# ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES:

# THE WARREN COURT, 1953 TERM—1968 TERM

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SUPREME COURT, U.S.

# In The
# SUPREME COURT OF THE UNITED STATES

October Term, 1954

Washington, D. C.

October 22, 1954

WILLIAM J. OPPER,

Petitioner,

v.

UNITED STATES OF AMERICA

No. 49

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Washington, D. C.,

Friday, October 22, 1954.

The above-entitled cause came on for oral argument at 12:50 p.m.

PRESENT:

The Chief Justice, Honorable Earl Warren, and Associate Justices Black, Reed, Frankfurter, Douglas, Burton, Clark and Minton.

APPEARANCES:

On behalf of Petitioner:

Frederick Bernays Wiener, Esq.

On behalf of United States of America:

John F. Davis, Esq., Special Assistant to the Attorney General

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PROCEEDINGS

The Chief Justice: Number 49, William J. Opper vs. United States of America.

The Clerk: Counsel are present.

The Chief Justice: Colonel Wiener.

ARGUMENT ON BEHALF OF PETITIONER

By Mr. Wiener

Mr. Wiener: If the Court please, this is not a net worth case, so there will be no safes or satchels full of folding money, nor any saga of the frugal life. It isn't even a tax case.

The only point which this case has in common with any of the others is the question to which Mr. Frankel addressed himself at the close of his argument, namely, the question whether and to what extent admissions after the fact require corroboration; and on that point, there is, in our view, a very significant difference between this case and the others, because in this case, the admissions of the petitioner supply the only competent proof in this record that any crime was committed by anyone, or otherwise stated, there is no case against this petitioner without his own statements.

Now, with that by way of preliminary differentiation, I turn to the facts here.

The petitioner was jointly indicted in the Southern District of Ohio with one Hollifield in a five-count indictment. There were four substantive counts naming Hollifield as principal, and

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the petitioner as aider and abettor, and these substantive counts allege that Hollifield, a civilian employee of the Air Force, agreed to receive and did receive payments from the petitioner in relation to his official actions.

All of the substantive counts are similar except as to the dates and the amounts of the payments or the agreements to pay.

And then there was a fifth count, a conspiracy count, alleging a conspiracy between the two to violate the law prohibiting such payments, and to deprive the United States of the faithful services of its employee.

A motion for severance was overruled; the two were jointly tried; they were both convicted on all counts.

This petitioner appealed to the Sixth Circuit, where his conviction on two of the counts was set aside, and I will advert later on to the significance of that, and this Court then granted certiorari on the admissions, basically on the admissions questions.

The essential facts are few, and they are not in dispute. Hollifield was an equipment designer who prepared specifications for survival kit equipment of the Air Force.

Now, a survival kit, broadly speaking, is an item containing numerous components that is placed on a plane, and if the plane lands or crashes, and anyone is still alive, these articles are to help them survive, be it in the Arctic or in the Tropics, in the jungle or on the ocean.

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Now, the petitioner was a dealer in goggles, and those are items that are useful and used in those survival kits, and the petitioner wanted to become a subcontractor to the prime contractors who were furnishing the kits. His proposals at first were rejected because his goggles didn't measure up to the specifications.

Thereafter, Hollifield changed the specifications; petitioner's goggles were accepted, he became a subcontractor, and the gravamen of the indictment is that he made payments to Hollifield related to the changes in specifications.

Now, the case is here because the only proof in this record arguably competent against the petitioner showing any payment or any agreement to pay, is contained in petitioner's admissions, admissions orally and in writing, made to FBI agents after the date of the acts charged in the indictment.

At the trial, there were introduced extra-judicial statements by Hollifield which admittedly and concededly were inadmissible against the petitioner.

The question, therefore, presented here is: Whether and to what extent those statements of the petitioner require corroboration.

The first inquiry under that heading is whether an admission made after the date of the acts charged as crimes requires corroboration, and on that our starting point is this Court's opinion in the Warszower case, in 312 United States, and since the passage

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is short, in order that the precise language may be before Your Honors, I will read it. It is at page 12 of petitioner's brief:

"The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone."

I pause there to point out a divergency in the Government's approach to that issue. In the Calderon brief it said that that requirement can readily be accepted as firmly imbedded in our law.

In its brief in this case, the Government questions that rule for about six pages.

Now, I do not know whether that divergency reflects that view that inconsistency is more precious than any jewel or whether it is hoped that by first establishing and then abandoning a series of untenable positions there will be some tactical advantage when it comes to defending the main line of resistance.

But, to return to the quotation:

"The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the

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inherent weaknesses of confessions or admissions after the fact."

Now, since we are here clearly concerned with admissions after the fact, we think that this case, with respect to the requirement for corroboration as such, is clearly within the rationale of the Warszower case.

The Government admits that we seem to be within the language of the Warszower case, but at two points in its brief suggests very strongly that this Court did not mean what it said in the Warszower case.

What was the Court asked to say in the Warszower case? In the Government's brief in this case, set out at page 13 of our brief, this is what the then Solicitor General said:

> "It is the Government's contention that independent evidence is required only in the case of confessions, and of admissions made after the event and in the context of conversations, interviews, and proceedings relating to the offense itself. The theory of this position squares with the purpose of the rule requiring corroboration."

Now that, of course, is the precise situation here, "admissions made after the event, and in the context of conversations, interviews and proceedings relating to the offense itself."

I would like to demonstrate that the Government's position in Warszower was correct, and also that Your Honors' position in

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Warszower was correct, and there I come to attempt a distinction, an analytical distincti;on, between confessions and admissions, and I suggest that we will all be assisted if we abandon the labels and concentrate on the realities.

Now, the real difference between a confession and an admission, it seems to me, is this: that a confession is an admission of every element of the offense charged. Admissions, I think, probably break down into two classes: One, is the admission in the nature of a confession which is an admission of one or more of the elements of the offense charged, but not all; those admissions, those partial confessions such as are involved here, we submit, must be treated on a parity with full confessions.

Then there is another kind, and that is an admission of some fact not constituting an element of the offense charged, and as to those there may well be a question. It is not essential to this petitioner's case to urge that those admissions of particular facts stand on the same footing.

Often there is the question, as in the Calderon case, whether the particular item, as to which corroboration is sought, is an ultimate fact or is a subsidiary fact.

I think the Government there also shows a divergence of view in its briefs in the Calderon case, and said this is not the starting point in the Calderon case, is not an essential element of the case. Mr. Holland, on argument, said, yes, he

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thought it was a crucial fact.

Fortunately, I do not have to resolve that. In any event, the difference between, if there is a difference between the quantum of corroboration required for the two kinds of admissions is really related to the rule I will discuss in the course of the argument, namely, whether there is the necessity for independent proof of all elements of the criminal act, apart from what the defendant said but where, as in this case, the admissions supply and relate to the essential elements of the offense, and where, as I will show in this case, they supply the only proof of essential elements of the offense, then we say they are within the scope of the confession rule requiring corroboration, and then that we say is -- I say is -- the meaning of Warszower, and I do not have to go beyond the issue in the Calderon case.

Now, it is true that there are a great many dicta to the effect that admissions go in more easily than confessions; if there is an admission before the fact, yes, Warszower holds that squarely.

It may be true, as to admissions of incicental facts not constituting essential elements of the offense, but it is definitely not true as to the other type of admission which clearly admits essential elements of the offense.

I will take three examples: Suppose an admission is coerced. It is perfectly obvious it is inadmissible, even though it is not a full confession.

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Suppose an admission is obtained through improper inducement? It is perfectly clear, it seems to me, that on that simple issue which is raised in the Smith case, but on that simple issue, if it is shown that the admission was obtained by improper inducement, it would be inadmissible.

And certainly where an admission is obtained from someone unlawfully detained, it is just as inadmissible as a confession obtained in the same circumstances.

So that we feel that the true rule is that if an admission after the fact is used to convict a defendant, because it supplies an essential element of his guilt, it stands on the same footing in every respect as a full confession and, therefore, requires corroboration.

Justice Frankfurter: Your three instances have nothing to do with the principle requiring corroboration?

Mr. Wiener: That is correct, because the admissions --

Justice Frankfurter: They are excluded on another ground.

Mr. Wiener: Yes. But I am addressing myself to the contention made that admissions go in more easily than confessions, and the Government has found a dictum in a footnote in the Stein case which supports it fully -- not very full support, but that is all they have.

Justice Reed: In this particular case, was the admission anything more than that he had loaned the money to Hollifield?

Mr. Wiener: Well, the admission -- I can answer that in the

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next minute. The Government says it was not that kind of an admission here because it was contained in an exculpatory statement, because while admitting a payment to Hollifield by way of loan, he denied guilt, and the Government's position is that only consciously inculpatory admissions are within the ambit of the rule requiring corroboration.

Here again, I suggest we leave to one side labels like "inculpatory," "exculpatory." They are no more helpful than the old, but now largely discarded, distinction between intrinsic and extrinsic fraud.

Justice Frankfurter: We rejected that distinction as to coercion.

Mr. Wiener: Yes, I think so. Certainly after the Hazel-Atlas and Knauer cases that distinction has very little play, if any, even in the field in equity.

I want to concentrate once more on the realities.

The heart of a confession or an admission of the first class is that it is the admission of a fact essential to establish guilt.

It seems to me that the concomitant expression or non-expression of a sense of moral guilt is completely immaterial, because notably in conspiracy cases -- and this involves a conspiracy count -- we know that the concept of conspiracy is very technical, meaningless to laymen and not too meaningful to many lawyers.

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Moreover, here petitioner in the substantive counts was indicted for a violation of 18 U.S.C. 281, a statute directed in terms at government officers, and he was a private citizen.

He was indicted by use of the aiding and abetting provision of the code; but I submit it would take a great deal of imagination for the ordinary layman to assume that he could possibly violate a statute directed against acts by government officers; and also, this indictment was not found until March 1952, and the admissions all date from October 1951, several months beforehand.

Let me test this notion of the Government of the conscious admission of guilt some more. Suppose there is a charge of premeditated murder, and suppose the accused says, "Yes, I shot him through the head with my 45 pistol. It was impulsive, not planned. In my heart I feel innocent; I have no consciousness of guilt, and I feel that history will applaud my act."

Now, that is not a full confession because it does not admit the element of premeditation.

On the Government standard that would not be a conscious admission of guilt and, therefore, would not require any corroboration, so we say that that notion is completely untenable.

When the defendant admits the fact, but denies guilt, certainly it is confession and avoidance, but a confession is nonetheless a confession if you try to drag in a little avoidance at the tag end.

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Now here, this petitioner's admissions clearly touch the fact of guilt. He admits essential elements of the offenses charged, namely, payments and an agreement to pay, and the only inquiry, therefore, is was the admission made after the dates of the acts charged in the indictment; were they made "in the context of conversations, interviews, and proceedings relating to the offense itself," and since here they unquestionably were, we say those admissions require corroboration, and I turn to the next question, what is the quantum of corroboration.

Justice Frankfurter: Before you tell what the quantum is, will you be good enough to state neutrally what were claimed to be the item or items of corroboration.

Mr. Wiener: Yes. The items of corroboration, the change in the specifications, Hollifield changed the specifications. There was one meeting between Opper and Hollifield at which others were present; there was one long-distance phone call from Hollifield in Dayton to Opper in Chicago; there was one trip by Hollifield ---

Justice Frankfurter: What was said is immaterial to the question, just the fact of the talk?

Mr. Wiener: Well, there was a talk at which other persons were present, at which the change in the specifications was discussed. There was no showing of any talk regarding payment. There was proof that Hollifield took a trip to Chicago and returned.

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There is proof also that two days after the date when Hollifield is alleged to have made the payment of $1,000 in cash to Hollifield, two days after Opper cashed a check for $1,000.

Now, so far as the quantum of corroboration is concerned, this Court is writing on a blank slate; it has never really been discussed here.

There are three variants of the rule in the Federal Courts. The original rule in the Federal Courts, restated by Judge Hand, in the Daeche case is this: that a confession is sufficiently corroborative if extra-confessional facts satisfy the judge that the confession is true, and here and now and hereafter when I say "confession" or "extra-confessional" I hope Your Honors will understand that that is shorthand, and is taken to be -- is to be taken to include also admissions after the fact of essential elements. That is the Daeche case.

The confession is sufficiently corroborated if you have outside facts enough to satisfy the judge that the confession is probably true; that is the Daeche or the loose rule.

Then, in the District of Columbia Circuit some nineteen years later, in the Forte case, a stricter rule was laid down to this effect: that a confession needs to be corroborated by a prima facie showing outside of the confession of the corpus, of every element of the corpus delicti.

There must be substantial evidence touching outside the

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confession, touching every element of the corpus delicti, including the scienter.

Then there is a third variant of the rule which is stated in these terms: that it is necessary to show, outside of the confession, that a crime was probably committed by someone. I call that a verbal distinction because it is applied both ways.

It is applied by circuits that follow the Forte rule, and by circuits that follow the Daeche rule.

The decisive distinction between the two is this, even when stated that way: Is it sufficient to prove the corpus delicti through the confession plus the outside evidence, or must you prove the corpus delicti at least prima facie, entirely by outside evidence?

The latter is the accepted rule in the District of Columbia. There is not any doubt about it; it was stated in the Ercoli case, page 48 of the Government's brief, Item (2):

> "such corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence touching and tending to prove each of the main elements or constituent parts of the corpus delicti."

Now, the conflicts in the circuits -- the circuits are in conflict between themselves, and in some cases within themselves, but I think at the present time, the majority of circuits follow Forte.

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Now, the reasons for Forte seem to me, however, far more significant than the mere counting of circuits, and we do not have to speculate as to the reasons that led to the Forte rule, because those reasons were set forth in the opinion.

It was based on experience; it was based specifically on experience in the intervening years with improperly obtained confessions, and the Forte opinion cites the report of the Wickersham Commission.

It was not a case, as the Government seems to feel, of doing homage, undue homage, to the technical concept of corpus delicti, not at all. It was occasioned by a deep and far-reaching judicial distrust of confession.

Now, has our experience since 1937 caused anyone to trust confessions more? The pages of this Court report are eloquent proof of the unreliability of confessions and of the numerous occasions when improper confessions were obtained, and we do not have to go behind the Iron or Bamboo Curtains for examples of brain-washings, we have it right here in Leyra v. Denno, in 347 United States, decided in the last term.

So I say that the experience, the judicial experience, with confessions justifies the majority of courts lining up behind Forte, and so far as I know, no one in the District of Columbia has ever complained that the Forte rule hamstrings law enforcement.

And this also, it seems to me --

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Justice Reed: What do you say about the Ercoli statement -- this is the fourth of the Ercoli statement:

> "If there is substantial evidence of the corpus delicti, independent of the confession, and the two, together, are convincing beyond a reasonable doubt of the defendant's guilt, that is sufficient."

Mr. Wiener: Well, that means this --

Justice Reed: That does not require a complete proof.

Mr. Wiener: That is right, prima facie proof, that is right. The Ercoli-Forte rule does not require proof of the corpus delicti beyond a reasonable doubt, outside of the confession. In other words, there is still a function for the confession.

Justice Reed: Is prima facie evidence sufficient?

Mr. Wiener: Exactly. But there has got to be prima facie or, as they say in Ercoli, substantial evidence touching and tending to prove every element of the offense.

Justice Reed: Well, does that substantial evidence have to be sufficient to make a prima facie case?

Mr. Wiener: Yes.

Justice Reed: You think so? Is that your position?

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Mr. Wiener: Yes. I think that is the position of the cases. I do not think there is any doubt about that, prima facie proof of all the elements.

Justice Reed: Does that mean a man could be convicted without the use of the confession?

Mr. Wiener: Not prima facie, no.

Justice Reed: I mean if he had a prima facie --

Mr. Wiener: Well --

Justice Reed: Otherwise it would be dismissed.

Mr. Wiener: Yes. If you have sufficient to go to the jury outside, he could be convicted without a confession -- well, no, there is still one element that is not there.

Justice Reed: He must have --

Mr. Wiener: There remains under the Forte-Ercoli Rule, there remain two functions for the confession. One is to raise the level of proof from the prima facie to beyond a reasonable doubt and, second, the identity of the defendant as the criminal.

Justice Reed: If the two together convince him beyond reasonable doubt, but that, to me, does not say that the corroborative evidence must be sufficient to establish a prima facie case.

Mr. Wiener: Well, I think very definitely that is the rule of the District of Columbia and of the circuits following it.

Item (2):

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"Such corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence touching and tending to prove each of the main elements or constituent parts of the corpus delicti."

Now, whether substantial is more than prima facie, I do not argue that at all, but there has got to be some evidence of every part of the offense other than the identity of the defendant, and that is why it is frequently expressed as there must be some evidence showing that a crime was probably committed by someone.

In discussing which courts will follow Forte, and which follow Daeche, I think it is very significant that in a United States court, which has more criminal business than any circuit, the United States Court of Military Appeals the Forte rule is followed. The Court of Military Appeals has held that the entire corpus delicti, including the cienter, must be proved outside the confession.

Now, when the government attacks, as it does in its Calderon brief, when it attacks Forte and Ercoli, as an extreme formula, one that carries to technical excess the concept of the corpus delicti, they are in the position of asking that this Court declare that a defendant in the U.S. District Court should have less protection than a G.I. who is accused before a court martial, and I say that when petitioner here asks that this Court adopt

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the strict rule, he is not, therefore, appealing to sentimentality or wishy-washy, softie libertarianism.

Now, tested against the Forte-Ercoli Rule, it seems to me perfectly clear that there is no independent proof of the corpus delicti outside of the petitioner's admission.

Apart from petitioner's admissions, otherwise stated, apart from petitioner's admissions, there is not any proof in this record that a crime was probably committed by anyone.

All right. What is the corpus delicti? As to the substantive offenses, clearly it is the payment or the agreement to pay, as the case may be.

As to the conspiracy count, the corpus delicti is the agreement. I assume for present purposes that the corpus delicti in conspiracy does not include the overt acts.

Justice Reed: Was there any other proof in this case of payment?

Mr. Wiener: No, none whatever, none whatever. The only outside proof, as I recite it --

Justice Reed: Just got the check?

Mr. Wiener: There is no competent proof whatever of any payment or any agreement to pay, outside of petitioner's admissions, and I will list again the items of independent evidence:

The change in specifications, one meeting between the two where others were present, one phone call by Hollifield to

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Opper, one trip by Hollifield to Chicago and back, and one check cashed by Opper two days after he is supposed to have paid the cash to Hollifield.

Now, how does that prove that a crime is probably committed by anybody? How does that possibly prove payment or agreement to pay?

Well, the government says opportunity.

Justice Reed: One check cashed by Opper, that is the check that this man is supposed to have paid him?

Mr. Wiener: He drew the check on Friday the 13th, he cashed it on Monday the 16th. The payment by -- in the indictment it is supposed to -- and in the admission, was paid on Saturday.

Now, how can you pay $1,000 in cash on Saturday with $1,000 in cash that you get from the bank on Monday?

Now, the government --

Justice Reed: You said Opper cashed it?

Mr. Wiener: Opper cashed it, yes. Opper drew a check to cash on Friday; he took it to his bank on Monday. He got $1,000 in cash. That, according to the government, is the money with which he paid Hollifield on the preceding Saturday.

Now, the government lines up these scattered items under the headings, "opportunity means motives."

Now, that is not lawyers' language, if the Court please; that is the terminology of detective fiction.

Justice Clark: On the probability of an offense being

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committed, what about the telephone call?

Mr. Wiener: Nothing to show what it was about.

Justice Clark: Well, he says here in his confession, sometime in April --

Mr. Wiener: Oh, yes; oh, yes, Your Honor, it is in the confession.

Justice Clark: Then they have the proof of the telephone company that a telephone call was made; then they have the proof of the airlines that on the next day following the telephone that he flew to Chicago.

Mr. Wiener: Well, there is no question that there is sufficient proof under the loose Daeche standard, because there is enough to corroborate the truth of the confession.

But under the strict rule, there is insufficient proof because there is nothing to show that a crime was committed by anyone.

There is evidence to show that a crime might have been committed, but that is not the test under the strict rule. You have to show that it probably was committed, and when the government talks in the language of "Who dun it," of opportunity and means and motive, that seems to me the clearest proof that they cannot show by independent proof commission of any crime.

Now, there is an additional reason, we submit, why this Court should adopt the strict Forte-Ercoli Rule, and that additional reason is the danger inherent in conspiracy prosecutions, to which opinions here have many times adverted, namely, the

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danger that evidence admissible in law against only one defendant is, in fact, going to be used by the triers of the facts against another, and you have the same danger in any kind of joint trial, and this record is a laboratory example of the the existence of that danger.

Now, it is true, that the government here says, well, the conspiracy count was not necessary. Well, maybe it was not, but it was included, and petitioner was convicted of a felony under it.

The motion for severance was denied. I think the chances of having had either case go to the jury if the defendants had been tried separately, are very slight. I will not speculate on what a jury might have done.

It would be a very thin case indeed if they had been tried separately.

Now, we say it is a laboratory example of the dangers of conspiracy trials and joint trials.

There were repeated admonitions and instructions as each one -- as each defendant's admission was introduced, that those admissions were not competent evidence against the other, and I think it is fair to say that the record is studded with those admissions as a fruitcake is studded with raisins.

Notwithstanding those instructions, the jury convicted this petitioner on all the counts, and the experienced and distinguished trial Judge, now unfortunately deceased -- that is the

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characterization of the Court of Appeals -- the distinguished and experienced trial Judge denied motions to acquit on all of the counts. He denied motions for a new trial on all of the counts. He imposed sentence on all of the counts, and the Court of Appeals had to set aside the judgment on two of the counts because the only evidence connecting this petitioner with those counts was the inadmissible testimony of Hollifield, and that is why we say it is a laboratory example of those dangers because, and it shows, it shows the utter impossibility of limiting at the all-important trial level, whenever you have a trial for conspiracy or a joint trial by use of the aider and abettor device of the inadmissible statements of the one limiting those two to that point.

Now, is there a way of minimizing that danger? We say, yes. We say you minimize that danger by the adoption of the strict rule of corroboration which requires independent proof of every element of the crime, independent proof that a crime has probably been committed by someone; because, if you adopt that rule, the attention of the jury will be focused on the independent evidence, which is admissible against all of the defendants, rather than on the declarations of one co-conspirator or co-defendant which are admissible only against him.

So that we say by adopting this strict rule which already has the support of most of the circuits, which now has the support, is the law in the military tribunals, by adopting that

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rule, this Court has a magnificent opportunity to clean up what are now two very messy areas in criminal law: one is the area of the confessions, and the other is the area of conspiracy prosecution, and that is why we submit that the strict rule should be adopted, and if it is, then this judgment must be reversed.

Justice Frankfurter: Before you sit down, you have said that most of the courts of appeals -- would you be good enough -- you seem to have set it forth in your brief -- to indicate in which circuits this question was squarely raised, namely, the question as to the quantum of proof of corroboration or the quality of the proof --

Mr. Wiener: Yes.

Justice Frankfurter: -- rather than quantity.

Mr. Wiener: Yes. In the District of Columbia Circuit.

Justice Frankfurter: Have you got them referred to in your brief?

Mr. Wiener: Yes, but I can run through them very easily.

Justice Frankfurter: All right, I would like you to do so.

Mr. Wiener: In the District of Columbia Circuit it is the strict rule; in the First Circuit it is mentioned in the Smith Case, just preceding this; there is really no differentiation there.

In the Second Circuit there is the loose rule, although there is an expression in the last case, possibly inadvertently,

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but indicating, perhaps, a momentary lapse, but up to that time the Second Circuit was very proud of its own rule, and would not change it.

The Third Circuit follows the strict rule.

Justice Frankfurter: You mean in a decision?

Mr. Wiener: Yes, in DiOrio. That is cited in the brief.

The Fourth Circuit has passed on the question three times, and has not resolved it.

The Fifth Circuit, the Vogt Case, I think leans toward Daeche, although using the intermediate formula.

The Sixth Circuit, in the Anderson Case, uses the intermediate formula, and leans toward Daeche.

The Seventh, Eighth, Ninth and Tenth follow the strict rule; the Ninth, I think, must be regarded now in the strict column after the Calderon Case, which clearly follows the strict rule, so that on my count there are six circuits clearly following the strict rule.

The Chief Justice: Mr. Davis.

ARGUMENT ON BEHALF OF THE UNITED STATES

By Mr. Davis

Mr. Davis: If the Court please, I think that it is important, in the first place, to bring this case back to the particular admissions and the circumstances under which they were given.

Although the distinguished counsel for the petitioner was careful not to imply that the F.B.I. has sat in the shade and

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rubbed red pepper into his client's eyes, in fact much of the basis of his argument is that the confessions, admissions are improperly extorted from the defendant.

I think, therefore, that the first thing that we should do is to see what these admissions were, and the circumstances under which they were gotten.

This case started through an investigation of procurement practices in Dayton, Ohio. The Office of Special Investigation of the Air Force, and the Federal Bureau of Investigation obtained facts first there which implicated the petitioner, Mr. Opper, whose office was in Chicago.

The Office of the Federal Bureau of Investigation called Mr. Opper in in Chicago, and gave him a chance to tell his side of the story, since he had been implicated in these procurement difficulties in Ohio.

He came in for the first time on October 10, 1951, and he told the F.B.I. agents of his business of manufacturing and selling compasses and goggles, and of his general relation with Hollifield; but when the agent asked him whether there had been any financial transactions with Hollifield, he replied that as to that matter he felt he had better not answer until he had had a chance to consult with counsel. Apparently at that point the interview ceased.

He came in two days later. There is no indication whether or not he had consulted counsel, but it was two days later, on

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October 12, that he returned to the Office of the Federal Bureau of Investigation, and at that time he gave an oral statement which contains most of the facts which were later incorporated in the evidence.

He stated that he had had dealings with Mr. Hollifield, that Mr. Hollifield had told him that he was hard-pressed for money, that he had called him on the phone and told him that he would come to see him, that he had come to see him, and that he, Opper, had given him $1,000 at that time to meet a mortgage on his house presumably.

This $1,000, says Mr. Opper, he took from his own house -- he had it in cash at his own home -- and he took it and handed it to the petitioner in a washroom of a restaurant. He had drawn a check for $1,000 which, this being a Saturday when the payment was made, he could not cash on that day.

He cashed it on the following Monday, and with the cash he replaced the $1,000 fund which he kept at his home for business purposes.

The agents for the Federal Bureau of Investigation then asked Mr. Opper whether he had any records to substantiate this story, and he said that he had none.

They asked him whether he would care to reduce his statement to writing, and he stated that he would like to have an opportunity to go over what records he did have, and also to refresh his memory as to dates before putting anything in writing; and at that

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time he left the office and did not return until 4 days later.

Four days later he returned to the office of Federal Bureau of Investigation, and he had prepared away from the office the statement which was introduced in evidence, the written statement which was introduced in evidence as Government's Exhibit No. 41, I believe. This detailed somewhat more generally the same facts which he had stated orally.

The agent for the Federal Bureau of Investigation said that he felt the statement lacked something in detail, and could he make the statements more concrete as to the manner of payment, and Mr. Opper replied that he felt he had cooperated as much as was necessary, and he did not think it was necessary to make it any more concrete.

He did, however, give to the agent some checks, some checks that had been returned to him from the bank, his own checks, and some bank statements.

Then there was one final interview between the Federal Bureau of Investigation and Mr. Opper which took place, I think, about ten days later, and at that time they again asked him, "Can't we have in more detail your statement as to what took place in writing, particularly as to the financial transaction?"

Mr. Opper said, "I shall have to consult with my own counsel to see whether I will give you anything more."

He called up on November 1st and said, no, that he had decided not to give any further written statements.

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Now, with the written statement which is in the record, and the testimony as to the oral statements, it seems that these admissions give every indication of trustworthiness.

They were carefully considered and voluntary statements by a responsible person, made on advice of his counsel. He was not under any detention; he was not even accused of any crime at the time he made the statement.

He was told he was implicated in this investigation, and given a chance to explain his side of the story, which he did apparently voluntarily and fragmentarily.

Now, if any admissions by a defendant are to be admitted against him without corroboration, it would seem that under these circumstances these are as trustworthy as admissions can be.

They are considered, careful statements by this man, and the only reason for requiring that they be corroborated in this case must be that if there is a reason -- if there is some overwhelming public policy -- which requires the corroboration of all admissions before they can be used. It must be an application of a blanket rule rather than the application of any special rule of this particular case.

Justice Frankfurter: Mr. Davis, I do not quite follow, I do not understand the requirment of corroboration -- the requirement for corroboration is a very different question as to anything having to do with coercion. If the one has to do with coercion,

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you do not have to bother about corroboration or not.

Mr. Davis: That is true.

Justice Frankfurter: Therefore, if there were any element or any claim of coercion, would we not be addressing ourselves to that and not whether the statement is trustworthy? Am I wrong in thinking that I might think this is as trustworthy as it can be, and that does not answer the question?

Mr. Davis: I think it may answer the question, but I think that in addition to corroboration --

Justice Frankfurter: But could it of itself? It could not of itself.

Suppose there were nothing in this case except a confession which, I believe, without a doubt is absolutely accurate in view of the circumstances, such as you have narrated in which they were made; do I have to go further, assuming there is no corroboration at all? Do I have to say this is trustworthy and, therefore, I think it is all right to --

Mr. Davis: No. Then you would leave it up to the jury as to how much they would want to believe of the statement, and how much they would disbelieve. You would admit it yourself.

Justice Frankfurter: I do not think so. I guess I do not understand it. If it is clear that a confession without corroboration, non -- can it go to the jury at all?

Mr. Davis: No.

Justice Frankfurter: All right.

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Mr. Davis: If it is a confession, if it a blanket rule requiring corroboration, it cannot go to the jury; it will have to be excluded.

Justice Frankfurter: Isn't there some rule about it that there is some corroboration required?

Mr. Davis: Yes. I say as to confessions, the confession cannot go to the jury under -- may I say, too, here that this Court has never adapted that rule, although it has recognized the rule, and for the purposes of this case we must assume that it is a rule which the Court wants us to argue because of the nature of the questions which are presented the way this case comes up, as to whether the rule as to confessions applies as to admissions, but I would point out that even as to confessions this court has never adopted the rule of corroboration with respect to confessions.

Justice Frankfurter: You think that is open here?

Mr. Davis: That is certainly open in this Court.

Justice Frankfurter: Very well.

Mr. Davis: And there is respectable authority for the fact that the rule should not be followed, but we are not urging that here because of the way in which this case comes up and which it seems to be assumed that we are to argue the application of the rule as to admissions rather than to take the rule itself.

Justice Frankfurter: Well, it would help me a great deal

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if you would tell me whether I should leave out of my mind or keep in my mind the question of whether a confession may be admitted and may be the basis of a conviction wholly devoid of anything that anybody would call corroboration. If you tell me I must keep my mind open on that, I can assure you I can keep it open, because I have already indicated my general predisposition, but I had not supposed that we are now going to say that Warszower was just an assumption which, when another case comes along, we will throw overboard.

Now, which is it, what position is the government taking?

Mr. Davis: The government is not urging that you overthrow the general rule.

Justice Frankfurter: All right.

Mr. Davis: But if I may say so, I still hope that, although we do not urge it, that you will bear in mind, I think, this Court has never adopted it, and that there is strong authority for not adopting it.

But in our brief -- neither of our briefs -- we have not urged it in our brief, and I do not argue and I do not plan to argue here that you should abandon that rule or fail to impose it.

Excuse me, Mr. Justice.

Justice Black: That is all right.

I do not quite understand how you -- how we can decide it without taking into account the government's position on that

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question. What is the difference between a confession and an admission?

Mr. Davis: That I am coming to. I think there is a very clear difference. A confession, as I would define the term, and as I find the authority to define it, is an acknowledgment of guilt. I refer particularly to Chamberlain's definition, which, it seems to me, fits clearly, most clearly, into the concept which we have here.

He says that it is an acknowledgment of guilt, of criminal liability or of such facts as, unless justified, directly and necessarily imply it.

In other words, a confession is a situation where a man admits that he has done the thing which is wrong. It does not necessarily mean that he admits moral guilt. It means that he admits that he has done the thing which the law appears to prohibit.

Justice Black: Is that necessarily the scope? Suppose a man admits he killed another, and then we try to find out who killed him. He admits he killed him. Sometime later he says that he did it, but it was in self defense. Would that be a confession or an admission?

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Mr. Davis: I think probably if he admitted that he killed the man, that it would be a confession.

Justice Black: It would not necessarily --

Mr. Davis: The other, self-defense, is a matter of defense; it is a matter of excuse, but he has committed the thing which the law prohibits, the killing of the person.

Justice Black: I say the law prohibits it. It is premeditated; the murder or some other word that they use. The mere fact that one admits that he killed another would not be necessarily an admission that he had done anything wrong.

Mr. Davis: That is right. I may have misunderstood. I thought you had meant self-defense, that it was an admission in the nature of a felonious killing.

If it were, for example, an automobile accident, where it was a question of gross negligence, and the man told the investigators, "I ran down X but I was driving under 15 miles an hour, and I was driving very carefully."

Justice Black: Suppose he did not put that latter part in it -- "I ran over him" -- and three or four days later he was asked whether he ran over him, and he said, "I did."

Mr. Davis: I think that would be in the nature of a confession; I think that is an admission.

Justice Black: I have not yet heard any definition distinguishing between the two that would be satisfactory in every case.

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Mr. Davis: Well --

Justice Frankfurter: Take the Fisher case, if I may add to your automobile case. The murder in the cathedral, premeditation -- it was part of the burden of the Government to establish it -- and if Fisher had said, "Yes, I killed him," that would not be a confession, according to the Chamberlain definition.

Mr. Davis: I think it would, Your Honor.

Justice Frankfurter: It would?

Mr. Davis: Because it says "acknowledgement of guilt of criminal liability or of such facts, unless justified directly and necessarily implied."

Justice Reed: Are you making a distinction between homicide and murder?

Mr. Davis: No, I was not, Your Honor.

Justice Reed: You were speaking of murder.

Mr. Davis: Yes, I was speaking of felonious homicide, first degree murder, second degree murder, not justifiable homicide under certain circumstances.

Justice Frankfurter: Really, Mr. Davis, unless I misconceive the law of first degree murder in the District, if Fisher had said, "I killed this woman," and that is all you had, it would not possibly conflict him.

Mr. Davis: That is true. He has not admitted the entire crime, and if we take the old rule of confessions, that the

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confession must include the entire crime --

Justice Frankfurter: Or the second part of Chamberlain's definition.

Mr. Davis: (Continuing) -- or such facts as, unless justified, directly and necessarily imply it -- I think maybe you are right; I think there is not the implication of intent there in Mr. Chamberlain's definition.

Here, however, maybe we can approach it from another point of view, and that is when there is a disclaimer, a disclaimer of guilt, as there is in the admissions which are made in the present case, whatever the line to be drawn between confessions and non-confessions in the close cases when there is a disclaimer of guilt, that is clearly not a confession, it is a denial of guilt as contrasted with an admission of guilt.

The rule as to corroboration, as we see it, arises from the distrust which courts have habitually held towards confessions of guilt, admissions of guilt.

The strange situation where a person invites his own self-destruction by telling the officials of the law, "I did this thing and I should be punished," the courts have habitually felt that a man should not lose his liberty, perhaps his life, merely on the basis of the fact that he himself invites that.

Now, that is not the kind of thing which happens in the kind of an admission which we have here. The admission is not an invitation to any disaster. On the contrary, the man was

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defending himself.

There is no reason to believe that there was any mental aberration here, no reason to believe that this arises from bad advice that he will get off more easily if he cooperates, no reason to believe that he is doing anything but stating his side of the case as strongly and as best he can.

I think an example of the reason it can be trusted can be given again in the traffic field.

If an accident occurs, and the police officer comes upon the scene and asks the man who is standing there what happened, the man says, "Well, Officer, I was driving only 15 miles an hour, and I was driving very carefully, and he stepped out from behind the other car," there is every reason to believe, as just from human experience, that the man was actually driving the car. If he had not been driving the car, one would have expected his defense to have been that he was not driving the car, that someone else was driving. But when he seizes upon the other elements and defends himself on that ground, the admission that he was driving the car carrier conviction; it is a reasonable thing to accept.

That is, as I see it, the basic difference between a confession and this kind of an admission. One is a natural, reasonable sort of thing for a person to do in defending himself; the other carries in itself the seeds of distrust, which writers on evidence, going back to Blackstone, have always

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stated is reason for doubt.

But factually the person who knows the most about what the defendant did in these circumstances is the defendant himself, and once we have passed the initial test of voluntariness and once we have gotten by this question of whether or not it may be induced by some improper motives, it seems as though a man's own statements as to what occurred are not only trustworthy evidence but, in fact, as good evidence as we can get.

That, I think, is the basic reason why we should distinguish between admissions and confessions.

Let us see what the authorities are. The petitioner, of course, starts out with the Warszower case, which is the expression of this Court, which appears to draw the analogy between admissions after the fact and confessions.

It seems to us that that is a perfectly natural way to approach the problem in the Warsower case. In that case, the admission was made before the events which were asserted to be criminal, and so it was perfectly apparent to the Court that these statements were not either induced by improper motives or did not arise from some guilt complex on the part of the speaker.

They could not have been because the statments were made before the event, and so it was quite natural in holding that these admissions by the defendant could be used against a defendant, to refer to the fact that they were made before the

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event, and to contrast it with statements that were made after the event; and in that respect, of course, the admissions made after the event fall in the same line as confessions, but I do not think the Court was meaning to say, meaning to imply, that all confessions after -- all admissions after the event should require corroboration.

If they did, they were overlooking and, perhaps, not strangely, an old case in this Court, the Miles case, in 109 United States, I believe, where this particular issue was before the Court.

Justice Frankfurter: One hundred three.

Mr. Davis: One hundred three United States, in 1880.

This particular issue of whether admissions after the fact need to be corroborated, was specifically before the Court.

Unfortunately, and probably the reason why the case has not been cited more frequently, the Court does not discuss the issue in reaching the decision, but it was the subject of a request for instructions in the trial court; it was the subject of briefing and exceptions before this Court.

The particular issue of whether those admissions needed to be corroborated was squarely presented to the Supreme Court, and the Supreme Court admitted -- stated that those admissions should be admitted without making any statement with respect to corroboration.

So far as authority goes, the direct holding of this Court,

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the direct holding of this Court is in favor of taking admissions without corroboration.

When we get to the question of how admissions have been treated in the courts of appeals, here again there is no strong line of authority. Courts of appeals have repeatedly made the assertion that admissions are to be admitted more freely than confessions, but there are cases --

Justice Reed: Do you lump all admissions in the same category, distinguishing only between confessions and admissions?

Mr. Davis: Well --

Justice Reed: Is what you have in mind that an admission might be of a fact that was almost a confession, does not require confirmation?

Mr. Davis: I would distinguish between denials of guilt, and admissions which are made in the sense of a denial of guilt, admissions which are neutral, and admissions which constitute a confession of guilt.

I think that it is only those that constitute confessions of guilt, admissions of guilt, which are subject to this inherent difficulty which requires corroboratio...

I think the neutral admissions and the denials of guilt should fall in the line of being trustworthy statements which should be accepted without artificial rules as to admissibility.

Justice Reed: But the admission of a fact that is an element of the crime, you do not make that distinction?

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Mr. Davis: No, Your Honor; that is my case here. The payment of the money, for example, is an element of the crime, and I urge, just as driving the car in the accident is an element of the crime, if the man said, "I was driving only 15 miles an hour," I would not say that had to be corroborated that he was driving; he stated that he was driving, and we can accept that without corroboration.

Justice Black: Most of the so-called confession cases we have had have been cases where a man has confessed that he was there and he did something, but that the other fellow really did the evil act; and I find it difficult myself to believe that you can draw a line between one kind of a statement, making an admission, and another a confession; and I think, if I am not mistaken, so far as coercion is concerned, it does not make any difference if the man says, "I did it," or "I had an excuse for it."

Mr. Davis: That is true, certainly as to coerced statements of any kind, whether they be admissions or confessions, and whether they be made by the defendant or some other person, if they are coerced, then they reflect the thoughts of the coercer rather than the speaker, and they should not be received in evidence.

Justice Frankfurter: It is immaterial that trustworthiness can be established.

Mr. Davis: As my learned friend would say, we need a

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prophylactic rule against using that kind of evidence in trials, and so we do not permit coerced statements to be used in evidence, that is no way to try cases.

Justice Frankfurter: So that the question is not trustworthiness, that is not the touchstone of admissibility in that category of cases. I am not saying that --

Mr. Davis: That is right, in that category of cases.

Justice Frankfurter: I am not saying you can transfer it over.

Mr. Davis: That is right; but in this category of cases trustworthiness or a feeling that the statements are not trustworthy, is the basis of the rule requiring an artificial test before they can be admitted rather than leaving them to the jury.

Justice Frankfurter: I suggested another consideration, Mr. Davis.

Mr. Davis: I want to come to that, and that is your suggestion is that a man should not be convicted out of his own mouth on any matter which is important to him.

Justice Frankfurter: I said this: The rule in most American -- certainly in the State courts -- the prevailing American rule is not because of that, but it is a reflection of that which lies behind the constitutional provision that a man shall not be convicted out of his own mouth.

Mr. Davis: It is a sound rule, and certainly there is some element of it in here; but if the man's statements are because

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of the way in which they are made and because of the nature of the statement, not only good evidence, but really the best evidence you can get because the man was there.

Justice Frankfurter: He is the only witness.

Mr. Davis: In this case, when I come to it, I will show you it is not the only evidence, but it is the best because he was there and knows, and if he is telling the truth he is in the best position to tell the truth, if anybody, why, then those statements are admitted and, as an example of that, I give you the Warszower case itself, where the man is convicted on the basis of statements made out of his own mouth, and why?

It is because under the circumstances under which those statements were made they were trustworthy statements, and one could leave them to the jury rather than barring them from admission on the ground of some artificial rule of evidence.

Justice Black: You mean we have to determine whether it is admissible or whether they should be corroborated?

Mr. Davis: I think that should not be the rule as to admissibility. I think that should be a rule which is left to the jury under proper instructions. In other words, we should not determine whether evidence should be admitted on the ground of whether or not the trial court believes that it is trustworthy; that is a question which should be left to the jury under proper instructions after the admission is admitted.

But I am suggesting that the basis for the rule requiring

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corroboration of confessions is the basic untrustworthiness of confessions, and I am stating that particularly with respect to denials of guilt -- a man putting in his defense, that you do not have that element of untrustworthiness which has required corroboration in the case of confessions, but, on the contrary, you have as sound evidence, as trustworthy evidence, as you can have and that, therefore, the rule with respect to confessions, if this Court wishes to adopt it, should not be translated and applied to admissions.

Justice Black: It seems to me that your position indicates the dilemma in which the Government finds itself in arguing the case, for this reason: The words "confession" and "admission" have been used in this Court's opinions in separate categories, marking off all these distinctions, and the basis of the feeling of their statement that confessions as to the offenses cannot be used unless corroborated, but admissionc can.

You are trying, I think, as well as anybody could -- I do not see how anybody could -- show the difference between confessions -- to show the difference, and say that they are admissions -- the same reasoning does not apply. Maybe it would be the truth -- but a confession maybe would be false; and I find it difficult, if we are going to have the rule, as you say adopt the rule, that corroboration is required, I would say that it would apply to confessions and not admissions, because I would not know what the difference was.

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Mr. Davis: May I suggest that as to one type of admissions this Court has already said corroboration is not necessary, so that it is clear that we can differentiate in these situations and say that as to admissions before the event, as to admissions before the event, and whatever happens afterward, corroboration is not necessary.

Justice Frankfurter: In a way, even simple words like "admission" have a multi-meaning -- in a way, that is not an admission that we are talking about, an admission in relation to the offense, because the offense has not yet come, as it were, into being; it has not yet been completed because it has not come into being.

Mr. Davis: All right. That is right. That statement by a defendant which proves to be against his interest and on which he is convicted even from his own mouth --

Justice Frankfurter: It turned out to be against his own interest.

Mr. Davis: (Continuing) -- turned out to be against his own interest.

Justice Frankfurter: At the time he was not in any danger.

Mr. Davis: That is right, any more than in many of these cases, as in Opper, he was not in danger.

Justice Frankfurter: Well, he must have been awfully stupid if he did not know the vultures were circling about him.

Mr. Davis: What I am suggesting is that we can distinguish

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between different kinds of statements, and see whether there is inherent in them the seed of lack of trustworthiness, the imperfection which requires an artificial rule.

Confessions have that seed because it is a strange thing for a man to invite self-disaster, and you wonder why did he do it, was he crazy, was he coerced? Why did he invite self-disaster?

But when a man stands up and says, "I didn't do this thing, this is what happened," you do not have that same element of accusing himself and, therefore, that is absent there. In that case his statement is very much like the statement of the man that is made before the crime takes place; he is making a statement in his own behalf, stating it as well as he can to present his side of the picture.

Justice Frankfurter: Perhaps the English have thrown overboard the whole thing because of the difficulty in drawing lines.

Take a case in which he makes a statement about what has been characterized, I think correctly, as a crucial fact; that is the thing that will land him in jail, a crucial fact. But by no stretch of the imagination could you call it a confession.

Mr. Davis: That is correct.

Justice Frankfurter: It is awfully difficult for me to say that if he had said, "Yes, I did it,' you could not use it, but he discloses the crucial fact which inevitably proves he did it, that one is more trustworthy than the other.

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(Luncheon recess)

The Chief Justice: Mr. Davis.

Mr. Davis: If the Court please, I think I will move on to the second portion of my argument which proceeds on the assumption, which I hope will not turn out to be the fact, proceeds on the assumption that this Court will apply the corroboration rule to admissions such as are involved in this case, and then the question is, what degree of corroboration is necessary, how far must all of the elements of the corpus delicti be corroborated?

I think I can state that -- well, petitioner's counsel has admitted that under the Daeche rule, which is that not all of the elements of the corpus delicti must be corroborated, that if that rule is adopted there is sufficient corroboration in this case.

Let me make that clear. The crime involved -- and I speak only of the substantive crime for present purposes -- the substantive crime consisted of the payment of money to a Government official for the performance of services in a matter in which the Government was interested, in this case related to the terms of the particular crime, the payment of money by Opper to Calderon, a Government official, for his services in passing upon the specifications for sun goggles for a contract under which the Air Force was buying survival kits.

Now, there is certainly evidence -- and I do not think it

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is disputed -- there is evidence to go to the jury, that Mr. Hollifield -- did I say Calderon? I meant Hollifield is the Government official -- Mr. Hollifield, the Government official, did pass upon the specifications and did change the specifications with respect to the sun goggles in order to -- and it does not have to be proved that this was a wrongful act -- it may have been an appropriate act -- but nevertheless he did change the specifications for sun glasses, and under them Opper's sun glasses were admissible in the survival kits.

So the question is, there are two elements in the crime; one, the services which have been substantially proved, and the other is whether he was paid money in connection with those services.

Now, if we accept the Daeche rule that not all of the elements of the corpus delicti must be established, but only an element of the corpus delicti that the evidence need only point to, support that other element, then there can be no question that the element of the services is established so that this man is not going to be convicted on the basis of his admission alone. It will be his admission, if you please, with respect to the payment of money, plus services which are proved outside of the payment of money.

Justice Black: You say there is no question about the services? I understood that Mr. Wiener had challenged that.

Mr. Davis: Well, there is no doubt, Your Honor, that

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Hollifield's duties were to pass upon the specification, and that he did pass upon the specification.

Justice Black: That is right.

Mr. Davis: So that he did the acts which are involved. The only question is was he paid money for doing those acts.

Justice Black: I see.

Mr. Davis: Again, it is not an element of the crime that these were wrongful acts, either. It may be that the Government saved money through changing the specifications of the goggles, and that these goggles were perfectly good goggles.

The only question is whether an outside contractor should pay money to a Government official for services which he is under a duty to perform for his employer, the United States, and his services here consisted of passing upon the contents of these survival kits.

Justice Black: The dispute is whether he did it on account of the payment of money and whether it had been proven that the money was paid.

Mr. Davis: That is right; that is right, Your Honor.

But under the Daeche rule we can accept the admission to support an element of the corpus delicti as long as there is outside evidence to support the remaining elements of the corpus delicti.

Justice Frankfurter: Under your rule, would there be corroboration if it were proved alieunde that he was in Chicago

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or whoever was in Chicago that is related to this transaction on that day, on a particular day? I am not giving a horrible example; I am just trying to find out -- I take it you do not mean there have to be three items; one item might be enough?

Mr. Davis: I really do not know how to answer that question, Mr. Justice Frankfurter.

Justice Frankfurter: Pardon me.

Mr. Davis: I really do not know how to answer that. It is very close. It is such a colorless fact, it adds very little, it is hardly substantial by itself to support the confession, the admission.

Justice Frankfurter: It is one item. Maybe you say it is de minimis. Is it de minimis?

Mr. Davis: I do not know; it seems to me that it is very slight -- it is like saying that the statement that someone did something is corroborated by the fact that he was alive. To be sure he could not do it unless he was alive; he could not do it unless he was in Chicago, but the corroboration is so slight.

Justice Frankfurter: How about drawing money, drawing cash, without the amount --

Mr. Davis: Well, I think you are coming close.

Justice Frankfurter: Getting warmer.

Mr. Davis: But turning to the question of the corroboration of the payment in this case, if I may for a moment, we must

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remember that the admission that was involved in this case is a fairly detailed admission.

He not only said he paid him $1,000, but fortunately he went on and gave some of the details as to the way he made the payment. He went home and got $1,000 from his house; he drew a check which he cashed on the following Monday; he gave the exact date that it took place on, namely, the 14th of April.

He mentioned the fact of a telephone call; he gave quite a little incidental detail with relation to these payments.

Now, much of the corroborative evidence deals not only with motives and so forth, but there is support for these particular details with respect to the telephone conversation the day before, there is in the evidence the record of the telephone company showing a telephone call from Mr. Hollifield's telephone in Dayton to Mr. Opper, by name, in Chicago on the 13th of April, 1951, which is precisely what Mr. Opper stated as the facts.

Justice Black: As to the date, too?

Mr. Davis: The date, too.

Then we have --

Justice Reed: That would not be corroboration by the introduction of evidence as to any element of the crime, would it?

Mr. Davis: Standing by itself, this evidence proves nothing, except it was a telephone conversation; it does not show that anyone has done anything wrong. It supports, however --

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Justice Reed: Standing by itself, if that was the only corroboration, do you still figure that that was enough?

Mr. Davis: No, I think not. I think that you have to take all of these details.

Let me relate the full amount of the corroboration, and we can tell a little better whether I am right in saying that if there is -- if there needs to be corroboration that there was.

I do not know that we get anywhere by taking each individual item, if we have a whole group of items, which I think, in the whole, corroborates whether an individual one does or not.

Justice Black: Have you stated them altogether in the brief?

Mr. Davis: Yes, I have.

Justice Black: Just consecutively?

Mr. Davis: Yes.

Justice Black: In an assembly line?

Mr. Davis: Yes; they are stated at page -- what Mr. Wiener referred to as the dime novel detective approach, or something like that -- $2 detective novel.

They appear on pages 53 and 54 of my brief.

First, I call attention to the fact that the telephone call, which was proved by the record from the telephone company; then the airline ticket office records which show that Hollifield reserved and used airline tickets from Dayton to Chicago on the 14th of April, which is the date payment was

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supposed to be made; and now I come to this $1,000 check, which seems to me to be among the strongest of the items.

The check is dated, strangely enough, April 13th. April 13th is the date of the telephone call.

Mr. Opper stated that he got the money on the 14th, paid it to Hollifield on the 14th, and that he cashed this check on the 16th.

There was evidence by the bank teller who cashed the check that this -- that Mr. Opper cashed a check made out to cash for $1,000 on the 16th of April; in other words, these details tie in precisely with the terms of the admissions made by --

Justice Black: Who cashed that?

Mr. Davis: Opper cashed the check; Opper got the money from his own home.

Justice Black: On the 14th?

Mr. Davis: Opper got money on the 14th.

Justice Black: I thought you said he cashed this check on the --

Mr. Davis: He cashed the check on the 16th. Opper's statement is, "I had it at home" -- and I do not give it exactly - "I had it at home, $1,000 in cash which I went and got and paid over to Hollifield. I replenished my cash supply by cashing a check for $1,000 on the following Monday when the banks were open. I was unable to do it on the date of the

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payment because the banks were closed, it being a Saturday."

Justice Burton: Does that explain the date of April 13th. He would have his $1,000 at home, and write a check out and take $1,000 out, and put it in that pile, and he could not cash it until Monday; he cashed it on the 16th.

Mr. Davis: That is correct; that is in effect his explanation of what went on, the presence of the check and the presence of the bank statement shows that the account was debited with $1,000 on the 16th, would seem to me to be strong evidence that his story is true.

Justice Reed: Is this the only cash check in a series of checks?

Mr. Davis: I do not know whether any of the other checks were made out to cash; there were other large checks which were charged against his account, but they are not in evidence, and I have no idea, I do not know whether they were made out to cash or made out to some other person. This particular check is made out to cash and does not have any indication on it,that it does not have Hollifield's name or anything like that.

As a matter of fact, it has New York expense written up in the corner, "NY Ex," which is explained that the funds were used for a trip to New York, the $1,000.

Justice Reed: Was the account a personal account?

Mr. Davis: It was his personal account, I believe; I am not sure; it is in the record. I will have to check on it.

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But all this detail as to whether the -- the account is in the name of -- it appears in the third volume of the record, page 104, and it is a personal account in the name of Mr. William J. Opper.

All of this detail with respect to the payment is necessary only if we accept the stricter rule as to corroboration, namely, that all of the factors, all of the elements of the corpus delicit must be proved by outside evidence.

If we accept the more lenient rule of the Second Circuit, then the fact that there is corroboration on other elements of the corpus delicti prevents this defendant from being convicted on the basis of his admissions alone, and it is sufficient.

However, I think in this case the record is sufficient to justify the rule in the Second Circuit or in the Court of Appeals, and that there is no occasion here to distinguish between the two rules.

But I do suggest that if we are going to translate into this field of admissions a strict rule as to the admissibility of evidence, that we need not go further than is necessary in order to prevent a man from being convicted out of his own mouth alone, and that we should, if there is occasion to do so, restrict the artificial admissions on evidence as much as is consistent with the purpose for imposing conditions, and it seems to the Government that the principles established by the Second Circuit do accomplish that end, and that there is no need of going as far as the Third Circuit does.

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The third issue in this case is whether or not the admissions made by Hollifield, the co-defendant, were used by the jury or were considered by the court below against this petitioner so that he was, in effect, convicted on the basis of the admissions or confessions of his co-defendant.

If that happened, that was imporper, because the confessions of Hollifield were clearly not admissible. They were made independently of any conspiracy between the two; they were admissible only against him.

He cannot confess a crime for Opper, and the question is whether or not this conviction should be reversed because we are convinced that the jury did not follow what counsel has admitted, the meticulous instructions of the Judge with respect to limiting the use of this evidence.

It is hard to tell, it is impossible to tell, what, in fact, the jury did take into consideration in the juryroom.

We know, however, or we believe, that there is sufficient evidence outside of Hollifield's confessions to justify a conviction, and it seems that the only way you can pass upon these cases is to assume that the jury has followed the instructions which have been given to it -- either that, or in this kind of a case, there should not be joint trials. There is no middle ground that I know of. But if you do not have joint trials in this case, in this kind of a case, you come to other elements of unfairness.

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This particular kind of a case, where there is the assertion that a government official has been paid money by a third party for services to the government is a particularly appropriate kind of a case for a joint trial because the facts which have to be proved in relation to one defendant are directly material in the trial of the other defendant. It is not an artificial kind of a joint trial.

The transaction is a joint transaction, and it seems as though that is the appropriate place for a joint trial, and if you do not have a joint trial, either the defendant who comes first or the defendant who comes second, if one is convicted and the other is not, is in a position to complain that the government took unfair advantage and took its strongest case first, and then went against the weakest case, or besides being a burden on the Court, it does work unfairly as to the defendants themselves to separate this kind of a trial.

It gives the government a trial run in one case, maybe its strongest case, that it can then use in its weakest case.

As to whether or not the Court of Appeals itself gave improper weight to Hollifield's confession, again all we can do is to read what the court did. The court clearly states that Hollifield's confessions were admissible only against Hollifield, and in no case confuses the admissions of one with respect to the other.

Therefore, I think there is little or no substance to this

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third point in the case, and basically this case will go on the question of the application of the corroborative rules to the problem of admissions.

Since I have one minute left -- I have more than one minute left, five minutes left -- I would like to address myself -- just make one more attempt to point out what I believe should be the grounds for distinguishing confessions and admissions, and I will start by saying that I believe there is a large shadowy area in here where there can be dispute whether the statement is a confession or an admission, and I will go further and say if the rule is to be applied, that if there is a shadowy area, then the rule requiring corroboration should certainly be applied if it appears to be the kind of thing which is a confession.

But when you start at one end of this field and have admissions of guilt, acknowledgments of guilt, maybe a full acknowledgment of guilt, and you come down to the other end and have a categorical denial of guilt, it seems to me that there is no confusion between those two ends of the spectrum, and that there is no difficulty in applying the rule requiring corroboration to the top and not to the bottom.

REBUTTAL ARGUMENT ON BEHALF OF THE PETITIONER

By Mr. Wiener

Mr. Wiener: If the Court please, I think I can best assist the Court by bringing into focus the issues on which the parties

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are still apart.

First is the cloudy classification between confessions and admissions. I think the cloudiness is due primarily to the attempt to inject the element of inner consciousness of guilt.

I suggest that we concentrate on what it is that makes a confession a confession, and let us leave the labels alone, and I say that where a defendant admits every element of the offense charged, that is a confession, regardless of whether he says, "I am innocent in my heart, I am sorry I did it; I guess I was foolish or I deserve punishment, and when do I start going to jail."

An admission in the sense that it requires the same kind of corroboration that a confession requires, an admission is a statement that admits less than all of the elements of the offense charged, and again it makes no difference whether coupled with the admission of elements of the offense, there is any statement about inner moral feeling, "I am guilty, I am not guilty," or anything like that.

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And that second class which is involved here, we say, requires the same kind of corroboration, and we say that that is what the Court had in mind in the Warszower Case, and it is what the Court was asked to say in the Warszower Case.

This Court, if it made a mistake, was led astray by the government. It was not led astray; the government took the correct position.

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Then we get a more questiorable area which I mentioned by way of distinction, and that is where the admission does not touch an element of the offense, but it admits particular facts.

There are two questions there: Does every admission of a fact have to be corroborated? We do not go that far; we take no position on it.

Does every admission of a crucial fact have to be corroborated even though it is not an element of the offense? We do not have to say that it does. Your Honors will have that problem to resolve in the Calderon Case.

The only position that this petitioner has to take is to say that where the admission covers an essential element of the offense charged, then it requires corroboration.

Now, the second issue which I will take a little out of order, what about the quantum of corroboration?

As I said in the argument-in-chief, there is no doubt that under the loose Daeche rule there is sufficient corroboration. I do not question that at all.

I think also that it must be admitted, although the government is apparently not prepared to concede it, it must be admitted that under the strict rule, the Forte-Ercoli Rule, which has the support of most of the circuits, you have got to make some proof of every element of the offense outside of what the defendant himself says; and I think it must be conceded

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that no such case is made out because, take Hollifield's statement out of the case, it is admitted they must go out; take petitioner's statements out of the case, do you have in this record any evidence that a crime was probably committed by someone?

I think the only appropriate answer, I mean the only objective answer anyone could make, is no, you do not have a showing that a crime was probably committed by someone, absent the statements of the two co-defendants.

That brings us to the question which rule of corroboration should be adopted here. We think, of course, that is a question -- there are reasons we have urged in the brief and orally why the strict rule should be adopted.

The strict rule is based on experience with confessions. The strict rule has won over most of the circuits.

The military rule shifted from the Daeche Rule to the strict Forte Rule. There must be some reason behind this unanimity of opinion, and one reason is that confessions are very untrustworthy, and they ought to be discouraged.

Basically, of course, it is a matter of judgment how bad are they. Well, most courts that have wrestled with it feel they are bad and they ought to be discouraged and, therefore, the strict rule of corroboration is applied, and it has not hampered law enforcement here in the District where it has been the law for a long time.

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Now, as to the conspiracy item, I am afraid my brother Davis was knocking down a straw man as the case appears on the briefs filed on the merits. We do not contend that the Court below, in affirming the conviction, relied on Hollifield's statement. We do not make that contention at all.

We say, after screening the record, that the dangers implicit in conspiracy that one man's statements will be used against his co-defendant although they are inadmissible in law against him, we say that danger is demonstrated in this case.

We cannot assume that the jury followed the Judge's instructions. We know they did not, because if they followed them, they could not have found this petitioner guilty on the counts where the Court of Appeals set aside the conviction.

So in the present posture of this case, we refer to the danger implicit in conspiracy prosecutions, the danger implicit in joint trials as another supporting reason why the strict Forte-Ercoli Rule of corroboration should be followed, because it will minimize that danger; it will minimize that danger because it will focus the jury's attention, it will concentrate the jury's attention, to the independent evidence which is admissible against all of the defendants rather than on the statements of a particular defendant which are admissible only against him; and that is why we feel that this Court should adopt the strict rule of corroboration, and if it does, there is no question but that this conviction must be reversed.

(Whereupon, at 2:55 o'clock p.m., the hearing in the above-entitled matter was concluded.)

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