Supreme Court of the United States

In the Matter of:

STATE OF CALIFORNIA, Petitioner, vs. JOHN ANTHONY GREEN, Respondent	**Docket No.** 387

Place Washington, D. C.

Date April 20, 1970

ALDERSON REPORTING COMPANY, INC.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

STATE OF CALIFORNIA, Petitioner;	:	
vs.	:	No. 387
JOHN ANTHONY GREEN, Respondent.	:	

Washington, D. C.
April 20, 1970

The above-entitled matter came on for argument at 10:45 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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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The first case on today's calendar for argument is N. 387, California against John Anthony Green.

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

ARGUMENT OF WILLIAM E. JAMES

ON BEHALF OF PETITIONER

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

This matter is before this Court on the petition of the State of California intending that the Supreme Court of the State of California improperly and incorrectly interpreted the rulings of this Court on the question of the confrontation clause of the Sixth Amendment and that, pursuant to that misinterpretation of that confrontation clause, the Supreme Court of California held unconstitutional a state statute that would have permitted the admission for the truth of the matters asserted, prior inconsistant statements of a witness who was present at trial and subject to cross-examination.

It was only a few weeks back, I believe, that this Court had occasion to view another aspect of the confrontation clause and in Illinois vs. Allen held that a defendant could deprive himself of the right by his conduct to be present in court. The Court emphasized that one of the rights included in the confrontation clause of the Sixth Amendment was the

right to be present in court. How else could you confront your accuser?

This Court has been consistent in holding that the Sixth Amendment right is a right at trial, a right to conduct cross-examination of the accusers, of the witnesses against the particular defendants.

In the first case where this Court held that the confrontation clause was obligatory on the states, Pointer vs. Texas, this Court said: "As has been pointed out, a major reason underlying the constitutional right of confrontation is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."

This Court followed that with the case of Barber vs. Page, emphasizing that the right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.

In a companion case to Pointer, Douglas vs. Alabama, this Court used these terms: "Our cases construing the clause (referring to the confrontation clause) hold that a primary interest secured by it is the right of cross-examination. An adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."

In that particular case the defendant Douglas had a co-defendant who was separately tried, one Loyd. Loyd was

convicted and took an appeal. At the trial of Douglas the prosecution called Loyd. Loyd, since he had an appeal pending, decided to exercise his privilege against self-incrimination and refused to answer questions. So the prosecutor commenced to read his confession which implicated Douglas to him. The prosecutor asked the witness Loyd at each sentence if he had made this statement, and he refused to answer on the ground of self-incrimination.

This Court held that the defendant Douglas had been denied the effective right of confrontation, because he had no opportunity to cross-examine the witness who was exercising the privilege against self-incrimination.

In Bruton, a more recent case, discussing the aspects of confrontation, this Court said, in reference to the Douglas Case: "We held that Douglas' inability to cross-examine Loyd denied Douglas the right of cross-examination secured by the confrontation clause. We noted that effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so but relied on his privilege to refuse to answer."

The California Legislature in 1965 adopted the Evidence Code of California, incorporating in that code the other provisions contained relating to evidence in the Code of Civil Procedures and other codes and abandoned by the adoption of that code the so-called "orthodox" view as to impeachment,

the use of impeaching prior inconsistent statements. And it adopted what has been referred to as the "academic" view. That is that prior inconsistent statements of a witness, present in court and subject to cross-examination, would be admissible as substantive evidence. They enacted Evidence Code Section 1235, which is the statute involved in this case and made it effective in California on January 1, 1967.

The factual basis upon which this case arises ---

Q Before you conclude the facts of this case, General James, is there any available evidence showing the legislative history of this amendment of the California Code? Is there anything that you know of that shows why the state legislature did this?

A Yes, Your Honor. The code commissioners, when the Evidence Code was being considered by the legislature, made comments. The comments of the code commissioners are contained in the code. I believe they were quoted in our petition for certiorari and also in our brief file for the petitioner herein. The code commissioners' notes were also referred to in the notes of the committee for the adoption of the rules of evidence for the federal courts and magistrates.

Q These notes indicate what? That this was a response to some sort of a felt need or was just this the academic rule and these commissioners were academic people and they thought they better put in that rule, or what was it?

A It was a conclusion of the commissioners that this was the better rule of evidence. There was no reason why these statements shouldn't be used as had been suggested by Wigmore in his latest work and as expressed by McCormack in his work on evidence.

I think in our petitioner's opening brief, at pages 36 and 37 where we are discussing the reasons by the advisory committee for the proposed rules of evidence for the federal courts and magistrates, they adopted a portion of the code commissioners' notes, and it is contained therein. It generally states that Section 1235 admits inconsistent statements of witnesses, because the dangers against which the hearsay rule is designed to protect are largely non-existent.

Then it continues, and it concludes by citing McCormack and his code in evidence. And then the advisory committee for the federal rules states: "The advisory committee finds these views more convincing than those expressed in People vs. Johnson, which was a predecessor of the Green Case. Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough explanation of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements."

The commissioners' notes are contained in the number of volumes which preceded the action by the state legislature in adopting the Evidence Code.

Q Is the availability of the primary speaker in the courtroom one of the conditions of the California statute as it is under the proposed federal rules?

A Yes, it is Your Honor. The section provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if his statement is inconsistent with his testimony at the hearing and is offered in compliance with section 770 of the Evidence Code." So it contemplates the presence of a witness in court who is subject to cross-examination and whose demeanor may be viewed by the trier of fact.

Q You do not see this as in conflict with any prior decision of this Court?

A I don't know of any prior decision of this Court that it conflicts with. The cases to which I have been referring all relate to situations where the defendant was effectively denied confrontation by lack of thorough cross-examination at the trial. Either the declarant wasn't there, or he made himself unavailable by an exercise of a privilege. Or as in Smith vs. Illinois, the defendant was precluded from some effective interrogation.

Q In the Douglas Case this Court equated the assertion of the Fifth Amendment right as being the same as not being present, not being available.

A It effectively denied cross-examination to the

defendant, and he wasn't able to examine the witness or the declarant in court. This Court pointed out that it would have been different had he been able in Douglas to cross-examine Loyd, which he was not.

We submit that this is a basic and fundamental factor. I think that the confrontation clause and the rules of evidence, the hearsay rules of evidence, are sometimes deemed to be co-existent. But, I think, a commentator has noted that there are fundamental differences. The right of confrontation secures to the defendant the right to be present in court to confront his accusers, to cross-examine those accusers, to probe into their story, and to have the privilege of having the accusers in court subject to the view, scrutiny of the trier of fact. That is what the confrontation clause is.

The rules of evidence concern themselves with the reliability of out-of-court statements of declarants who may or may not be in court and do not concern directly the confrontation right, which was granted to the accused in the Green Case and would be granted under the state statute and, we submit -- I am sure the solicitor will submit --, under the proposed rules for the federal courts and magistrates.

Q How is a prior inconsistent statement actually proved?

A In this case it was proved first by the reading of a preliminary hearing transcript and also by a statement made

to an officer of the juvenile court by the officer himself, who testified concerning the statement of the defendant.

Q You have here two types of prior statements: one, a statement under oath at a preliminary hearing of which a transcript was made in a magistrate's proceeding; then, additionally, an unsworn statement made in no judicial proceeding, but made to an officer of the juvenile court.

A That is correct, Your Honor.

Q Unsworn?

A Yes.

Q And there may or may not be a difference with respect to the two?

A We submit that there is no difference under the rule of confrontation, at least,and that perhaps judicial policy or policy of a legislature in adopting one rule or another where the various conflicts arise. Judge Stone in the Minnesota Case gave very eloquent reasons why the orthodox rules should be adopted.

Q You did, in the California Supreme Court, confess error with respect to the latter?

A Only as it pertained to the state court ruling which we were bound by at that time.

Q Because of a previous state court decision?

A That is right. At that time we had pending a petition for certiorari in Johnson in this Court, which was not

denied until January 20, 1969.

Q So the fact is that you did confess error but submitted that the error was harmless, wasn't that it?

A Yes. We made no intention of conceding the issue. We were bound at that time by a final state court decision which we were contesting unsuccessfully. Our heads were bloodied but unbowed at that time.

The factual context where this case arises is the fact that a minor, in the early part of January 1967, came into possession of a quantity of narcotics, marijuana, and ultimately, on January 10, sold it to an undercover officer.

Further investigation -- including an arrangement for a meeting between the officer and the defendant Green -- resulted in Green's arrest and a preliminary hearing which was held on February 8, 1967. He was held to answer and information was filed, and he was charged with violation of California Health and Safety Code, Section 11532, "Furnishing to a Minor a Narcotic." He came to trial on this charge on April 5-6, 1967.

At this trial the people introduced the first witness, the minor himself, one Melvin Porter. He was placed on the stand, and he was asked some questions. He related that in the early part of January, sometime between the first and the tenth of January 1967, he received a telephone call from the defendant. The defendant told him that he had some stuff for to him to sell. But the minor witness testified that he couldn't

remember what happened because he was under the influence of LSD.

At that point the people introduced, pursuant to Evidence Code Section 1235, a portion of the direct examination of this witness in which he related that the conversation over the telephone with the defendant Green related to a sale, the selling by Porter of a kilo of marijuana.

The preliminary testimony was that the marijuana came in 29 "baggies" in a large shopping bag. The witness at the trial was asked if this was his recollection as to what occurred, and if that was the way he testified, and if he believed he was telling the truth when he testified at the preliminary. And he said, "Yes, I believe it to be at that time, yes."

He was then asked how he came into possession of this marijuana, a portion of which he had ultimately sold to this undercover police officer. He said that he couldn't recall who he got it from or where he found it.

So again the people, pursuant to Evidence Code Section 1235, referred this time to the cross-examination of the minor witness at the preliminary hearing, in which he acknowledged that the marijuana was pointed out to him by the defendant Green, apparently at the defendant Green's father's home. And that after the defendant had pointed it out to him, the boy went and got it, and thereafter consumed part of it, sold 6 or 7 "baggies", including one sale to the undercover officer, and the rest

supposedly was stolen from his closet.

He was asked at the trial concerning this statement that he had made, the testimony that he had given at the preliminary investigation. He was asked this particular question, "All right, now with your recollection refreshed, would you tell us of your own knowledge, where did you get that bag of marijuana?" And he said, "Well, I guess I got it from his back yard." He was then queried whose back yard, and he said, "John," referring to the defendant.

The question by the prosecutor at the trial: "Did you get any money for selling this marijuana, the bags that you managed to sell?" Answer: "Yes." Question: "What did you do with the money?" Answer: "I gave it to John, I think." Question: "To the defendant?" Answer: "Yes, I guess." This is page 23 of the appendix.

Q Is this testimony he was giving at the trial or is this ---

A This is testimony he was giving at the trial following the reading of his cross-examination at the preliminary hearing. The trial was on April 5th and 6th; the preliminary hearing had been on February 8th.

Thereafter, the people also put on the witness stand the juvenile narcotics officer, Officer Wade. They asked him if he had had a conversation with the minor Porter, and he related that he had. He testified that this conversation took

place on January 31, and that at this conversation Porter had told him that he had obtained this marijuana, grass, or stuff, as he referred to it, from the defendant Green, and that Green had brought it over to his house. It consisted of 29 wax paper bags in a large shopping bag.

The witness was cross-examined by counsel for the defendant. And subsequently, when the minor witness Porter was recalled as part of the defendant's case in chief for further ross-examination, counsel questioned the minor regarding his statement to the police officer. He was asked if he had made this statement, and then, "Do you recall what you told him at that time?" Answer: "Let's see. Well, it had to do with buying it from John, yes sir. I mean I couldn't say exactly what went on or not." Question: "Well, do you remember telling the officer that Mr. Green phoned you up and told you that he, Mr. Green, had some marijuana and wanted to bring it over and leave it at your house?" Answer: "I might have said that, yeah." Question: "Do you remember telling him that Mr. John Green had brought the marijuana over to your house that day, the day that you had the conversation with Mr. Green." Answer: "I think, let's see, yes, I think so."

And then he was questioned -- this is pages 59-60-- whether he believed he was telling the truth when he made this statement to the police officer on January 31, and he said, "Yes sir." And both asked if he believed he was telling the truth

when he testified at the preliminary hearing on February 8th, and he answered, "Yes." And he was also asked if he was testifying truthfully in court, and he also replied in the affirmative.

We submit that in the context of this particular case, with particular reference to these facts, it is clearly demonstrated that this defendant was not denied confrontation as has been explained in this Court's opinions, The numerous opinions that have proceeded since Pointer vs. Texas have all pointed out that there was in the particular case a lack of adequate cross-examination at the trial. Not within one of the exceptions, or there had been no diligent effort made to secure the presence of the defendant in court, to subject him to --- to get the witness in court, the declarant present in court, to subject him to cross-examination, and to permit the trier of fact to view him when he testified, and to determine whether his testimony was worth anything.

Q Excuse me, was the defendant represented by a lawyer at the preliminary hearing?

A Yes, Your Honor. He was represented by the same attorney who represented him at the trial.

Q Do you think that makes any difference?

A No, I don't. But I think in this particular case it clearly demonstrates that this man had the opportunity to confront the declarant at the time the earlier statement was made and further cross-examination, the important aspect of

confrontation, the presence before the ultimate trier of fact. And he had the attorney. The attorney did a good job in both questioning the witnesses at the preliminary hearing and then following it up with an examination of the minor witness, the officers, and the other witnesses at the trial.

Q What is the object of a preliminary trial in California?

A Primarily to determine whether there is probable cause to hold the defendant to answer.

Q And if it is found, what is done?

A An information is filed within a period of 15 days in the superior court. The defendant is thereafter arraigned in the superior court and the date is set for trial.

Q Held for the purpose of determining whether or not there will be a warrant?

A An information file, an accusation file against him.

Q You don't have any grand jury investigation?

A Yes, we have both the grand jury and the preliminary hearing in California.

Q Well, this one was not a grand jury investigation?

A This was not grand jury. This proceeded by information. The Johnson case that had been decided earlier and that has been referred to was a grand jury proceeding, at which the witnesses testified under oath but not subject to

cross-examination.

Q Suppose the court had decided on preliminary trial there was no probable cause?

A The man would not be held to answer.

Q He would be released?

A He would be released, and the complaint would be dismissed.

Q What is the difference in the procedures when you try him for preliminary trial and actually try the case?

A Well, actually ---

Q Do you put on witnesses?

A At the grand jury proceeding?

Q At the preliminary?

A At the preliminary, oh, yes.

Q Can the defendant put on witnesses?

A Ordinarily not. He would be there to merely cross-examine.

Q He cannot put on witnesses?

A He may put on witnesses; he ordinarily does not. Because the question there is, is there probable cause to hold the defendant to answer. If there is, that question will be determined in the superior court.

Q And if he wants to have a lawyer and put on witnesses, he has a right to do both?

A Yes. He has a right to a lawyer at the

preliminary, and in California would be furnished a lawyer at the preliminary hearing, if he was unable to afford one.

Q What is the reason suggested why that is not a kind of a trial or proceeding where you could use the evidence from it, if you could use it from any other place?

A I would submit that there should be a right to use this preliminary examination evidence at a later time.

Q But there is a suggestion why you shouldn't and that is the confrontation clause of the Sixth Amendment, in answer to Justice Black's question.

A That is right.

Q Can California proceed --- Were you finished Mr. Justice? Can California proceed by way of information or indictment by grand jury without any preliminary hearing at all if they want to?

A They can proceed by grand jury indictment without a preliminary hearing.

Q But not by information?

A Not by information, unless the defendant waives a preliminary hearing.

Q Do we have that clear? The preliminary hearing is an absolute right if proceeded by a charge by information, but not so by grand jury indictment.

A That is right, Your Honor.

If I may defer right now to the Solicitor and reserve

a few minutes.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, General.

Mr. Solicitor General.

ARGUMENT OF ERWIN N. GRISWOLD

ON BEHALF OF PETITIONER

MR. GRISWOLD: May it please the Court:

As Mr. James has said, there are two pieces of evidence involved here, both prior inconsistent statements. First is the testimony at the preliminary examination where, I may point out, there was confrontation in a physical sense. That is, the defendant was himself present and saw the witness who testified. The second piece of evidence is the statement made to Officer Wade.

Both Porter, the witness who testified at the preliminary examination, and Wade, the officer to whom the statement was made, were present at the trial and subject to cross-examination. And the testimony at the preliminary investigation was, of course, an official record.

I think I may point out, too, that in this particular case, the trial was before the court without a jury, because the defendant had waived a jury. But we do not believe that this should lead to any difference in the result.

There is a note by Professor Kenneth Davis in the current April issue of the Harvard Law Review making a

contention that the rules should be different in trials without a jury and in trials with a jury. But I find hard to make that applicable in a criminal case. Because it seems to me odd that the defendant's counsel should be put to the choice of trying to decide whether we shall waive a jury or not, depending upon what evidence can or cannot come in. It seems to me that in a criminal case the rules of evidence should be the same either way.

Now our submission here is against the decision below by the California Supreme Court, which deals in effect only with the evidence taken at the preliminary examination. And it is also against the decision of the California Supreme Court in California against Johnson, decided a couple of years ago in which this Court denied the State's petition for certiorari, which deals with a prior statement like that made to Officer Wade, unsworn and not subject to cross-examination.

We think that both decisions are wrong, and that they are not required either by the Constitution or by decisions of this Court. If we are wrong as to Johnson, however, we would urge that the decision below, with respect to the evidence at the preliminary examination, is nevertheless wrong and should be reversed.

Q On your brief premise, Mr. Solicitor General, it doesn't make any difference whether there was counsel at the preliminary hearing or not?

A No, Mr. Justice, our position is that ---

Q The confrontation is satisfied by the presence of the witness at the trial?

A At the trial, itself.

Q It doesn't make any difference whether there is counsel there, or it doesn't make any difference whether the defendant was there.

A All of those things go to the weight of the evidence but not to its admissibility. This leads directly to the first point of my argument which is that this case is not a Sixth Amendment case. This case does not deal with the right of confrontation, because the right of confrontation was fully vindicated.

The witness Porter was present and sworn and subjected to cross-examination. The trier of the facts had full opportunity to see and hear him, to observe his demeanor, and to form a conclusion about his honesty and trustworthiness.

That conclusion might well have been that he was a very devious person who probably spoke the truth shortly after the event but, for one reason or another, found it convenient to be forgetful and evasive at the trial.

And similarly with respect to the other item. The witness Wade was present, sworn, and subject to cross-examination. He testified fully, and his personality and demeanor could be evaluated by the trier of the fact.

Thus, every objective and requirement of confrontation was met. This is not a case like Pointer against Texas or Douglas against Alabama or, more recently, Barber against Page, where the person whose out-of-court statement was sought to be used was not present or available and particularly where the prosecutor was at fault in not having the declarant available.

Here the key fact is that the witnesses were present at the trial, were sworn, and were subject to cross-examination. So that the defendant had full opportunity to show what he could to the trier of the fact by way of impeachment, explanation, contradiction, or otherwise.

Some 40 years ago Judge Learned Hand dealt with this problem in a case which was cited in our brief, though this quotation is not there. This is DiCarlo against the United States in 6 F. 2d. And I quote from Judge Hand: "He is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect to contradictory answers he may have made at other times. If, from all that the jury see of the witness, they conclude that what he says now is not the truth but what he said before, they are, nonetheless, deciding from what they see and hear of that person and in court."

Indeed, this Court, of course, held that prior statements may be introduced even though the declarant is not present at the trial in cases of necessity. The leading case is Maddox against the United States in its two separate

appearances in this Court, where both dying declarations and testimony taken at a previous trial -- where the witness was now deceased -- were held admissible. And the Maddox Case was specifically referred in the recent decisions of this Court as a decision which was not affected by those decisions.

There are other illustrations as in the case of book entries, ancient documents which might be used to prove the title to land in a charge of trespass in a criminal case, and other established exceptions to the hearsay rule.

In this situation where the witnesses were present and were cross-examined in court, it seems to me that the only case which is troublesome is Bridges against Wixon in 326 U. S. Whatever may be said about that case -- it was a deportation case rather than a criminal case, but I don't think that is of any particular importance -- it is clearly distinguishable.

There the declarant took the stand as here. He admitted that he made a statement as here. But at that point the two situations diverge. In the Bridges Case the witness denied at the trial that he had said anything in his statements about Bridges' Communist activities. Here the witness admitted that he had made the statement and testified that he apparently thought that it was the truth when he made it. I don't want to overstate what he said at the trial, because he was very devious. But he specifically admitted that he had made both of the statements, and one of them, of course, was a public record.

Q What case did you say that was, Richards?

A I am talking about Bridges against Wixon in 326 U. S. But as we see it, the Court need not examine Bridges now. It need say only that it is inapplicable in a case where, as here, the declarant witness testifies under oath and subject to cross-examination, that he made the statement and that he believed it was true when he made it.

There are, of course, a number of decisions of the Court which support the conclusion that such evidence is admissible. There is the well-known Bruton Case, involving the use of a co-defendant's confession in a joint trial, implicating another defendant, where the Court quoted from the leading Maddox Case these words: "Hence, effective confrontation of Loyd (who had made the statement) was possible only if Loyd affirmed the statement as his." And here the witness did affirm the statement as his.

On the basis of this passage, this quotation of Maddox in the Bruton opinion, a number of lower courts have held that in the Bruton situation the confession of the co-defendant is admissible, when he does, in fact, appear at the trial, is sworn and is subject to cross-examination there. This Court has several times denied certiorari from such decisions.

There is another case of this Court that seems relevant and interesting. It is Stovall and Denno in 388 U. S.,

and it is not cited in our brief. That was the case which was decided on the same day as the Wade Case. In the Stovall-Denno Case the only witness to the crime, or a witness to the crime, was the wife of the deceased, who was seriously injured and was in the hospital. The defendant was taken to the bedside, and the wife identified him then as the perpetrator of the crime.

It so developed that the wife recovered, and she was a witness at the trial, and she was sworn and subject to cross-examination. This Court held that the evidence of her prior identification was admissible, not merely her testimony at the trial but her inclusion in the trial of her prior identification,without violation of the due process clause.

Now, I point that out, because the Court held that since Wade was not retroactive, the confrontation clause was not before it. But as I think this case is really a due process case and not a confrontation case, it does seem to me that Stovall and Denno is directly in point. There the prior statement, the prior evidence, was consistent not inconsistent, but the same questions would seem to me to be applicable in determining its admissibility. Of course, in that case, as in the sequelae to the Bruton Case, the prior statement is not sworn and was not subject to cross-examination.

Now I turn to my second approach to this case.

Q Mr. Solicitor General, are you suggesting that the rule would be different if the witness denies having made

the prior statement, but you put on witnesses to show that he did?

A I am suggesting, Mr. Justice, that if we had that case, then we would have to deal with Bridges against Wixon head on, which I would prefer not to do and think I don't have to here, or that that would be a harder case. My own view would be that it ought to make no difference. That Bridges and Wixon was in its application, at least in this case, wrong. That that ought to be a matter for the evaluation of the trier of the fact at the trial, since the witness is before him and under oath at the trial.

Q And you put on testimony to show that he did make this prior statement?

A That he did make the prior statement, that is correct. But I feel a little happier, or quite a bit happier, that I can distinguish Bridges against Wixon rather than having to meet it head on.

Now, if in accordance with our submission, this is not a Sixth Amendment case, then our contention is that there is nothing in the due process clause which should prevent the admission of the evidence below.

Let me say, before going further, that,in my opinion, this is a poor case. I am not representing the State of California here, and Mr. James will speak up for the State. They are, in no sense, bound by what I say; but this Court

has recently found that proof beyond a reasonable doubt is a requirement of the due process clause in criminal cases, and I can only say that I can't find proof beyond a reasonable doubt in this record.

This is not a case where it is enough to find some evidence, or sufficient evidence, to support a verdict based on a preponderance of the evidence. It is a criminal case where proof beyond a reasonable doubt is required.

Needless to say, I don't think this Court should review records in state criminal cases to determine whether there is sufficient evidence to support a verdict of guilty beyond a reasonable doubt. But it does seem to me that the Court can correct the error of the California Supreme Court -- an error into which, I think it may be said, the California Court fell because of the chilling effect of certain decisions of this Court -- in rejecting the admissiblity of the evidence here and then remand the case to the California Court for further proceedings.

After all, the Court below concluded its opinion by saying, on page 118 of the appendix, "We need not reach the defendant's additional contention of insufficiency of the evidence, suppression of the evidence, and prejudicial misconduct."

Q It suggested then that even if all this evidence was properly admitted, as you say it was, that there would

remain a question of whether or not, even with this prosecution evidence, there was proof beyond a reasonable doubt of the defendant's guilt; but that is a matter we should leave to the California Court?

A That, it seems to me, is a matter for the California Court.

Q You are not suggesting that this is a Thompson and Louisville Case are you?

A No; I think there is more evidence here than there was in Thompson against Louisville, but I don't think -- and my view is of no importance -- but I have read the record, and I couldn't find that there was evidence beyond a reasonable doubt here.

I don't think that the Court need be concerned that justice will not be done if it corrects the court below on the constitutional law of evidence. What I am concerned with is that hard cases make bad law. We all know that. And I agree that this is a hard case, but I don't think that it should be resolved by a wholly novel and, I should think unfortunate, discovery that the Fourteenth Amendment, and thus presumably the Fifth as well, requires that hearsay evidence is inadmissible, even where the witneses involved are in court, sworn, and available for cross-examination.

Q Could I clarify something in my mind? Are you saying that even if you prevail on the confrontation question,

or the State prevails on the confrontation question, you are still left with a due process question as to the "sufficiency of the evidence?"

A No, Mr. Justice. What I am trying to say is a little bit like what was in Stovall and Denno; the first portion of my argument is this is not a Sixth Amendment case. The Sixth Amendment was fully satisfied here. There was every confrontation you could want. Therefore, perhaps that is enough to dispose of the case. If it is, what I have more to say is irrelevant.

Q That is the question I wanted to put to you. If you prevail, if the State prevails, on the Sixth Amendment case, do you think there is a due process question left?

A I think conceivably there is, Mr. Justice.

Q I figured you to say, first of all,when you started out on this due process business, that that was premissed on the theory that the State might not prevail on the confrontation question.

A I think, perhaps, that I would prefer to put it this way, Mr. Justice. If there is any question, it is only a question under the Fourteenth Amendment. I don't regard that question as serious, but I thought it of enough concern that it was appropriate to devote a part of my argument to it.

Q Now, I am getting a little confused. Are we talking about proof beyond a reasonable doubt, that part of

the Fourteenth Amendment?

A No, Mr. Justice; we are talking about the admission of prior inconsistent statements as affirmative evidence.

Q May I ask you this question? Let's assume you prevail and that the Court decides that neither the Fourteenth Amendment, insofar as it incorporates the Sixth Amendment, nor the Fourteenth Amendment, simpliciter, plaino, requires the exclusion of this evidence and that the California Supreme Court was wrong in holding that the United States Constitution requires the exclusion of the evidence, do you still say that, with the inclusion of this evidence, there might remain a question of whether or not there was proof beyond a reasonable doubt of the defendant's guilt, but that that is a matter for the State of California?

A Yes, Mr. Justice; that's my personal view. My concern here is that when the Court reads this record and finds that it is a pretty thin case, that we may end up with a constitutionally prescribed rule with respect to the rules of evidence as a means of disposing of it, when I think it ought to be disposed of simply on the narrow ground of whether there is sufficient evidence to support a verdict as beyond a reasonable doubt. That gets close to the area of Thompson and Louisville, although this is different from that case in many ways.

Q Well, Bridges went at it from a due process standpoint mostly, didn't it, rather than confrontation?

A There is confrontation overtones in the language in Bridges; the passage is quoted in our brief.

Q But it was a federal case, and yet they really didn't seem to talk due process, did they?

A The passage is on page 22 of our brief. To admit this prior statement in Bridges said the Court: "So to hold would allow men to be convicted on unsworn testimony of witnesses-- a practice which runs counter to the notions of fairness on which our legal system is founded."

Q Is that confrontation talk?

A That is due process talk, I suppose. Perhaps that is the reason why I thought it was relevant to make a due process argument here.

Q Mr. Solicitor General, I was just looking at Mr. Prettyman's brief for Green. I don't see that he has raised any question -- unless I have missed it -- on the sufficiency of the evidence.

A No, Mr. Justice. I have interjected this as a means of hoping to divert you from deciding this case against the government on constitutional grounds.

Q It is a diversionary argument.

A It is a diversionary argument, in confession, in avoidance. What I am concerned with is that we should not

end up with this case by finding that, for the first time in 180 years, it has been discovered that the hearsay rules are embodied in the Constitution, on one ground or another, and are beyond the power of state legislatures to change, to innovate, to experiment and, indeed, beyond the power of the people who formulate federal rules of evidence.

Q It is a little more dangerous and far-reaching to precipitate us into a program of examining state records to see whether the evidence was beyond a reasonable doubt.

A I am not suggesting, Mr. Justice, that you should. I am suggesting you should remand to the Supreme Court of California to do that ---

Q Yes, I realize that.

A --- with such innovations as you care to include in it.

Q But how does that process avoid our getting into the evaluation?

A It does not. It means that you decide that the Supreme Court of California was wrong in its decision below and in the Johnson case, that this is not a constitutional requirement, but that you can feel satisfied that, nevertheless, justice will be done in this particular case.

Q What you are saying is that is is none of our business, really, but that we should take a quick look at it and do something about it, the sufficiency of the evidence part?

A Well, Mr. Justice, I can't quite say it is none of your business, since the Court put it into the Constitution about three weeks ago -- the question of beyond a reasonable doubt being a constitutional requirement. And I don't know that the Court can completely escape that, though it can delegate it quite widely and expect that the delegation will be faithfully honored.

Q Mr. Solicitor General, I thought that, ordinarily, with circumstances like that in the state's case, we remand for proceedings not inconsistent, because we don't think we ought to get beyond the issues raised by the petitioner of the state case. When did we go reaching into things like this? I didn't think we did.

A Mr. Justice, my whole objective is that when you read this record, I don't think you will think the State's case is very strong. And I don't want that to result in an affirmance of the State's decision, which puts this rule of evidence into the Constitution.

There is another way, which is to reverse the decisions below on the constitutional questions and remand it for further proceedings consistent with the ---

Q Not inconsistent with the state cases; we don't send them back for proceedings consistent; we send them back for proceedings not inconsistent.

A Not inconsistent ---

Q It is rather an important distinction we make between state and federal cases.

Q Well, I thought your proposition on what I call the diversionary argument was that you are uneasy about the record. And the California Court said that since we find that this was not admissible under confrontation, we don't have to reach anything else. And, therefore, you are simply suggesting that if we agree on the confrontation thing, leave it open for the California Court to do what it wants to with it?

A Exactly, Mr. Justice. That is my point.

Now, this question of the admissibility of prior inconsistent statements as evidence is one which has been discussed over a period of two generations. It is sometimes, it seems to me, denigrated a little bit by talking about the orthodox view and the academic view.

The academic view, for which we speak here, has been supported by some very great figures; Wigmore, who is one of our authentic greats, and Morgan and Judge Weinstein can hardly be called impractical persons. This change in the California Statute Section 1235 was recommended by a state commission in California, which had a staff of which Professor James A. Chadburn was the chief reporter. He is now at the Harvard Law School and is the editor carrying out the current revision of Wigmore on evidence.

This rule is supported by distinguished members of the

bench, not impractical men, such as Judge Learned Hand, whom I have already quoted, and Judge Henry Friendly, who is cited in our brief. From Bentham to the present time, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom.

We should continue to be free to experiment in this area by legislation, by delegated rule-making, and by judicial decision. The area should not be frozen into a constitutional rule by application of a constitutional provision, which says nothing about it and, obviously, has no application to the problem either in terms or in light of its history.

I speak,of course, of the Fourteenth Amendment, because I have earlier contended that the Sixth Amendment, whether incorporated by the Fourteenth Amendment or not, has nothing to do with the case, since the defendant here did confront both of the human witnesses involved.

There is no case in this Court which requires affirmance of the court below, either here or in its decision in the Johnson Case. On the contrary, affirmance here is nothing less than reading into the Fourteenth Amendment a conclusion that hearsay evidence is always inadmissible. For if this evidence cannot come in, it is hard to see how any extra-judicial statements can be received.

That would be a revolution, not only in the law of evidence, but in constitutional law. And if the Court thinks

I am overstating, I can only say that is what the California Court has decided in both of these cases.

Moreover, since we are talking about the Fourteenth Amendment and not the Sixth, Mr. Chief Justice, I will borrow a little time from Mr. James, with his permission, I don't see how it could be limited to criminal cases. It would apparently apply to civil cases as well, for they are surely subject to the Fourteenth and the Fifth Amendment.

Apparently, such a rule would apply to the administrative process, where we have widely had statutes saying that the rules of evidence shall not apply.

Such a conclusion would go beyond anything that is needed or useful or warranted; it would go far beyond any conception of due process which is part of our tradition or a concept of ordered liberty. Our law has always accepted hearsay evidence and evidence of extra-judicial statements and actions, often without oath or cross-examination, under one or another of a great many exceptions to the hearsay rule.

I would point out, of course, that other systems of law widely admits hearsay evidence, subject only to the weight to be attributed to it. Scholars in those systems often find themselves quite unable to understand our concern about hearsay.

Often, in one situation or another, particularly in administrative proceedings of one kind or another, our law has specifically provided that no hearsay rule shall apply and

that the only test of the admissibility of evidence shall be its relevance, with its weight under all of the circumstances to be a matter of the trier of the fact.

It can hardly be said that such rules are irrational. It ought not to be said that they are forbidden by the Constitution. If states want to expand the admissibility of evidence within sound reason, they should be free to do so.

As I have indicated, justice should be done in this case but not by distorting our rules of evidence and putting it beyond development and change. This is not a case for a constitutional decision, and the California Court was wrong in thinking that this Court's decision required it to dispose of the case on federal constitutional grounds.

That error should be corrected, and the case should then be remanded to the California Court for further proceedings and not inconsistent with this Court's decision.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Prettyman.

ARGUMENT OF E. BARRETT PRETTYMAN, JR.

ON BEHALF OF RESPONDENT

Q Before you get under way, Mr. Prettyman, may I ask if you know -- because I am not sure I could see it in the record -- whether, in the California Supreme Court, the insufficiency of the evidence to support the verdict was urged

by the petitioner here.

MR. PRETTYMAN: It was urged before the California Supreme Court, and they reserved judgment.

I might say that I view the record in this case as the Solicitor General does, but, perhaps, with more alarm. And I have not raised the issue in my brief for the simple reason that I was appointed after the petition was filed and granted.

Consequently, I found myself bound by the issues there presented. But, if for some reason I do not prevail here, I would certainly intend to urge before the California Supreme Court on remand that this conviction cannot stand on such paltry evidence as we find in this case.

Q Even assuming all the evidence?

A Even assuming that all came in. As a matter of fact, I would urge the rule -- which as I understand it has not been decided by this Court -- as to whether a conviction can stand on the basis of hearsay alone.

Q Well, the last sentence of the opinion says just that. We need not reach a definite additional contention of insufficiency. So it is wide open.

A That is correct. I would be happy to present the issue of insufficiency and obtain a reversal on any ground that I can.

Q Would you lead the Court, or seriously urge the

Court to review this record and make an initial determination that this record was insufficient to satisfy the standards of reasonable doubt?

A Your Honor, I think that the confrontation issue is so square and is so surely in my favor that I don't think that I have to urge that the Court do that. I think that the California Court, should there be a remand, is fully able ----

Q I realize that, but I was just putting a direct question to you as to whether you were seriously urging the second proposition of this Court.

A You mean the hearsay?

Q Yes.

A Not at this time. I hope if there is a remand that I will be back up if it is decided adversely by the California Court.

Q It would appear on what you just confirmed about the situation in the California Supreme Court that they reached out of their y for a constitutional issue, when they could have disposed of this case on what you and the Solicitor General suggest is a relatively routine, non-constitutional ground.

A Of course, I can't speak for the Court, but I would guess that since they said that this evidence shouldn't have been in the case in the first place, that they didn't find it necessary to reach the question of what would have

happened if it had gotten in.

Q That is the reverse of what was once thought the orthodox approach to the problem, isn't it?

A I concede it.

Mr. Chief Justice and may it please the Court: I think I am fortunate in having a case in which the facts so dramatically illustrate the dangers of adopting the position that is urged by the State and the Solicitor General.

I would like to review those facts briefly, even though they have been touched on before, because some very important facts have not been mentioned to you.

The key witness in this case, and in fact the only witness to the alleged crime, was a 16 year old named Melvin Porter. In footnote 2 to my brief I have listed a series of comments about this witness from the judge and the prosecutor. I think that the most kindly and restrained way of summerizing their attitude toward him was to say that they considered him a worthless liar.

Yet it was he, and he alone who convicted Mr. Green. Mr. Green at the time was 24 years old,and according to the state, he gave or sold some marijuana to Porter.

Now, how did the State prove its case?

Q If I may interrupt you there, Mr. Prettyman, does that go, do you think, primarily to admissibility or to weight?

A I think what I am going to demonstrate to you, Your Honor, is how it was impossible for the defendant to have true and effective confrontation in this case. And I think I can develop it for you through the facts and the situation that he was confronted with -- how he was denied confrontation in the same sense as if the witness had not even been on the stand or if he had been pleading self-incrimination.

Before, during and after the trial in this case, this 16 year old made four separate and self-conflicting statements in regard to this crime. The first one was after Mr. Porter, himself, had been arrested in an offense that was separate from the one we have here.

He was arrested after selling marijuana to an under-cover agent. And he had been incarcerated for four days at the time he made this statement. The police officer, Officer Wade, interrogated him at the juvenile headquarters. Only the two of them were present. There was no lawyer either for the defendant Green or for the defendant Porter, no witness, no stenographer, just the two of them after this young boy had been in jail for four days.

According to Wade, Porter told him that some weeks before Mr. Green had called him and then had come by his house and brought with him a bag of marujuana.

The second statement was made at the preliminary hearing of Mr. Green after he had been arrested as a result of

the first statement. Mr. Porter was still in custody of the police, still in jail; his case had not yet been disposed of. That hearing was held only eight days after Mr. Green's arrest.

At the hearing Porter testified this time, not that Green had brought a bag of marijuana to his house, but rather that he had come and taken Mr. Porter over to the house of Mr. Green's father and had showed him some marijuana behind a bush, and Mr. Porter had come back on his own that night or the next day and picked it up.

Now, I might say that there are a number of inconsistencies between these first two statements, and the State has never yet tried to reconcile those inconsistencies.

Q Did the State use both of those statements at the trial?

A Correct.

Q I suppose you could agree that it is not unusual in a criminal or a civil case to have inconsistencies and disparities as wide as what appear in this record from two different witnesses or from the same witness with internal inconsistencies on direct cross-examination?

A I do think, however though, when you consider that these are the only two statements that convicted this man. He was not convicted upon any testimony at trial. He was convicted on the basis of these two statements. I think that

there is some burden on somebody's part to reconcile the conflicts. We don't even know from the trial judge whether he relied on the first statement, the second statement, or both statements; we have no idea.

Q But, what if we didn't have the out-of-court statement at all, the preliminary hearing statement, that had the one version on direct examination and the other version, precisely as they now stand on the record, on cross-examination, this would be purely a weight of the evidence question then, wouldn't it?

A You would not have the conflict you have here, but I am trying to demonstrate that to go back, as the State would do, and say, "Well, these prior statements are more likely to be true, because they are earlier in time," doesn't face up to the issue that the two statements, themselves, don't coincide one with the other. I think it goes to the point about what kind of witness this is and the necessity for having him give his convicting statement in front of the trier of fact and not back before some police officer or at some previous hearing.

I want to emphasize that at the preliminary hearing Officer Wade, to whom the first statement had been given, did not testify, and no mention was made of that first statement. Therefore, Porter's attorney apparently had no view of it, had no idea that he given a previous inconsistent statement.

Another thing about the preliminary hearing was that Porter's attorney, apparently, knew nothing about the LSD that was going to develop later. Not a single, solitary mention was made of LSD at that preliminary hearing.

Now, we go on to the third statement.

Q What you are really saying is -- if I get the argument is -- that the relevant point of confrontation is not confrontation at the trial, but absence of confrontation at the time of his out-of-court statement? Is that it?

A If I may state it just a little differently, Mr. Justice; that the point of confrontation is to look the witness in the eye, have the trier of fact look him in the eye, not as he is talking about some other statement that he might have made at some other time, but when he is talking about the crime, when he is saying the words that convict.

This whole cross-examination at the trial was not about the crime. The cross-examination was, "Well, now did you say something to somebody else back there?" And he is saying, "I am really not sure; I can't remember."

The third statement was given at trial. At this point it is important to note that this young man was no longer in custody; his own case had been disposed of. This is the first time, now, that he is out of the hands of the police. And what does he testify to now? He says, "Well, if you want to know the truth of it, I took LSD about 20 minutes before

Mr. Green called me, and I am not sure what happened thereafter."

He didn't know whether Mr. Green had come by his house; he didn't know whether, if he came by the house, he left anything. He didn't know where he got the marijuana, because he had been under the influence of LSD.

It was, thus, apparent to the State that they could not convict Mr. Green on the testimony in court. This was the only testimony of this crime.

So, what do they do? They turn around and have the officer come in and say, "Well, he told me down at juvenile headquarters such and such." And then they read to the witness from portions, about one-fourth of the testimony at the preliminary hearing -- including, I might say, about one-fourth of the cross-examination -- they read this testimony to the witness, and they say, "Didn't you say that at the preliminary hearing?"

If you will look on page 7 of my brief, you will see in the footnote his various replies to these questions about what he had said before. If there was ever a young man who was confused, who seemed to be saying 6 different things at once, it was this young man. The best we can make out of all of his testimony was, "Well, if I said it before, perhaps it was true, but the fact of the matter is that, because of my condition, I don't know anything about the crime."

Because of these two sections of the California Code,

these prior two statements, the one to the officer and the one at the preliminary hearing, where the young man both times was under police control, those were the statements that convicted Mr. Green. Nothing that was said at trial could have convicted him. Because the only direct evidence at trial was that he didn't know what had happened.

The fourth statement from this young man was made after trial. It was in a sworn statement, which he said he was making at the suggestion of his probation officer. Here he said he had not gotten the marijuana from Mr. Green; he had gotten it from a gentleman named Lug Head, that Mr. Green was entirely innocent of the offense and that he, Mr. Porter, had made these statements because of police threats when he was in their hands and because he was unable to distinguish between reality and fantasy.

Both the intermediate appellate court and the California Supreme Court unanimously held that Mr. Green was denied his right of confrontation.

Q This follow-up statement that he made after trial, an extra-judicial sworn statement, it really doesn't go very much to the issue before us, does it?

A Well, except to this extent, Mr. Justice, it was made part of the record as part of a motion for a new trial. And I think if you review the four statements and see the incredible inconsistencies, I think to view any statement made

by this man as evidence, even if you look back at the prior two, it simply won't wash. This fourth statement is part of the pattern of four totally inconsistent ---

Q It does, however, rather go more to the question of whether, admitting all this evidence at the trial, was there proof beyond a reasonable doubt when you are dealing with a witness such as this.

Q I would like to ask you another question: Supposing you didn't have this ambulatory testimony and just a straightforward contradictory statement, without any LSD or any equivocation that had been offered, would you still say the confrontation rule which you are arguing for now should be the rule?

A Let me see if I understand it. He gets on the stand and he makes one statement?

Q That is right. And they come up and prove a flat-footed staement the other way, period.

A I think, conceivably, that might be used soley to impeach, and, incidently, I have some question even on that. Because in order, at least in the federal courts, to impeach you have to have both surprise and affirmative damaging evidence given for the other side, which you don't have in the case of this LSD testimony. But, assuming that you could use it only to impeach, I certainly don't agree that you could use the prior statement for the truth ---

Q No matter how unequivocal it was?

A No, sir; I certainly don't, and I will show you why shortly.

Now the State has a quite simple argument, deceptively so. And in some ways it seems to have a certain appeal. They say quite simply that so long as the witness is available at trial, so that the trier of fact can look him in the eye, what possible harm can be done in putting in the prior statements?

Well, the answer is great deal of harm can be done. The right to confrontaion, in order to have any substance, in order to have any meaning, if it is not going to become an empty right, must mean that there is going to be something more than having a witness, a body, available.

MR. CHIEF JUSTICE BURGER: Let's dispense for lunch now, Mr. Prettyman.

(Whereupon, at 12:00 p.m. the argument in the above-entitled matter was recessed to commence again at 1:04 p.m. this day.)

(After the recess the argument in the above-entitled matter was resumed at 1:04 p.m.)

MR. CHIEF JUSTICE BURGER: You may proceed whenever you are ready.

MR. PRETTYMAN: May it please the Court:

There are three basic ingredients of the right of confrontation which I would like to discuss, all three of which were missing in this case. The first one is, perhaps, the least important of the three, but, nevertheless, I think it is a factor; it is the requirement that the witness make the incriminating statement at the crucial hearing itself, so that the subjective, moral impact of the courtroom is brought to bear on it. So that he fully realizes the importance, the seriousness, the gravity of the proceeding and the necessity for telling the truth.

I am not going to elaborate on this except to say that it is a very far cry from giving a statement to a police officer at juvenile headquarters than it is from giving it under oath before a judge or a jury, facing the defendant in the courtr om itself, where the issue of innocence or guilt is going to be decided.

The second basic ingredient is viewing the contemporaneous demeanor of that witness, the concept that the witness will make his inciminating statement in front of the trier of fact. So that the trier of fact, then and there,

as the words are said, can determine whether this man is telling the truth.

The State says that you can judge his demeanor at trial as he is asked about his statement. But is the demeanor at trial in any way comparable to the demeanor on the prior occasion? Of course not.

Porter, in the hands of the police, implicates Green. Porter, out of the hands of the police, fails to implicate Green. We can see his non-implicating demeanor at trial. But his implicating demeanor is lost to us forever. There is no way we can go back and pick that up.

The State's position assumes that you can judge at trial whether or not the witness is lying at trial, and, therefore, you can make an assumption about prior truth. That just isn't so.

In this case, if the judge at trial found that Porter was telling the truth about taking LSD, it follows of course that Green's conviction cannot stand. Because Porter said that the effect of the LSD was such that he simply did not know the facts about the crime.

But what if the judge at the trial didn't believe the story about LSD? What can that possibly prove about the two prior statements? Porter could have lied in his first statement; he could have lied in his second statement; he could have lied at trial or all three occasions.

It is not enough to see the man's demeanor now, weeks or months after those statements were made. You have to be able to compare demeanors, to see the demeanor now and the demeanor then.

As a matter of fact, there is a very great danger here. Because I think there is a tendency to feel when a man is lying at trial, if he has made a prior statement that is different, to feel automatically that the other statement must be true. But that again just isn't so.

Q What would you do, Mr. Prettyman, on that thesis with the traditional hearsay exceptions, dying declarations for example, where the same arguments can be made that you are making now? Would you say that those are unconstitutional too?

A No, Your Honor. In the case of the dying declaration you have two elements that are lacking here. One is there is an assumption that if the witness were available, if he was here at trial, he would tell the same story that he told before. You assume that. Here that is completely refuted and rebutted. Because when the man gets on the stand at the trial, and you are looking him in the eye, he has a different story to tell.

The other thing about the dying declaration is that it has a very high degree of probability of truthfulness. The Courts have always assumed, perhaps rightly or wrongly, that

a man on his death bed is going to tend to tell the truth.

Q Those are legal presumptions that have the force of tradition behind them, and it seems to me that would suggest, perhaps, the earlier question I put to you as to whether or not your argument doesn't turn on the particular facts of the case rather than to a general rule as to the scope of the confrontation problem?

A Your Honor, I think the facts of this case point out rather dramatically the dangers here, but there are other cases which point it out just as well.

Now that you have asked me about that, let me turn to the case that the State is asking you to overrule today, although you denied certiorari when it came up to you before.

In California vs. Johnson you had a mother and a young daughter testifying before the grand jury that the father had had incest with the daughter. Now this is before the grand jury where the defendant cannot be present; his counsel is not allowed to be present.

When the mother and the daughter got on the stand at trial, what did they say? The mother said, "I'll tell you why I told that story, because he beat me up and I was mad at him." And the daugher said, "I told the story, because he found out I was a member of a sex club in high school, and he turned my name over to the U. S. Attorney." They said the stories just are not true, and they convicted that man on the

basis of the grand jury testimony. That is the rule that the State is asking you to adopt.

Q Could you draw any distinction between -- in terms of what kind of a statement the witness made at the previous time? What if the witness had made a statement that was against his interest?

A Your Honor, I think that -- and incidentally, I make a distinction between a civil and criminal proceeding, although the Solicitor General doesn't -- in a criminal proceeding I think the against interest rule goes out the window. I think that in a criminal proceeding, where you have not had the opportunity for discovery of the facts as you do in civil proceedings, the prosecution has to rest on the evidence that it develops at trial, at least for the truth.

Q But, generally, the prior statements by the witness -- if there were some other substitute for reliability, I take it, like in the dying declarations, you would permit those?

A No, because, as I point out, in the case of the dying declaration it is not just a question of a probability of truth. It is a more basic assumption that if the man were here, he would say the same thing.

Q So except for the dying declaration, you wouldn't permit any of the exceptions?

A Only for impeachment purposes, but not for the truth of what they say. I say that for a man to be convicted in a criminal trial he has to have the evidence against him introduced at the trial where the person, as he says the words, can be looked in the eye by the trier of fact.

Q Let's assume that a co-defendant is tried, and one of the co-defendants has confessed and he implicates the other defendant. In Bruton the Court held that -- at least where the co-defendant didn't testify -- you couldn't introduce the confession ---

A That is correct.

Q --- or use it against the other defendant. What if the co-defendant does testify?

A All right. Suppose he testifies, and he says, "In truth and fact, what I said in this alleged confession is simply untrue. It was extracted out of me by force?"

Q You would say then they cannot introduce these prior confessions?

A Well, except possibly for impeachment purposes and possibly ---

Q Well you could introduce it against him?

A Yes, but not against the defendant, absolutely.

Q You would say the prior statement of the defendant, himself, is permissible for the truth of the matter?

A Yes; of course, you have a double problem in

Bruton. Because, as you recall, the instruction to the jury, it is not to be considered against him.

Q Put that aside for a moment.

A Putting that aside, I say, absolutely, the prosecution has to content itself with the evidence that they can produce before the trier of fact. They cannot, as in this case, rely soley upon evidence that was developed out of the sight of the trier of fact, that is written, spoken words that the trier of fact has not seen and which the defendant cannot even find out about.

How can this defendant in this case -- when we talk about the right of cross-examination -- how is he supposed to cross-examine a man who says that he knows nothing about the offense because he had taken LSD? How is he supposed to cross-examine him about a statement made to a police officer at juvenile headquarters, when the kid had been incarcerated for four days -- nothing had happened in his trial, only the two of them were present? He later says in his fourth statement that he had given it partially because of police threats.

Q You would have the same position whether or not the prior statement was made under the influence of LSD; if he would have been perfectly competent and knew exactly, you would take the same position?

A Absolutely. Because the right of confrontation

in any meaningful sense is missing. I think that they view the right of confrontation the same way, in a comparable fashion to the right to counsel. They would say, "So long as you have counsel, that is all that is necessary." That isn't what this Court has said. It says that you have to have the effective assistance of counsel. If the counsel sells the man down the river, you have not had counsel.

Here it is not enough to have a body on the stand that you can throw questions at. You said this in Douglas vs. Alabama where you had the witness present, available; he could be asked questions. But he wasn't answering them, because of self-incrimination. He was denied "effective" confrontation. And that is what is missing here. And that is what I want to turn to.

Q But as Justice Harlan suggested to you, all of these arguments could be made on the dying declaration exception, too, couldn't they? And nothing but, I think Justice Harlan called it tradition -- and presumably behind that tradition -- long human experience supports the exception.

A Your Honor, I can only say to you that the two basic underpinnings of the dying declaration are totally absent here. The only way the dying declaration ever gets in, and it gets in only in the case of the absolute necessity of the witness not being there, the only way is that you assume

that he would testify the same way, and it has a very great degree of probability of truth. Because of those two factors the courts have let it in in the past. Both of those are missing now; the witness is present, and he is giving a different story. Therefore, you do not assume that he gives the same; you have to assume the opposite. The degree of the probability of truth is missing. It can't be said to be present in this case.

Q But the testimony is under oath.

A Not the first statement, no, sir.

Q What about the one at the preliminary hearing?

A The one at the preliminary hearing was under oath. Sir, I am going to address myself very shortly to the proposition that testimony at a preliminary hearing is a very far cry -- as this Court has said -- from testimony at trial. And the right of cross-examination is quite different at the preliminary hearing than it is here.

Q Why? I never heard that before.

A For this reason: In the first place the preliminary hearing is held as soon as possible after arrest and sometimes contemporaneously with the appointment of counsel. Quite often, in the state courts and even in the federal courts, the first time that the appointed attorney sees this man is when he walks into the preliminary hearing, because he was just appointed.

Secondly, the issue at the preliminary hearing is a very narrow one. It is not guilt beyond a reasonable doubt; it is whether there is simply enough evidence to say that there is probable cause to hold the man.

Q What effect does that have on the examination?

A Because, sir, in the first place the cross-examiner has not been able to find the facts. In this case this trial attorney was retained no more than six days and perhaps ---

Q I understand that, but I can't understand the reason for your argument that the examination is somehow different.

A I was saying cross-examination, Mr. Justice.

Q I don't understand why it would be different. It is not in my state, and I don't know why it would be generally.

A In the first place, as I say,the attorney who is going to do the cross-examination simply has not had time to gather the facts to prepare for effective cross-examination. In this case, for example, the attorney knew nothing about Officer Wade's statement and he knew nothing about LSD, just by way of example.

In the second place the courts are constantly striving to keep the issue at the preliminary hearing narrow. Here in the district defendants have attempted a broad gains

cross-examination, attempting to use it for discovery purposes to all the whole range of facts surrounding the case, and they have been denied that right. The trial courts have said no; so long as the issue is the very narrow one of probable cause, that really is all that you can cross-examine.

Q But it's a probable cause of guilt in each case either in the preliminary or the other; one is the probable cause of guilt and the other one is just guilt.

A Well, one is whether there is probable cause to hold him, and the other one is whether there is guilt beyond a reasonable doubt. And those standards ---

Q That is right, but the issue is not what it decides is the same. I just don't understand this idea that there is some difference. It may be that Alabama's rule is different than most states; I am not saying it is not. But that is why I was asking you this question about why the difference. Sometimes a preliminary is not tried for months, 2 months, 3 months.

A Well, on the other hand, the whole purpose of the preliminary is to hold it at an early a time as possible.

Q That is not the whole purpose, not an early a time as possible. They are not always held that early.

A Here in the District there is a statute which requires you do it within 10 days unless you waive it.

Q Well, that may be true; that is why I was asking

you about the difference. It might be different in other states.

A Well, they are asking you for a rule that is going to apply to all preliminary hearings, regardless of when they are held. What I am saying to you is that to have a man available for cross-examination at preliminary hearing is simply not an effective right. As a practical matter, you are not able to cross-examine.

Q That may be true, but I just can't understand it. Because I have tried many; we have examined just like you on the regular trial. There is no difference in it. Sometimes it is a week, 2 months, something, but always we really had a trial.

A I can only assure you, Mr. Justice, that it is quite different in many jurisdictions. In many cases the lawyer at the preli inary hearing isn't even the same as the one at trial.

Q Suppose it is a jurisdiction which does have a regular knock-down and drag-out trial in cross-examination?

A Well, I would still say that if you have a man who gives one story at the preliminary hearing, whether he has been cross-examined for 8 days or not, and he gets on the stand at trial where the issue is entirely different and gives a different story, that the prosecution is stuck with the story that the man tells on the stand. Because the trier

of fact as to ultimate guilt is going to look him in the eye.

In California they can't even be the same judge. It is a different judge. The judge down at the preliminary hearing is a magistrate or a justice of the peace, and not the same man who is going to appear when the ultimate issue o guilt is decided.

I think this case illustrates the fact that there may well have been enough evidence at the preliminary hearing for holding the man. But even the Solicitor General recogniz s that when you start talking about ultimate proof of guilt at the trial, you get into some serious difficulty.

Q Are you not drawing any distinction between the legal relevancy of a statement made at a preliminary trial, where there is a cross-examination, and one made to an officer on the outside?

A I think quite obviously that the statement mad to Officer Wade has all kinds of problems to it, some of which are less serious in the preliminary hearing. But what I am saying is that to equate the preliminary hearing and the cross-examination allowed at the preliminary hearing with the trial is simply not realistic. And, as a matter of fact, goes entirely against the grain of what this Court has said when, itself, has said that the preliminary hearing issues ar entirely different.

Q There is no doubt about the issues being

different; the issue is finally whether he is guilty or probable cause for guilt. Am I to understand from you that if the person should be against you on the issue with reference to the preliminary trial, that he can't be against you on the others -- or rather for you on the others? Are you putting them on the same level?

A Putting which person? I am sorry; I didn't understand the question.

Q The one where they have a chance for cross-examination at a preliminary and the one just where a statement is made to an officer.

A I have said to you, sir, that I do believe there is a difference, and that I think that the difficulty with the statement to Officer Wade is a far more serious one. But, on the other hand, I still think that it is not enough to have a man at a preliminary hearing simply cross-examine.

If you hold this way, look what is going to happen to the effective assistance of counsel. Do you realize the fantastic pressure that this is going to put on counsel to prepare themselves for a full, effective cross-examination at that preliminary hearing?

You have said that counsel has to be at a line-up, because it is a critical confrontation, because not to have him present might derogate from the man's right at trial. What are you going to do about these preliminary hearings? The

man has to prepare himself fully just as he would for trial, because, otherwise, he might miss his only opportunity to tear this man's story down.

Many of these statements are taken, of course, before there even is a defendant, such as in the Johnson Case and such as the statement made to Officer Wade here.

Q If the man testifies at the preliminary hearing one way and then at the hearing on the merits he says I didn't know what happened because I was on LSD, once he made that statement, both the statement read to him and the statement which was made, the defense counsel has unlimited cross-examination.

A At the preliminary hearing or at the trial?

Q At the trial.

A Well, I think this case is the perfect example of why cross-examination at trial in regard to any previous statement is not sufficient; it simply is not. And the reason is that when you have this man at this trial who says, "I don't know anything about the facts, because I was under the influence of LSD," you can talk to him until you are blue in the face about some prior statement, but what are you going to get him to say? Just what you did here. Read page 7 of my brief and see these comments. He says, "Well, I don't know; I guess I said it, but really I just don't know too much about it."

Q Well, you don't deny that you are getting toward the truth?

A Not in this case I don't think you are getting toward the truth, Mr. Justice.

Q Why not?

A If you mean getting further toward the truth from the statement from Officer Wade, I would agree that you have a little better chance.

Q At this point I am not interested in Officer Wade. At this point you can discredit him to the bitter end. The defense counsel.

A The point I am making is what good does it do ---

Q Well, the defense counsel just established that this man is a non-truth-telling person; I've got a better word. That should discredit him should it not?

A All right. If you show that he is lying now, what have you proved about whether he was lying before?

Q Possibly you could show that he never told the truth since he was born.

A I would like to think that is precisely what was shown here, but the man was convicted on the basis of these prior statements.

Q That is just the point; that the judge sitting as the trier of fact does not agree that he just never tells the truth.

A The judge at trial, Mr. Justice, how is he going to know the circumstances under which this man testified at the preliminary hearing? How is he going to see the flicker of lying on his face?

Q He will know as much about it as competent counsel brings out on cross-examination at the trial.

A I submit to you that it isn't very much. I submit to you that he has no opportunity to recreate the scene as the man gave his testimony; that you are allowing a man to testify on one occasion and use it under other circumstances, something that has never been done.

This -- so far as I know -- has never been done before. This rule that they are asking for is a broadening of the common law rule. The very first right under confrontation -- even before the right to cross-examine -- was the right to have the witness come and appear at the trial while he gave his testimony. That was the most basic of all rights.

I say it is not enough to have him cross-examined now about his prior statements. He should be cross-examined about what he knows about the crime and the facts of the crime.

Here that right was simply denied. This man was denied an effective cross-examination just as much as if he would have had a wooden body on the stand. This boy simply could not answer the questions. He didn't know.

Q Well, of course, there is another factor,

isn't there, Mr. Prettyman? That he may have been dissembling at the trial? No one has any way of knowing, subjectively, what was the motivation behind this.

A If I were to guess -- and I confess that it is only a guess -- I would say that this boy at trial really knew that Green did not give him this stuff; that he got it from Lug Head; and that he finally decided he had better get him off.

That is perfectly in conformity with his fourth statement, which in turn is actually supported by evidence at the trial. And it is just as logical to assume that he decided at trial to get him off as it is to assume that one of these prior statements, which conflicted one with the other, was in fact true. That is a guess, Mr. Justice.

But I don't think we should be guessing about this kind of thing. I think the man has to get on the stand and give his story and let you judge him by the way he is giving it now. So that when he gives the incriminating testimony, you look him right in the eye and you tell as best you can if it is true or false.

Now I would like to pass, in the moments remaining to me, to something which I think is extremely important. I have touched on it, but I would like to expand on it a little bit. I am concerned -- if you approve this rule -- about what

is going to happen to this problem of effective assistance of counsel.

It is inconceivable to me that, if these statements are going to come in, that they can come in without counsel being present when they were first made.

Look what is going to happen now to all of these pre-trial proceedings: motions to suppress evidence, hearings on sanity and ability to stand trial, line-ups, preliminary hearings and all the rest of these pre-trial proceedings.

Every one of these proceedings is going to be turned into a forum for the prosecution to get its statements down, to get its case put in, and they couldn't care less about the trial later. They couldn't care less whether the man gets up and even says, "I never made the statement before." Because, under the California statute, it is not even required that he admit he made them.

Do you realize the pressure that this is going to put on the police, for example? They have got a fellow in tow here, down at headquarters, for four days. They could beat a confession out of him, and he gets on the stand, and he says, "I never meant a word of it. They beat me up." And that first statement can be used to convict. It is incredible.

Q Well, subject to all the constitutional rules developed over the years with respect to involuntary confessions.

A Of course, Your Honor. But we are hopeful that the facts would come out and that he could show that he was beaten up. But the point I am making is that even to allow the possibility that a statement out of the defendant's presence, under the tow of the police, could be used as the sole evidence at trial to convict a man, despite what he says at the trial, I think that is inconceivable. I think it goes directly against every concept of confrontation.

You are going to have statements ---

Q Suppose a man comes into the police station and says, "I have just murdered my brother, and I shot him with a 38 revolver, which I am now handing to you. And I am ready and willing to sign anything that you will give me. But, as a matter of fact, I represent myself." And he doesn't have a lawyer or anything else.

A I say that if he goes on the stand at trial and says, "In truth what happened was this: That the guy didn't do it at all; it was somebody else who did it; that I was drunk at the time and just felt like playing a game and came into police headquarters and confessed," I say the prosecution is stuck with that testimony.

Q But he can't use the other?

A No, sir.

Q In his own handwriting?

A Yes, certainly, whether it is in his handwriting

or not.

Q If you keep pushing me, I am going to have six witnesses with him.

A Your Honor, I had a man once tell me that he had committed such a crime. And it turned out that legally he hadn't. He didn't know whether he had done it or not.

Q He had a good lawyer.

A Thank you, sir.

Q Suppose he goes on television and confesses? Would you believe that?

A No, I wouldn't. Because we don't know why he is on television. We don't know whether he confessed under pressure. We don't know whether he may be under LSD.

Q He can explain that he was under pressure. You are saying that there is no way it can be admitted?

A As evidence of the truth of the fact asserted. That is the traditional rule. As the Eighth Circuit has said, that rule has stood the test of time, and the academic ---

Q That a voluntary confession is never admissible?

A Not against the man himself, now. This is against another defendant you are talking about. We are not talking about a confession of the man who shot the woman; we are talking about a confession of one man who implicates the other fellow who is on trial.

Q What do we do with a man who testifies and

has his own tape recorder?

A And again, this is a statement about somebody else, not about himself?

Q About somebody else; it won't come it?

A Not as affirmative proof of guilt against the other party, if that is not the story he gives at trial.

Q And it is your position that there is nothing in the record other than those that will stand up as proof that Green did sell the marijuana?

A No; what I am saying is that the total lack of evidence of guilt itself other than these two statements. There were circumstances which could be said to -- if believed -- corroborate some aspects of it. But I think everyone would agree that if we took these two statements out, there would not be enough evidence.

Q What you want us to say is that, where there is no evidence other than these statements, then the conviction cannot stand?

A No, sir. I do not base it on whether there is enough evidence or not. What I am saying is that you look at each statement itself, whether or not it is enough to convict, whether or not. And you judge it as to whether the statement was made in court before the defendant and the trier of fact. You judge it. Or whether it was made on some other occasion.

Q And once the witness says, "I don't have the

slightest idea of what happened that day, because I was under LSD." And he never contradicts that statement. You cannot use anything similar to these two statements to the contrary, because there is nothing.

A Well, you can use extrinsic proof of some kind, but you cannot use the man's own prior inconsistent statement. That is the great innovation in this California Code. This type of evidence has traditionally been used to impeach a witness, but not, obviously, for the truth of what is in it. And for all of these various, obvious reasons. The dangers are just too great.

Q You would still let it stand for impeachment purposes?

A I would where it met the test; that is the test both of surprise and of ---

Q And you would be content to rely on jury instruction that they can't use it for the truth of the fact, even though as a practical lawyer you probably know the jury would take it that way anyway?

A Well, I don't think we can decide the constitutional question on the basis that the jury will disregard the instruction.

Q Well, that runs into Bruton, doesn't it?

A Yes, sir.

Q You would, therefore, never accept the old

co-conspirator exception?

A The co-conspirator exception only allows the statement in to impeach the particular defendant against whom it comes, and it is not allowed as affirmative evidence of guilt as to the other party. And the jury is so instructed.

But, this Court, as you know, has had difficulty in cases where they felt that it could be considered. And you have reversed cases where a statement has come in that implicated the second defendant. You felt that the jury instruction was not sufficient.

Q Did you say that we said the co-conspirator statement may not be used on the question of guilt or innocence?

A Of the co-conspirator?

Q I am saying that A and B are indicted as co-conspirators. A makes a statement pursuant to the conspiracy implicating B.

A As I understand it, if the first co-conspirator has made a pre-trial statement, and it then comes in as to him. But if it implicates the other co-defendant, the jury must be instructed -- unless he is testifying the same thing at trial, in other words, if it is an out-of-trial statement -- that it can't be used against him.

Q I think that is, perhaps, not quite accurate with respect to the federal rule; that is with respect to co-conspirators. That is generally understood to be a

recognized exception of guilt. But you do not have a conspiracy case.

A No; I, fortunately, do not.

The last point that I would like to make is simply that we are going to have all kinds of conflicts develop between the various goals that we seek in our criminal justice system, if we allow this kind of thing to happen.

As I have indicated, the entire point of the preliminary hearing, for example, is to get it as soon as possible, so that you can free men who are not guilty and who shouldn't be held. Whereas, I am afraid that retained counsel and appointed counsel -- that the great impetus with them if this rule is approved -- is going to delay that preliminary hearing just as long as possible. Because it means that they are going to have to prepare for it the same way they prepare for trial. They know they have got to strike while the anvil is hot at that preliminary hearing.

Every, single experienced trial lawyer is against this academic approach. Because they tell you it is not enough just to have somebody available for cross-examination days or weeks later.

As a matter of fact, it is even error in court to delay cross-examination too long after direct examination. Because the trial lawyers know that if you don't get that man to change or retract his testimony as he makes it, it is going

to become solidified in his mind; it is going to become solidified in the jury's mind. It is going to gain a stature merely by the passage of time, and it is going to be too late to cross-examine that man at some later day about what he might have said long ago.

Q Mr. Prettyman, when you say that this is the universal view of trial lawyers, how would you reconcile that with the recommendation of the American College of Trial Lawyers, which certainly contains some of the most eminent trial lawyers in this country, and a great many of them with approval of exactly what the Solicitor General and the Attorney General of California are arguing here today?

A I have, perhaps,misstated, but I was quoting ---

Q I wasn't suggesting that you misstated, just overstated.

A I was citing, actually, the Eighth Circuit's statement to the effect that trial lawyers did not think that this was an adequate substitute. And my own experience in talking to trial lawyers is that they regard late cross-examination, cross-examination long after the fact, as something that is totally unacceptable as a substitute for cross-examination while the man is testifying.

Moreover, some of these codes and propositions that have been put forward, you know, are not all like this one. Maguire, for example, -- although he is cited as in

support of this -- actually would restrict it to witness statements. And the British Code would not only restrict it to witness statements, but would restrict it to civil proceedings, which is far different. Because there, as you know, you have such a right of discovery before trial; that you can discover all these facts that you would need to know for your trial or cross-examination. But it is not true in criminal cases, in most instances.

I think that the impetus to put off the preliminary hearing as long as possible, so that you can prepare for it, I think is going to be a very serious result of all this.

The California statute is worried about the turncoat witness. The answer to the turncoat witness is a speedy trial. It is not -- Right now prosecutors want a speedy trial, because they want to get that evidence in while it is still fresh in the memories and the minds of the witnesses.

Under the California statute, they couldn't care less about a speedy trial. They have got their case. They have got the statement before Officer Wade and at the preliminary hearing, and they know they can go in and convict on that.

I say that the answer to the turncoat witness is not to take away the most valuable single right the defendant has in a criminal trial; and that is to confront and cross-examine the witnesses against him as the crucial, incriminating testimony comes in.

If you have no more questions, thank you very much.

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

Mr. James.

REBUTTAL ARGUMENT OF WILLIAM E. JAMES

ON BEHALF OF PETITIONER

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

In the few moments that I have left, I think I just want to touch on a few points. I think there is no fact clearer from the decisions of this Court than that the right of confrontation is a trial right. And if there is anything in our adversary system, it is the right of cross-examination by competent counsel.

I believe Mr. Justice Marshall pointed out that if there are discrepancies in the story of a witness, a prior statement, a statement in court, cometent counsel can probe out that statement and determine what the truth is. And the trier of fact has an opportunity to view the witness as he is testifying on the stand.

Now this argument that we have heard about contemporaneous utterances. It comes, I think, from the Supreme Court of California where they used the term "contemporaneous confrontation", which isn't found in the Sixth Amendment as far as I know. It is a sort of "do-it-yourself constitutional" attitude.

If there is to be any confrontation, the personal confrontation at trial should be sufficient-- where the competent counsel has an opportunity to examine the witness, to find out why he made his statement at one time and why he is making this statement. And the trier of fact can view him and determine wherein lies the truth.

We submit that that is all that the Constitution requires.

Q What other states, if any, have got this California statute?

A Well, I believe we cited a recent case out of Kentucky where, by judicial decision, they adopted this rule. This is also true of the State of Wisconsin, as far as I know. California has it. I believe the Second Circuit follows it. And following the Bruton decision and remand by this Court of a number of cases, I think the Ninth Circuit follows it.

If the co-defendant who confesses -- when you have a Bruton type situation -- is present in court and takes the stand and is subject to cross-examination by the particular defendant, that defendant has not been denied confrontation.

I think this was evident from the case that this Court had relating to confrontation just last term, following Bruton. And that was Harrington vs. California. There were four defendants tried together. Harrington was up on appeal to this Court contending that he had been denied confrontation.

There were three confessing co-defendants whose confessions, relating to the crime and those who participated in the crime, were introduced into evidence.

Two of those confessing co-defendants, Bosby and Cooper, did not mention this defendant Harrington by name. They talked about a white boy. And Harrington was the only Caucasian who participated in this abortive robbery and murder.

They specifically said he did not have a gun. This Court held that there was Bruton error as to those two co-defendants' confession, but that it was harmless.

The third confessing co-defendant, Rowan, named Harrington, placed him in the store where the robbery took place with a gun, in possession of a gun. But the significant thing in that case was that the co-defendant Rowan took the stand and was subject to cross-examination by Harrington's counsel. And we submit ---

Q Can that holding stand if your opponents are correct here?

A I don't think so. If they would say that as to Rowan likewise, his statement made out of court -- although he was present in court subject to cross-examination -- would not be admissible. And it would be error of a Bruton type.

Q But Rowan's testimony was no different from his confession.

Q But it was an out-of-court statement.

A It was an out-of-court statement.

Q Well, I know. But he testified -- and that certainly was substantive evidence against Harrington -- he testified at the trial against Harrington.

A Yes; and he was subject to cross-examination by Harrington's counsel.

Q I know he was, but what we are dealing with here is a testimony at the trial which doesn't support the prosecution. And you are relying on statements given to the police officer for the substantive evidence upon which to convict Green, aren't you?

A And the preliminary hearing. Thank you. My time is up.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. James. Mr. Prettyman, you acted at the appointment of the Court and at our request. We thank you for your assistance to the defendant and to the Court. And Mr. Solicitor General, we thank you. The case is submitted.

(Whereupon at 1:45 p.m. the argument in the above-entitled matter was concluded.)