

ORIGINAL

In the

Supreme Court of the United States

HARRY PARKER,

Petitioner,

v.

JAMES RANDOLPH, ET AL.,

Respondents.

No. 78-99

Washington, D. C.
March 20, 1979

Pages 1 thru 47

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Tuesday, March 20, 1979.

The above-entitled matter came on for argument at
2:00 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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Petitioner

WALTER L. EVANS, ESQ., Brown and Evans, 161 Jefferson
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Tennessee 38103; on behalf of the Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Parker v. Randolph.

Mr. Terry, I think you may proceed now Whenever you are ready.

ORAL ARGUMENT OF MICHAEL E. TERRY, ESQ.,

ON BEHALF OF THE PETITIONER

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

The case which I have the privilege of presenting to this Court began in Memphis, Tennessee, in 1970. As the Sixth Circuit opinion states, this matter involves a sequence of events which have the flavor of the old west before the law crossed the Pecos. The difference is that here, as the Sixth Circuit stated, there are no real heroes and there was a trial.

It seems that in July of 1970, a Las Vegas gambler by the name of William Douglas came to Memphis with a gun, an alias and a device for marking cards. Douglas sought through some local connections in Memphis a card game. He was introduced eventually to a Memphis gambler by the name of Robert Wood. Wood apparently felt that through his skill at poker he would be able to relieve Douglas of his money. However, Douglas opted for the advantages of marking the cards, rather than the uncertainties of skill and in three head-to-head

matches he relieved Wood, Robert Wood, of approximately \$5,000.

Now, Wood apparently had some confidence in himself and in his game because he didn't blame the losses on his own incompetence and began to suspect that he was being cheated. He became convinced that he was being cheated and, together with his brother, Joe Wood, they formed a plan to recoup his losses. That plan involved using Joe Wood and the three respondents in this matter to rob a fourth poker game between Mr. Douglas and Robert Wood. Thus, Robert Wood's plan in a nutshell was to recoup his gambling losses by the robbery proceeds.

Prior to the night of the fourth game, Mr. Joe Wood, his brother, and two of the respondents here, Hamilton and Pickens, went to the scene of the fourth game, looked it over, planned their strategy and, according to the evidence, there was some discussion on how the proceeds would be split.

On that night of the game, there were four people in the room when the game began, Robert Wood, Joe Wood, Mr. Douglas, and an individual by the name of Tommy Thomas, who is said to be a mutual acquaintance of Douglas and Robert Wood.

At about 9:00 o'clock that evening, Joe Wood began to unfold the robbery plan. He got up and said he was going to the store to buy some beer. He went outside and he met with the three respondents. They did go to the store. They

did buy some beer, but apparently they stationed their cars some place suitable to their plan and they approached the apartment together. Mr. Douglas became suspicious. He heard noise outside and he armed himself with a shotgun.

Now, Joe Wood removed the three respondents from right outside the door of the apartment before Douglas could see them and he was allowed to crawl back into the apartment while being watched with Douglas who was armed with a shotgun. Once Joe Wood was back inside, the game continued. The three respondents were outside.

Joe Wood then a short time later, telling the people inside that he had to use the bathroom, entered the bathroom of the apartment and came out armed with a gun. He apparently was a little nervous at that time because he gave the gun to his brother Robert Wood who was seated at the table playing cards with Douglas, and Joe Wood left, leaving the door to the apartment open.

Tommy Thomas at that time was lying on the floor. He got up, closed the door and attempted to mediate between Douglas and Robert Wood. As the evidence shows, Douglas apparently reached for a gun that was in his belt at that time and Robert Wood killed him.

QUESTION: Where was this, in a private residence or --

MR. TERRY: This was in an apartment house in

Memphis. It was in --

QUESTION: In an apartment?

MR. TERRY: Yes, sir. Within seconds from the shots that eventually killed Mr. Douglas, the door flew open and the three respondents came running in to carry out their plan of robbery. They fired some shots within the apartment, robbed Thomas of some \$50 to \$80, took the proceeds off the table, took a knife and then five eventual defendants in this case, the two Wood brothers and three respondents here, Hamilton, Pickens and Randolph, left.

They went from there, according to the evidence, over to Hamilton's apartment where they hid the weapons, divided up the money and went their separate ways. Douglas, of course, died.

Subsequently, they were all either arrested or they turned themselves in to the Memphis Police Department. Prior to their trial, four of these individuals gave statements to the Memphis Police Department. Joe Wood never gave a statement, and he did not testify at the trial. Robert Wood gave a detailed lengthy statement that was later introduced at trial in a redacted form. Robert Wood also testified at the trial. Mr. Hamilton --

QUESTION: What is the state's position on the redaction? Somewhere in the briefs I had the impression that the state conceded the redaction was not effective. Do you

agree to that?

MR. TERRY: Mr. Justice, I think that the redaction process was admirable. I do not concede that it wasn't effective. What I mean by that is I don't think that redaction when there are two defendants sitting there and the references are two others is ever a substitution for cross-examination or confrontation. But I do think it is a factor to be considered when you get to the issue of the devastating effect of the co-defendant's statement. In other words, I think it is better in this case that there was an attempt at redaction. For instance, in some of the cases here where this Court has found harmless error, like Schneble and Brown, there was no redaction.

QUESTION: So it isn't a question of erroneous redaction where some word that should have gone out was left in?

MR. TERRY: No, sir. I perceive the redaction as a factor to be considered in reaching the final question.

QUESTION: Now in this trial there were how many co-defendants?

MR. TERRY: There were five, sir.

QUESTION: Five co-defendants.

MR. TERRY: That's right.

QUESTION: And the charges were murder and robbery?

MR. TERRY: They were charged under the felony

murder statute, murder in perpetration of a robbery.

QUESTION: All charged with murder and some of them also, if not all of them, charged with robbery as well?

MR. TERRY: They were charged -- I don't believe they were charged with armed robbery.

QUESTION: It is not a matter of belief, it is what happened.

MR. TERRY: It is my understanding of the record that they were charged with murder in the perpetration of a robbery and were convicted of that offense.

QUESTION: The five co-defendants in one trial?

MR. TERRY: Yes, Your Honor.

Now, Hamilton gave two confessions, one oral which was immediately reduced to writing and admitted in a redacted form. He went through a question and answer routine with the police department, that was transcribed but not admitted. Randolph gave two oral statements which were later admitted, both redacted and admitted. Pickens went through the same question and answer routine with the police department, the questions and the answers were transcribed, there was redaction performed and they were admitted. In Pikens' case, he signed the transcription and initialled each page also. The redaction process reduced any references to the other defendants, either eliminated them, deleted them or changed them to "they" references, two "other party" references, "we"

of "guy." The "guy" reference is the only indication of the sex of the people who were involved. There is no indication of any other physical characteristics, no indication of race.

Now, it is the position of the State of Tennessee here that the question before this Court is a Sixth Amendment question involving the right to confrontation. We maintain that the error in this matter below stems from an inappropriate application of Bruton to the facts in this case. We believe it is impossible to draw a logical analogy between these facts and the facts in the Bruton case.

To do that, to draw that analogy ignores some very real distinctions in this case and also ignores the decisions of this Court in Schneble, Harrington and more recently in Brown. We think the most important distinction between this case and Bruton is that in this case the parties raising the Bruton objection had confessed themselves, that their confessions are internally consistent, that they corroborate each other, and that they have been redacted.

We think that these factors have an impact, have an effect on the question of devastation, the question that concerned this Court very much in Bruton. We think that the risk of prejudice to these people is eliminated because of the internal consistency, because of the redaction. We think that the overall effect of the confession is simply cumulative.

I think another important distinction between this

case and Bruton is the testimony of Robert Wood and the testimony of Tommy Thomas, Robert, --,

QUESTION: Mr. Terry, are you basically making harmless error argument?

MR. TERRY: Mr. Justice, I think that it is fair to say that, but I think that --

QUESTION: The reason I am asking, supposing one of these confessions had been very, very brief and really didn't -- wasn't enough to constitute proof beyond a reasonable doubt, was just some kind of inculpatory statement that tended to hurt him in the trial, would he be disabled from making a Bruton objection if you didn't have enough -- if there were not proof beyond a reasonable doubt, apart from the other confessions? In other words, are you arguing as a matter of law that whenever you confess you don't have the Bruton objection, or are you arguing in this case that it is harmless error?

MR. TERRY: The problem I have with that, Mr. Justice Stevens, is starting with Bruton as a starting point, when you have more than one confession or when the objector is also a confessor. I think at that point you should go back to the Sixth Amendment and the question should be confrontation, and what does confrontation require and whether the remedy has to be what occurred in Bruton. In Bruton I think, under the facts in Bruton, George Bruton was convicted

on hearsay. There was very little else there. Here that is a different situation and that is why I don't like to say harmless error, because harmless error assumes a Bruton violation and I don't think there was a Bruton violation here. If there is a violation, it is a Sixth Amendment violation.

QUESTION: Well, is it because each defendant confessed or because the confession of each defendant was very, very probative against him?

MR. TERRY: I think the most important distinction is that they confessed, they incriminated themselves.

QUESTION: You would make the same argument even if you didn't have a confession from Robert Wood and if you didn't have a lot of detail in each confession -- say, for example that Pickens had a very short confession in which he just said, "Well, I met with these people but then I went home," and he didn't really say very much, and that is all he confessed to. Would he be disqualified from raising a Bruton objection? And you don't have a Wood confession in there and basically your proof consists of what is in the Randolph confession and the Pickens confession.

MR. TERRY: No, I think Mr. Pickens would be in a much better situation because --

QUESTION: Well, as a matter of law, would he be able to make a Bruton objection? He would have made a

confession.

MR. TERRY: Again -- and I don't want to appear to argue with you -- I think he should make a Sixth Amendment objection, a right to confrontation objection --

QUESTION: Yes.

MR. TERRY: -- no cross-examination, "I'm being convicted on hearsay," he would be saying --

QUESTION: Yes.

MR. TERRY: -- not Bruton. It is just not Bruton because Bruton has one confession and the person raising it is --

QUESTION: But he is being convicted on hearsay.

MR. TERRY: -- is sitting there silently, not testifying and not confessing and I think that you have a different situation when you have corroborative confessions --

QUESTION: You see, what I am trying to find out is whether you are making a legal argument or a factual argument. You make a very strong factual argument in your brief that the evidence is overwhelming against each of these people, but is that because of this particular record or because as a matter of law none of them has the right to make this --

MR. TERRY: I think it is because of this particular record and I think that under harmless error -- I am saying harmless error under the Sixth Amendment, not harmless error under Bruton, and that I know is confusing but I am not the

only one confused. If you read the circuits in this situation, they are very much split and they go through a process of trying to figure out exactly what they are saying, and some of them in the end say it doesn't make any difference what we are saying. But I think the important thing is to go back to the right to confrontation and not stop at Bruton, go all the way back and say what does confrontation require. If confrontation requires cross-examination, and there is no cross-examination, then what is the remedy.

In Bruton's situation, he is convicted on hearsay. In this situation they are not. So the remedy does not have to be reversal. The remedy here can be affirmance. Even if you say that there is a technical violation of a right to cross-examine that is secured by the Sixth Amendment, there still does not have to be the drastic remedy that was necessary for --

QUESTION: Mr. Terry, tell me, Mr. Pickens, the holding below is that his confession was improperly admitted against him, isn't it?

MR. TERRY: Because of Miranda.

QUESTION: So there is no interlocking confession issue as to him under Brutons, is there here, as the case comes here?

MR. TERRY: I would be less than candid to tell you that we are in as good a position with Pickens as we are with

Randolph and Hamilton.

QUESTION: If it was improperly admitted, then there is obviously no interlocking confession issue at all as to him, is there, and Bruton was violated as to him. You have just suggested that in his situation he may have been the victim of a conviction on hearsay evidence.

MR. TERRY: That's correct, except --

QUESTION: As least as to Pickens, isn't he entitled to an affirmance here?

MR. TERRY: Pickens was identified by Robert Wood.

QUESTION: I know, but you said yourself, as I understand it, three confessions were introduced -- four.

MR. TERRY: Because Robert Wood's was in, too.

QUESTION: And it has been held now that Pickens' was improperly introduced.

MR. TERRY: Yes, sir.

QUESTION: Then if his conviction rests on the three confessions that were introduced, why isn't that a Bruton situation?

MR. TERRY: It is not a Bruton situation because --

QUESTION: As to him?

MR. TERRY: As to him it is not because --

QUESTION: If his conviction rests only on the confessions of the others that were introduced?

MR. TERRY: -- because Robert Wood testified at

trial and he said Pickens was one of those people who came through that door, and he was cross-examined and in cross-examination Pickens' counsel asked one question. He said to Robert Wood, "Did Wilber Pickens work for your brother?" He never contested the identification, and Robert Wood had just identified his man as coming through --

QUESTION: What you are telling me is there is evidence other than --

MR. TERRY: Yes.

QUESTION: -- the confession --

MR. TERRY: Yes.

QUESTION: -- to wit, the evidence of Robert Wood.

MR. TERRY: Yes, and that is different than Bruton.

QUESTION: Which of these defendants, if any or maybe all of them, testified at the trial?

MR. TERRY: Robert Wood. Robert Wood testified and the other three did not testify.

QUESTION: Well, you told us there were five co-defendants.

MR. TERRY: Joe Wood did not either. Joe Wood, the reason I am treating him different is he made no statement either. He just --

QUESTION: But he was a co-defendant?

MR. TERRY: He was a co-defendant.

QUESTION: Only one of the five testified and that

was Robert Wood?

MR. TERRY: Yes, sir.

QUESTION: In the Bruton case, there was Evans whose confession was the critical document or the critical fact, I guess it was an oral confession testified to by some policeman or someone, and Evans didn't testify. Did Bruton? Neither of the co-defendants testified?

MR. TERRY: No.

QUESTION: All they had was the confession of Evans as reported by a third party and the trial court said you can't use that except against Evans, and this Court held that despite those instruction it was so damaging with respect to Bruton and violated so greatly his Sixth Amendment right to confrontation that that conviction was reversed. Is that it?

MR. TERRY: That's accurate.

QUESTION: But neither Evans nor Bruton testified?

MR. TERRY: Neither one testified and there was no redaction.

QUESTION: Right.

MR. TERRY: And an examination of this Court found in rendering an opinion that Evans' confession was just about it against Bruton. As a matter of fact, later on Evans' conviction was reversed because --

QUESTION: Well, that had happened before the case got here, as I remember it.

MR. TERRY: Right.

QUESTION: Isn't that correct?

MR. TERRY: Correct, before it got here. So --

QUESTION: We just had Bruton's case here.

MR. TERRY: That's correct. And Bruton, the weight of the evidence in the record against Bruton was Evans' confession which was hearsay.

QUESTION: Although the trial had been told by the trial judge to disregard with respect to Bruton.

MR. TERRY: Yes, they had and that is what this Court said --

QUESTION: The judge must have considered there was evidence other than that confession to take the case to the jury.

MR. TERRY: I would think so, but I don't think that there was much in reading this Court's opinion. I think this Court found that there wasn't much other than that.

QUESTION: Bruton was a federal prosecution, wasn't it?

MR. TERRY: Yes, it was. Yes, it was.

I think that if you go through the testimony in this record other than the confessions, put the confessions aside and go through everything else, go through Robert Wood's testimony, go through Tommy Thomas' testimony, go through the police officers' ballistic report, go through the finding of

the weapons of Hamilton. At the end of that review -- there was also a number of witnesses outside the apartment who could not positively identify the people but could relate physical characteristics. At the end of that review, there is only one question that is left and that is who were those three people who broke down that door and came in there, what was their names, who were they. That is the only thing left unanswered by the competent admissible evidence in this record.

That question is answered by the people who broke down the door themselves. They come in then, one by one, and say "I did it, that was me," and that is the only value, that is the only value of their confession. That is the only thing that you get from their confession that you don't already have. And you sort of have that, although you don't have it as well as any prosecutor would like to have it in Robert Wood's identification of them.

QUESTION: Mr. Terry, may I come back a moment to Pickens' and Wood's testimony. I am looking at Footnote 27 of your brief, at page 19: "The petitioner is cognizant of the district court's finding that Pickens' confession was admitted in violation of Miranda. *** The Court of Appeals' decision affirmed this finding in the last sentence of its opinion. This Court limited the writ of certiorari to the Bruton issue." How is there any Bruton issue here as to

Pickens?

MR. TERRY: How is there a Bruton issue?

QUESTION: Yes.

MR. TERRY: Well, there is a Bruton issue. He is here complaining --

QUESTION: He's not here complaining, you're complaining. He is satisfied with what happened below.

MR. TERRY: But I am complaining that the writ of habeas corpus was issued because he has been successful with a Bruton argument in the Sixth Circuit. The Sixth Circuit opinion says that Pickens' rights were violated according to Bruton and they talk about Miranda in about two sentences and I --

QUESTION: Well, if his confession was improperly admitted, then I don't see how there is anything about his confession that affects the holding as to Bruton in his favor, because he was then convicted only on the testimony of the --

MR. TERRY: I agree with you. I agree --

QUESTION: In any event, whether or not there might also be a Bruton issue with respect to him, his conviction has been reversed because of a Miranda violation.

MR. TERRY: No.

QUESTION: Isn't that correct?

MR. TERRY: No. His confession has been struck from this record because of a Miranda --

QUESTION: Well, therefore wasn't his conviction reversed, for a new trial? That is generally the result.--

MR. TERRY: No, Your Honor.

QUESTION: -- if a confession is improperly admitted.

MR. TERRY: Not if you can say that there is still enough evidence in this record to convict --

QUESTION: No, no, no, at least that is news to me. If a confession is wrongfully admitted at trial against a defendant in a criminal case, regardless of the other evidence, that conviction is reversed for a new trial, isn't it?

MR. TERRY: Well, I --

QUESTION: Isn't it?

MR. TERRY: I think that that has been the holding of this Court in the past.

QUESTION: A good many times.

MR. TERRY: And what I urge with regard to Pickens is -- and I mean to emphasize this, I don't mean to give you the impression that I think that we are as well off with regard to Pickens as we are with Hamilton and Randolph.

QUESTION: Well, all of these convictions were reversed by the Court of Appeals, were they not?

MR. TERRY: Yes, sir.

QUESTION: And Pickens was reversed because of, among other -- maybe two reasons, but one of them was that his self-incriminatory statement was admitted against him in

violation of the Miranda rule and that would alone lead to the reversal of his conviction, would it not?

MR. TERRY: About the only thing the Court of Appeals said about that was that they were reversing under Bruton and they went through pages and pages --

QUESTION: What is your second question in your petition for cert which we refused to review? Did this apply to Pickens?

MR. TERRY: It has to do with --

QUESTION: Whether the Court of Appeals and the District Court violated 2254(d) by finding that one of the respondents was denied his right to counsel, is that Pickens?

MR. TERRY: Yes, sir.

QUESTION: But we refused to review that.

MR. TERRY: I know and I am not asking you to review it, not again. I already have asked you but I am not asking you now. I am not asking you to review that.

QUESTION: So Pickens' conviction was reversed for that reason alone, if for no other?

MR. TERRY: Pickens' conviction, by reading the Court of Appeals opinion, was reversed for violation of Bruton. In the bottom line of their opinion, they say, "We do not have to reach the Miranda issue or discuss it, but we have looked at it and we agree with the District Court, and that is about it."

QUESTION: Even that isn't technically accurate. Federal habeas Courts of Appeals don't reverse convictions, do they? They either affirm or reverse the grant or denial of the writ by the District Court.

MR. TERRY: They issue the writ of habeas corpus.

QUESTION: That's right.

MR. TERRY: In this case, that meant that we had a reasonable time to retry them or let them go.

I would like to reserve some time to rebut --

QUESTION: Mr. Pickens, isn't he the one that didn't get any amount of this whole thing, the others got \$50 apiece and --

MR. TERRY: I think the only place you can make that finding is in his own confession. If you read everybody else's version, Pickens got as much as everybody else.

QUESTION: He got \$50, too?

MR. TERRY: \$50.

QUESTION: He claimed he didn't get anything.

MR. TERRY: Right.

MR. CHIEF JUSTICE BURGER: Mr. Evans.

ORAL ARGUMENT OF WALTER L. EVANS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. EVANS: Mr. Chief Justice --

QUESTION: Are you going to deal with Mr. Pickens' case differently from the others, or not?

MR. EVANS: Yes, if Your Honor please, on the one hand, and no on the other. For purposes of clearing the air as far as the Bruton rule is concerned, I think that the Court should consider the total picture of all the confessions, but we will contend that the finding below that the Pickens' confession was inadmissible because of a violation of Miranda constitutes a final adjudication on that issue and his conviction should be reversed on that reason alone.

But in considering the whole Bruton issue and the question of harmless error, I think that it would be good to consider Pickens' confession along with the other three, and this would support our contention that all three of these defendants, including Pickens, were denied their right to confrontation and cross-examination based upon the Sixth Amendment to the U.S. Constitution and the past decisions of this Court which have been rendered since the Bruton rule.

Now, the first issue involved in the matter coming up from the Sixth Circuit was that involving the interpretation of Bruton, Schneble and Harrington. We maintain in our original response filed in opposition to the state's petition that the state has erroneously categorized the facts of this case to Schneble and Harrington and more or less overlooked the significance of the Bruton rule.

If you will notice in their briefs, they discount the importance of Bruton, and I think that in every decision

of this Court has some constitutional significance and Bruton certainly stands as a landmark on the question of violation of right to confrontation and right to cross-examination.

As Mr. Chief Justice Burger stated in Davis v. Alaska and also this Court in Pointer v. Texas and Douglas v. Alabama, that the right to cross-examination is very much a part of the right of confrontation as stated in our Sixth Amendment to the United States Constitution.

This case in our opinion will present somewhat of a precedent in the sense that it will clear the air on the question of harmless error. The cases of Harrington and Schneble did not overrule Bruton, which Mr. Justice Brennan wrote his well-reasoned argument on. This case is a case, as Mr. Justice Stevens indicated, involving the question of harmless error. And when we talk about harmless error, we must look at Chapman v. California, Fahy v. Connecticut, Schneble v. Florida, Harrington v. California, and the Court has consistently stated that harmless error means harmless error beyond a reasonable doubt. It is the federal standard which this Court should consider, as indicated in the case of Fahy v. Connecticut.

Now, the crucial facts of this case as they relate to the respondents' convictions are subject to two basic theories, the one promoted by the state and the theory or possible theory supported by us in our brief. And the state

has made a number of conclusory statements throughout this proceeding which have indicated that the facts of this case show very clearly that these respondents were a part of a plan to rob, but a close examination and a view of the record in our opinion could lead this Court to conclude to the contrary, or certainly lead this Court to conclude that the facts are not clear as to the respondents' involvement in this whole proceeding.

Now, the District Court and the Sixth Circuit Court of Appeals for purposes of ruling on Bruton accepted the theory most favorable to the state on the question of the respondents' involvement in this whole proceeding.

QUESTION: All five respondents? There were two Wood brothers, and then there were three others, weren't there?

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

QUESTION: Is there any question about the involvement of the Wood brothers?

MR. EVANS: No, there is no question, as I understand it.

QUESTION: I mean in your mind, or should there be in our mind after reading the record?

MR. EVANS: There is no question in my mind as to the Wood involvement. In fact, we contend that the Wood brothers, possibly along with Tommy Thomas, the supposedly

impartial observer --

QUESTION: He was the fellow lying on the floor?

MR. EVANS: Right -- that the two or maybe the three of them concocted the plan to -- and we deny that that was even in the plan, to rob the poker game. This is a theory promoted by the state. A close reading of the record and even a close examination of Robert Wood's testimony, which the state relies upon so heavily, does not really support the theory in our contention about a plan to rob.

QUESTION: Why do you think those three others came there at all?

MR. EVANS: If the Court would examine the --

QUESTION: They did come there, and the evidence was that they swept a lot of money off the table, didn't they?

MR. EVANS: That is not the evidence, if Your Honor please. The evidence shows that Robert Wood took all of the money off the table, some of which was his own. In fact, the theory of the robbery is contained in the latter part of Robert Wood's statement where he stated that if I caught the gambler cheating then I was going to ask for my money back. He didn't say he was going to get any of the victim's money. He says I am going to ask for my money back if I caught him cheating.

QUESTION: What do you suppose the reasonable fact-finder could have found as to the reason that those three

others came there at all that night?

MR. EVANS: Mr. Justice Stewart, if you would consider the confession or the statement, the oral statement of Hamilton, which was presented to the jury, a reasonable conclusion could be drawn that Hamilton worked for Joe Wood. He was asked to bring a couple or bring some of his friends by this particular apartment. He may not have even indicated the purpose of their coming by. But assuming he indicated that my brother was involved in a poker game and that he felt that this other fellow was cheating him and he might just need some physical bodies present when he asked for his money back, and this is why they went there, because his boss had told him I want you to come and maybe bring some of your friends. But we deny and the record would support our contention that these three respondents possibly did not even have any weapons.

QUESTION: Were the Wood brothers white men and the three respondents Negroes?

MR. EVANS: That is correct, Your Honor.

QUESTION: That was my impression.

MR. EVANS: And the entire episode carries a very interesting scenario and we have a situation here where the evidence that was presented, if you really examine the evidence presented before the jury and the state's theory is contained to a great extent, Mr. Justice Stevens, in that

that evidence which was not admitted into evidence before the jury.

On the question of harmless error, the Court must consider what evidence was presented before the jury. There was the fact --

QUESTION: Didn't we take this on one point only?

MR. EVANS: Yes, if Your Honor please.

QUESTION: Well, how do we get to harmless error?

MR. EVANS: Involved in the Harrington case, the specific issue in Harrington and Schneble assume a violation of Bruton and the question was was there harmless error in those cases. In this particular case, the first issue or the only issue before the Court as framed by the state is whether the United States Court of Appeals for the Sixth Circuit has correctly interpreted the law as stated by this Court in Bruton v. United States, Schneble v. Florida, and Harrington v. California. So Harrington and Schneble were cases dealing specifically with or dealing only with --

QUESTION: Well, why do you think Bruton is in there? Bruton didn't have anything to do with harmless error, did it?

MR. EVANS: Bruton stood for the proposition that the admission into evidence of statements of co-defendants which implicate each other and where these co-defendants do not take the stand and testify and be available for cross-

examination violates the co-defendants' right to confrontation and cross-examination.

QUESTION: But in this case, according to the state's argument, the only people that didn't confess were those that weren't arrested.

MR. EVANS: The only ones who did not confess --

QUESTION: All of them did confess.

MR. EVANS: All confessed except in our opinion --

QUESTION: One.

MR. EVANS: -- the crucial man.

QUESTION: Except one.

MR. EVANS: Joe Wood was the link between these three respondents and the one who actually fired the fatal blow. Now, there are certain facts in this case that are undisputed, without any question. Number one, Robert Wood was the person who fired the fatal shot. The state does not contend to the contrary.

QUESTION: He was the card player.

MR. EVANS: Yes, he was the card player. Secondly, neither of these respondents participated in the game nor had they been in the room at any time prior to the shooting. The state does not contend to the contrary. Neither of these respondents took any money from the game at all. The state does not contend to the contrary. In their brief in fact they state that Robert Wood took all the money. Well, a

closer reading of the record indicates that he took some money from the table and stuffed it in his pocket. Another theory might be that Tommy Thomas took the rest after everybody had left. But nevertheless the state admits that Robert Wood took all the money on the table and stuffed it in his pocket.

QUESTION: Some of which he considered his anyway.

MR. EVANS: Right, some of which he considered rightfully his.

QUESTION: But taking money isn't essential to the crime of robbery under Tennessee law, is it?

MR. EVANS: No, but these respondents were convicted of murder in the perpetration of a robbery and --

QUESTION: But doesn't robbery simply require the --

MR. EVANS: Forcible taking.

QUESTION: Or attempt to take with the threat to use great bodily force?

MR. EVANS: If there was an attempt which was not consummated, I believe -- and the gentleman can correct me -- that that would be an offense of attempted robbery. But in this case they were charged with murder in effect during a robbery.

QUESTION: So you have to actually succeed under Tennessee law in getting the money in order for it to be robbery?

MR. EVANS: We will not go that far, if you please,

Mr. Justice Rehnquist, in saying that the robbery had to be consummated at the time of the murder in order for that to be a violation of the statute. But what we would say is that at the time of the murder, there had been no attempted robbery and the murder took place -- and if you would read the Tennessee Court of Criminal Appeals, which is a very interesting analysis of the felony murder doctrine, the murder took place before any attempted robbery, if there was in fact a robbery, and before these three respondents came into the room, if they came into the room.

Now, the state contends on the theory of harmless error that there is other evidence in the record placing these particular respondents at the scene of the robbery or at the scene of the crime. Assuming --

QUESTION: Didn't George testify to that?

MR. EVANS: Who was that?

QUESTION: Didn't the man that testified, didn't he say that they were there?

MR. EVANS: But if the court --

QUESTION: That was evidence, wasn't it?

MR. EVANS: No, if Your Honor please. The testimony was that he assumed that they were there, and the record will show that throughout Robert Wood's testimony, when he was asked directly whether these respondents were those three blacks who came into the room after the robbery, his statements

were specifically, "I assume they were because I met them for a second after the robbery."

QUESTION: If he met them for a second, isn't that testimony that they were there?

MR. EVANS: No, if Your Honor please.

QUESTION: Well, how long did he have to meet them, two seconds?

MR. EVANS: He did not testify that they were there. He testified "I assume that they were there," which in our opinion is quite different. He did not positively identify these three respondents as those three blacks who came into the room after the murder was committed. But assuming he did, the only evidence that would be presented at that point is that these defendants came into a room after a murder. But in order to convict them of murder in the perpetration of a robbery, where it is quite clear that they did not do the shooting and they did not even do the robbing, there must be a link and a plan, and that is what the Supreme Court of Tennessee considered in reversing the Court of Criminal Appeals.

The Supreme Court of Tennessee felt that they were nevertheless a part of the plan to rob, and it is our contention that this plan is only contained in the confessions of these three respondents, and a close examination of the record presents serious questions even considering all the

evidence. Although this Court is not considering the sufficiency of the evidence, but --

QUESTION: You don't want us to reverse the Supreme Court, do you?

MR. EVANS: If Your Honor please, we would like for this Court to support the opinions of the Court of Criminal Appeals of Tennessee, the United States District Court for the Western District of Tennessee, and the Sixth Circuit, which all three of these courts, in reviewing the whole record, not only --

QUESTION: Actually, the only thing you want is affirmance of the Court of Appeals.

MR. EVANS: That is correct. We are not seeking to request this Court to make any drastic inroads into the law. We are not seeking to overrule any of this Court's past decisions since Bruton. We are merely asking this Court to affirm the decision of three courts.

QUESTION: No, one court.

MR. EVANS: I'm sorry, one court, if Your Honor please, and that is the Sixth Circuit Court of Appeals.

QUESTION: Were you in the state proceedings?

MR. EVANS: No, I was not, if Your Honor please.

QUESTION: Do you know if the intermediate Court of Appeals in the state dealt with the Miranda issue at all?

MR. EVANS: The Tennessee Court of Criminal Appeals

dealt with the sufficiency of the conviction on felony murder or murder during the perpetration of a robbery and the Bruton rule.

QUESTION: But it did not reach the Miranda issue?

MR. EVANS: No, it did not.

QUESTION: And neither did the Supreme Court of Tennessee, I take it?

MR. EVANS: No, it did not.

QUESTION: They just reversed?

MR. EVANS: Right.

QUESTION: So what the highest courts of the state think about the Miranda issue, we have no idea?

MR. EVANS: No.

QUESTION: And so the issue has never been exhausted in the Tennessee courts?

MR. EVANS: The issue was raised in the -- it was raised in the --

QUESTION: It was never presented to the state Supreme Court, was it?

MR. EVANS: I believe it was, if Your Honor please, but the court did not address itself to those issues. It disposed of the case on Bruton and also on the sufficiency of the felony murder rule, if I recall the record.

QUESTION: If a state Supreme Court is presented three federal constitutional claims, ordinarily doesn't it

feel obligated to dispose of all three of them or address all three of them, rather than saying, well, we will talk about this and we won't talk about the other two?

MR. EVANS: Well, the Court of Criminal Appeals felt that the reversal on the grounds of insufficiency of felony murder and Bruton was --

QUESTION: That would be true, the Bruton issue would dispose of the case, but that decision got reversed by the Supreme Court of Tennessee.

MR. EVANS: That is correct. So the Supreme Court of Tennessee only dealt with those two issues presented --

QUESTION: The question then remains what about the Miranda issue, was that ever decided by the Tennessee courts, and I think that depends on whether it was presented to the --

MR. EVANS: The Miranda issue was not --

QUESTION: The convictions were affirmed by the Tennessee Supreme Court.

MR. EVANS: Right.

QUESTION: And if the Miranda issue was presented, I suppose it was rejected.

MR. EVANS: It would not have been -- if Your Honor please, it would not have been considered by the Tennessee Supreme Court or the Tennessee Court of Criminal Appeals did not address itself to that issue. The Tennessee Supreme Court merely address itself to those issues contained in the Court

of Criminal Appeals decision.

QUESTION: When did these respondents raise the Miranda issue in the state courts and in what one of the state courts?

MR. EVANS: It was raised initially in the trial court.

QUESTION: And was it also raised in the Court of Criminal Appeals?

MR. EVANS: I believe so, if Your Honor please.

QUESTION: Well, do you know so or not?

MR. EVANS: It was raised, to the best of my recollection. The record is pretty thick and I came in at the U.S. District Court level, and in trying to review the entire record below, it did appear that the issue was raised before the Court of Criminal Appeals.

QUESTION: Well, if you know, what -- it varies in every state, it seems, the jurisdiction of the Supreme Court of Tennessee over the intermediary court, do they take the whole case or part of the case or certiorari or how?

MR. EVANS: The respondents appealed their conviction on the trial court decision to the Court of Criminal Appeals.

QUESTION: Right.

MR. EVANS: It was on appeal. And after the Court of Criminal Appeals reversed or overturned the convictions on

the basis of Bruton and insufficiency of the evidence under the State of Tennessee's felony murder rule, the state appealed that decision to the Tennessee Supreme Court.

QUESTION: Well, under the law of Tennessee, does the whole thing go up or does just the constitutional part of it or what?

MR. EVANS: Those issues that are raised in the court below will go up.

QUESTION: All of it. So if it was raised in the lower court, it went to the Supreme Court?

MR. EVANS: It would go to the Court of Criminal Appeals.

QUESTION: Then after that would it go to the Supreme Court?

MR. EVANS: That which was decided by the Court of Appeals would go to the Supreme Court.

QUESTION: That which was decided or everything that was raised?

MR. EVANS: That which was decided, if Your Honor please.

QUESTION: All the Criminal Court of Appeals decided was that the convictions should be reversed for two reasons, insufficiency of the evidence to prove a felony murder and, secondly, a violation of Bruton, and that is all it decided, and that was sufficient. In fact, either one of those was

sufficient to reverse the convictions.

MR. EVANS: Right.

QUESTION: And then the state appealed to the Supreme Court of Tennessee at Jackson and, according to the Appendix, page 227, where the opinion of that court appears, they say this case presents two principal issues -- they don't say it presents only two issues -- two principal issues, i.e., the sufficiency of the evidence of the felony murder and, secondly, the Bruton point, and then they proceed to discuss those two issues separately and reverse the Court of Criminal Appeals on both, without ever discussing any Miranda claim.

MR. EVANS: Right, that's true.

QUESTION: Therefore, my Brother Marshall's question I guess is of some importance. It was there before them, the Miranda claim --

MR. EVANS: Not before --

QUESTION: -- which had not been dealt with by the Court of Criminal Appeals, even though raised there.

MR. EVANS: Right. It was now before the Tennessee Supreme Court and was not dealt with and --

QUESTION: It certainly wasn't dealt with, was it?

MR. EVANS: It wasn't dealt with, but presented on appeal from the trial court.

QUESTION: You say it wasn't presented to the

Tennessee Supreme Court?

MR. EVANS: No, Your Honor, it was presented to the Court of Criminal Appeals --

QUESTION: Yes, but not to the Tennessee Supreme Court.

MR. EVANS: Right.

QUESTION: But the state was the appellant there.

QUESTION: The only way you could have presented it was --

MR. EVANS: If we had lost, then --

QUESTION: -- on the ground, look, we raise this other question, and even if we are going to lose on these two, we are entitled to be heard on that one. You didn't have to present it there initially.

MR. EVANS: No, the respondents did not have to present or raise the issue --

QUESTION: The court is the appellant.

MR. EVANS: Right. The state was the one who appealed to the --

QUESTION: I am just inquiring as to whether there has been exhaustion in terms of federal habeas corpus of the Miranda issue, exhaustion in the state courts.

QUESTION: Well, were you in the habeas proceedings?

MR. EVANS: I was in the District Court, right, in the habeas proceedings.

QUESTION: In the habeas proceedings.

MR. EVANS: Right, in the habeas proceedings.

QUESTION: And the state, did the state ever raise any failure to exhaust as a reason for denying and calling in habeas?

MR. EVANS: Not on these issues. If the Court would --

QUESTION: On any issue.

MR. EVANS: Yes, if Your Honor please. The District Court denied any pretrial order certain issues raised by the respondents because they had not been exhausted in the court below.

QUESTION: But Miranda obviously was not one of them because --

MR. EVANS: No, it was not.

QUESTION: -- the District Court decided the Miranda issue.

MR. EVANS: That is correct.

QUESTION: Well, certainly the Tennessee Supreme Court went so far as to affirm the convictions.

MR. EVANS: That is correct.

QUESTION: They didn't send the case back for consideration of the Miranda issue.

MR. EVANS: They did not.

QUESTION: Which would indicate it was not raised,

or if it was raised they rejected it.

MR. EVANS: For whatever reason the court did not address that issue, we can only speculate that it was because it was not raised in the state's petition for appeal from the Court of Criminal Appeals.

QUESTION: Of course, when we granted certiorari, we did not grant certiorari on the Miranda issue, did we?

MR. EVANS: That is correct. The issue that is before this Court is whether the Bruton rule was violated and, more importantly, in our opinion, whether the violation of the Bruton rule was harmless error beyond a reasonable doubt.

In considering the question of harmless error, the evidence presented before the Court is very much important. The only evidence introduced was the testimony of five supposedly impartial witnesses, whose only testimony was limited to their statements that they saw three blacks outside the door of the apartment. One witness says I saw three blacks coming outside. Another witness -- two witnesses said a white and three blacks. But nowhere in the record could we find any testimony of these supposedly impartial witnesses that these respondents had any weapons in their hands, that they did anything other than either appear at the door and/or kick the door in.

The crucial testimony in this case comes from Robert Wood, who gave an initial statement to the police

before his indictment in which he stated very clearly, "I cannot identify these blacks that came in," and consistent with the original plan of Robert Wood, Joe Wood and Tommy Thomas to place all the blame on three unidentified blacks. And the record will show in reading the statements of Tommy Thomas and also of Robert Wood, that Joe Wood, Robert Wood, and Tommy Thomas met after this incident to concoct a plan to put this whole murder on three unidentified blacks who supposedly came into the room, shot the victim, and left with all the money. But after some investigation, apparently the police did not believe that version and subsequently indicted the Wood brothers along with three respondents.

Now, I think that in considering the question of harmless error, the Court cannot turn its head to the complaints of coercion and, as the Sixth Circuit said, there were some very vivid complaints of coercion and physical abuse as it relates to these three confessions. And it would be our contention that the existence of this kind of abuse would create a sort of tainted character to these confessions. We are not dealing with unchallenged confessions. We are not --

QUESTION: Is that really before us, Mr. Evans, on the petition that was granted?

MR. EVANS: In considering the taint of evidence against the untainted evidence, and I think that Mr. Justice

Brennan in Harrington raised the question about in weighing harmless -- in effect, weighing harmless error, you must consider the quality of the evidence on both sides, the quality of the untainted evidence, the quality of the tainted evidence. And it is our position that there is very little untainted evidence in this case. If there is any untainted evidence, it would be the testimony of the five witnesses outside the apartment who could not identify either of these three respondents as the three blacks or the three Negroes or the three colored men who were at the door. And the testimony of Robert Wood is tainted.

QUESTION: If the testimony showed that these five people heard the shot, did any of them go running into that room --

MR. EVANS: Did --

QUESTION: -- after they heard the shot?

MR. EVANS: As I read the record --

QUESTION: The witnesses, those five witnesses.

MR. EVANS: As I read the record, Mr. Justice Marshall, the witnesses merely testified to what they observed outside the apartment. They did not go inside the apartment.

QUESTION: That makes me again to wonder why these three went in. All of them heard the shot. These three were more curious than the five?

MR. EVANS: Which three are you referring to?

QUESTION: Your clients.

MR. EVANS: The state contends they went in and, of course, the court could possibly conclude that they did or some of them did go into the apartment. But the testimony -- the confession of Hamilton, which was admitted before the court, showed that he did not go into the apartment and this is consistent with the respondent's theory that once the door was kicked in primarily by Joe Wood, they looked inside the door, saw a white figure lying on the floor, they turned and went away. But because Tommy Thomas and Robert Wood and Joe Wood had concocted this theory about the blacks involvement in order to maintain some credibility in court, it is our contention that Robert Wood, Tommy Thomas consistently maintained that these blacks did in fact come into the apartment and did in fact fire some shots and rob him, and so forth.

But the record is very clear that the evidence of these three respondents' involvement is very shady and that without these confessions there is no reasonable way these respondents could have been convicted of murder in the perpetration of a robbery.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, counsel?

ORAL ARGUMENT OF MICHAEL E. TERRY, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. TERRY: Yes. May it please the Court, on the issue of the Miranda, the route it went, it was considered by the trial court outside the presence of the jury, found in the state's favor, assigned as error number five to the Court of Criminal Appeals by the defendants, considered by the Court of Criminal Appeals and found to be without merit. Then the state appealed from that decision and it wasn't before the Supreme Court of Tennessee, but we did not raise exhaustion, we relied on 2254(d) in the District Court. We figured there had been a fair hearing. That issue is not here but that is the route that it went.

One important point I would like to make is that, as Mr. Evans says, untainted evidence, very little untainted evidence. It is very important to note in deciding this case, in considering this record, that each of these confessions is untainted evidence as to the confessor. And when you are getting into a weighing of the proof that can make up that quantum of proof necessary to find harmless error, the confessor's confession should be considered against himself. It is untainted in that respect.

QUESTION: But, Mr. Evans, isn't his argument, if I understood it correctly, that some confessions are more probative than others. And one factor that tends to make a

jury sometimes disbelieve a confession is if they think there was some brutality attached to coercing the confession. I think his argument is that arguably this confession should not be -- would not have been taken at face value if it stood alone, but it was much more likely to be believed when there were three or four confessions all in the same hopper.

MR. TERRY: Well --

QUESTION: Isn't that a valid argument?

MR. TERRY: I think -- I would have to reflect back along --

QUESTION: He did argue, did he not, that the confessions were not voluntary?

MR. TERRY: He did, but that point was not before the Sixth Circuit, and it was not --

QUESTION: But it goes to the quality of that evidence.

MR. TERRY: That issue was decided outside the presence of the jury. It wasn't in front of the jury.

QUESTION: I see. They did not again have a chance to pass on voluntariness.

MR. TERRY: It was --

QUESTION: But didn't the District Court say it was coerced?

MR. TERRY: One of them. The District Court -- it

is not coerced. They didn't find coerced.

QUESTION: Violation of Miranda.

MR. TERRY: Violation of access to counsel.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:58 o'clock p.m., the case in the
above-entitled matter was submitted.)

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