than a commutation. It will be a new trial, and maybe a verdict of acquittal.

A Right, it will be a retrial. Yes, sir. There is no question it will be commuted.

My only other comment has to do with the furtherance rule. There are many variants of furtherance in the various States. The Georgia view is -- they interpret it; they don't use the word "furtherance" -- they say "relevancy".

In our brief we cite a Federal Court which interpreted furtherance exactly the same way. I think it is not the rule anywhere that I know of that the actual statement itself must further the conspiracy. I think it is sufficient that it relates to acts taking place during the conspiracy.

Q May I ask you one question: Why would the Witherspoon case compel a commutation of sentence?

A Well, of course, Mr. Justice Black, there were many errors alleged in the --

Q Suppose it should be tried again before a jury and the Witherspoon question did not come in.

A Of course, if the new trial is granted, yes, this is so. If the new trial is granted, then, of course, it would have a new jury and there could be a death penalty if the new trial is granted.

Q There might be no commutation required, you mean?

A Yes, sir. I am assuming that on remand, if the case is remanded to the Fifth Circuit, under this trial, the trial which we have had, Witherspoon is applicable. Of course, if there is a new trial, presumably the District Attorney would examine the witness in such a way as to comport with Witherspoon.

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SURREBUTAL ARGUMENT OF ROBERT B. THOMPSON, ESQ.

ON BEHALF OF APPELLEE

MR. THOMPSON: If it please the Court, I know I am out of order to ask for one moment, for one sentence to answer what has just been said.

I would like to state that the Georgia Supreme Court, in cases such as this, has now held that a case otherwise subject to Witherspoon would be remanded to the trial court for a trial on the issue of penalty only.

Q On what?

A On the issue of penalty only.

MR. CHIEF JUSTICE BURGER: Mr. Thompson and Mr. Evans,

we thank you for your submissions, and the case is submitted.

(Whereupon, at 11:10 a.m. the argument in the above-entitled matter was concluded.)