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THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 83-2143

TITLE TENNESSEE, Petitioner V. HARVEY J. STREET

PLACE Washington, D. C.

DATE March 18, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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TENNESSEE :
Petitioner :
V. : No. 83-2143
HARVEY J. STREET :
- - - - -x

Washington, D.C.
Monday, March 18, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:08 o'clock a.m.

APPEARANCES:

ROBERT A. GRUNOW, ESQ., Associate Chief Deputy Attorney
General of Tennessee, Nashville, Tennessee; on
behalf of petitioner.
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on behalf of the United States as Amicus curiae in
support of petitioner.
LANCE J. ROGERS, ESQ., Washington, D. C.; on behalf of
respondent.

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JOSHUA IRA SCHWARTZ, ESQ.,	
on behalf of the United States as	
amicus curiae in support of Petitioner	20
LANCE J. ROGERS, ESQ.	
on behalf of Respondent	29

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1 Tennessee. The defendant, a Clifford Peele, and five
2 other young adults, were charged with murder, and
3 defendant Street's case was severed from the others.

4 The state's proof in chief at Street's trial
5 consisted of several confessions by the defendant and
6 testimony of law enforcement officers concerning the
7 scene of the crime that tended to corroborate certain
8 details of the defendant's confession.

9 From the time of its opening argument through
10 its case in chief, the state did not mention the
11 existence of Peele's confession. Thereafter, the
12 defendant presented an alibi defense and took the
13 stand. In his direct testimony the defendant admitted
14 that Peele had given a confession which had implicated
15 the defendant in the murder. The defendant also
16 admitted that he gave a confession but maintained it was
17 merely a coerced imitation of Peele's earlier
18 confession.

19 With regard to this claim, the defendant
20 maintained that prior to taking his confession, the
21 sheriff repeatedly read him Peele's confession. The
22 defendant also claimed that when taking his confession,
23 the sheriff interrupted him any time his account varied
24 from Peele's and demanded that the defendant replicate
25 Peele's version, which the defendant then did.

1 As part of its rebuttal proof, the state for
2 the first time in this case sought to introduce Peele's
3 confession into evidence. Over objection, the state was
4 allowed to introduce the confession for the limited,
5 non-hearsay purpose of establishing that it was said,
6 and with the express goal of impeaching the defendant's
7 parrotting claim with the most appropriate evidence
8 available.

9 Limiting instructions were given on three
10 occasions, and the record clearly indicates that the
11 state carefully limited its use of and argument on the
12 accomplice's confession to the impeachment purpose for
13 which it was introduced.

14 Thereafter, the defendant was convicted of
15 first degree murder and was given the only sentence
16 permitted in this case under state law, life
17 imprisonment. On appeal, the Tennessee Court of
18 Criminal Appeals reversed the conviction of the
19 defendant on the ground that the introduction of Peele's
20 confession under the circumstances of this case denied
21 the defendant his confrontation rights under the Sixth
22 Amendment.

23 The state urges this Court to reverse the
24 decision below since the limited introduction of the
25 accomplice's confession for the impeachment purposes on

1 rebuttal did not violate the defendant's confrontation
2 rights. We contend that limiting instructions were
3 adequate in this case to avoid a confrontation clause
4 violation for four reasons which I will summarize and
5 then address in sequence.

6 First, the manner of introduction of the
7 questioned evidence created little if any likelihood of
8 improper jury consideration of that evidence.

9 Second, there existed legitimate and
10 compelling reasons justifying the state's use of such
11 evidence in light of the defendant's parroting claim.

12 Third, no suitable alternatives existed.

13 And fourth, under the circumstances of this
14 case, the evidence was not devastating in nature.

15 In applying the confrontation clause to the
16 admission into evidence of nontestifying accomplice
17 confessions, Bruton, Douglas and the Parker plurality of
18 this Court have addressed two basic questions: first,
19 whether the manner of introduction of such evidence
20 creates a substantial likelihood of improper
21 consideration of that evidence against the defendant,
22 and second, if so, whether the resulting risk of unfair
23 prejudice as a matter of policy or practical necessity
24 outweighs the ability of a jury to follow limiting
25 instructions given. We suggest that both questions are

1 answered in the negative in this case.

2 As to the first basic question, the manner of
3 introduction created little if any likelihood of
4 improper consideration. Unlike prior cases in this are
5 where no legitimate inferences against the defendant
6 could be drawn from the evidence placed before the jury,
7 in this case there was a legitimate inference that could
8 be drawn from the introduction of Peele's statement,
9 namely, that Peele's confession was sufficiently
10 different from the defendant's so as to negate the
11 defendant's parroting claim

12 QUESTION: This was not a joint trial, was
13 it?

14 MR. GRUNOW: It was not, Your Honor.

15 The evidence was introduced by the state only
16 after the defendant had already focused the jury's
17 attention on the existence of the accomplice's
18 confession.

19 QUESTION: And after it had been denied by
20 state officials, categorically denied.

21 MR. GRUNOW: Your Honor is speaking of the
22 introduction?

23 QUESTION: Before it was introduced. Didn't
24 the sheriff take the stand and say it's not true?

25 MR. GRUNOW: That's correct, Your Honor.

1 QUESTION: So it had been adequately denied,
2 hadn't it?

3 MR. GRUNOW: Your Honor, our position is that
4 that did not make it adequately denied.

5 QUESTION: But it had -- well, it had been.

6 MR. GRUNOW: It had been denied, but it became
7 a swearing contest at that point between the defendant
8 and the sheriff.

9 QUESTION: Well, the Court of Appeals doesn't
10 agree with you on that.

11 MR. GRUNOW: That is correct, Your Honor.

12 QUESTION: Specifically, specifically, the
13 Court said no. The Court said that it was used in the
14 argument to the jury as to express details of the crime,
15 which is in addition to a falsehood claim.

16 MR. GRUNOW: We believe, Your Honor, that the
17 conclusion of the Court of Criminal Appeals below rested
18 on a faulty assumption that because of its appraisal of
19 Bruton and Douglas, they felt that it always had to
20 be --

21 QUESTION: Well, let me read you one
22 sentence. Here the alleged confessor was not even
23 called to the stand. The statements inculcating the
24 defendants stood basically unchallenged as the state
25 directed inquiry not to those allegations but to the

1 factual statements surrounding the scene of the crime.

2 Do you agree with that?

3 MR. GRUNOW: No, Your Honor.

4 QUESTION: Then the Court was wrong.

5 MR. GRUNOW: Yes, Your Honor.

6 QUESTION: Factually.

7 MR. GRUNOW: It was wrong assuming those facts
8 and interpreting them the way they did as a matter of
9 federal constitutional law.

10 QUESTION: Do you agree with this statement,
11 that in this case, while admission of the confession was
12 not technically used to prove its truth, the state
13 actually placed before the jury testimony incriminating
14 the defendant made by one not available for cross
15 examination.

16 Do you agree with that statement?

17 MR. GRUNOW: No, Your Honor.

18 It is our position that because of the limited
19 nature of the statement's introduction in this case, it
20 was not offered to prove the truth of that statement but
21 was rather merely entered to show what that statement
22 was, to directly impeach on rebuttal the defendant's
23 claim that he parroted the very terms of that other
24 confession.

25 We believe that the Court of Criminal Appeals

1 below misapplied this Court's doctrines as enunciated in
2 Bruton and Douglas and the Parker plurality to find that
3 there necessarily had to be a substantial likelihood of
4 improper consideration. It is our position that that
5 simply did not occur in this case.

6 QUESTION: How did the subject of a confession
7 first come into the record of the case?

8 MR. GRUNOW: As to Peele's confession?

9 QUESTION: How did the subject of a confession
10 first get into the record and called to the attention of
11 the jury?

12 MR. GRUNOW: Your Honor, the subject first
13 came in in the defense attorney's opening remarks to the
14 jury in which he pointed out that a co-defendant, Peele,
15 had confessed and had implicated Street in the murder.

16 In this case, as to the substantial likelihood
17 of improper consideration, the defendant focused the
18 jury's attention on the existence of the accomplice's
19 confession. We submit that this is important because
20 the jury had already been informed by the defendant that
21 the accomplice had confessed and had implicated him in
22 the murder, thereby avoiding the potential for any
23 proper consideration of the confession as introduced
24 later by the state.

25 As to the second basic question raised by this

1 court in prior decisions, both as a policy and practical
2 matter, any resulting risk of unfair prejudice
3 occasioned by the introduction of such limited purpose
4 evidence on rebuttal was eliminated through the use of
5 limiting instructions. In Bruton, this Court considered
6 three factors in determining whether the introduction of
7 such evidence would further rather than impede the
8 search for truth, first, whether adequate justification
9 exists for the use of the questioned evidence; second,
10 whether alternatives exist in the pursuit of truth to
11 avoid any conflict; and third, whether the devastating
12 nature of the evidence is too great as a practical
13 matter to be cured by a limiting instruction.

14 QUESTION: May I ask a factual question to be
15 sure I have this right?

16 Is it correct that the defendant at the trial
17 did not challenge the fact that this -- that he said the
18 words that were said to be his confession? Rather, only
19 his position was he said them under coercion and so
20 forth?

21 MR. GRUNOW: That is correct.

22 QUESTION: But the actual text was not --
23 there is no real dispute about that.

24 MR. GRUNOW: That is correct.

25 QUESTION: Okay. I wanted to be sure.

1 MR. GRUNOW: As to the first factor, there
2 were legitimate and compelling reasons justifying the
3 state's use of such evidence in this case. In Bruton
4 and Parker, this court dealt with judicial economy in a
5 joint trial as a justification for the use. Here, the
6 more important justification lies in the defendant's
7 election to place before the jury his parroting claim
8 which called into question the very terms of his
9 accomplice's confession.

10 Now, as a practical matter, the state was
11 justified in using the accomplice's confession because
12 it was the strongest and only adequate evidence to
13 directly challenge that defendant's claim. As a policy
14 matter, after making his parroting claim, the defendant
15 should not be allowed to invoke the confrontation clause
16 to bar the limited non-hearsay rebuttal use of such
17 evidence. Such invocation of the confrontation clause
18 would impede the ability of the jury to assess the
19 credibility of the defendant's claim, thereby posing a
20 grave risk of perversion of the truth-seeking function
21 of the trial. It would also permit the defendant to use
22 the confrontation clause as a shield to subvert the very
23 mission of that clause as ensuring the fairness and
24 accuracy of the criminal claim.

25 Such a policy is consistent with past

1 decisions of this Court. In 1948 in *Michelson v. United*
2 *States*, this Court recognized that evidence which may be
3 too prejudicial to introduce in the state's proof in
4 chief, even with limiting instructions, may nevertheless
5 be used for impeachment purposes once the defendant
6 elects to put that issue into evidence by taking the
7 stand.

8 Now, *Michelson v. United States* admittedly
9 does not raise constitutional questions. However, other
10 cases cited in our brief suggest that constitutional
11 protections, whether afforded by prophylactic
12 exclusionary rules or by direct application of
13 constitutional rights, should not provide a defendant
14 with a shield to bar the legitimate impeachment
15 techniques in assessing the credibility of a defendant's
16 claim that he asserts on the stand.

17 QUESTION: Mr. Grunow, are there any limits in
18 your view on the use of such evidence by the state? Is
19 redaction of the statement required on occasion? Are
20 there any limitations in your view on the use of the
21 evidence for impeachment purposes?

22 MR. GRUNOW: I will address both the
23 limitations as well as the possibility of redaction,
24 Your Honor.

25 As to limitations, we suggest that it has to

1 be relevant to the impeachment purpose for which it is
2 introduced, that many impeachment purposes require that
3 the evidence be offered for the truth of the matter
4 asserted. Where, as in this case, it is offered
5 properly for a relevant, limited, non-hearsay purpose,
6 to merely show that that statement was made, it would be
7 proper.

8 QUESTION: Oh, yes, assuming it is relevant,
9 are there any limitations by virtue of the prejudicial
10 nature of the evidence?

11 MR. GRUNOW: It is quite possible that the
12 prejudicial impact in certain occasions may outweigh its
13 probative value, and we simply say that this is not that
14 type of case, and we do not want this Court to give a
15 broad ruling to that effect. But when in fact it is
16 relevant and these other factors weigh so heavily in its
17 favor for admission, we suggest that there are
18 compelling reasons to admit it.

19 As to the redaction issue, we suggest that is
20 the third factor in this case -- the second factor in
21 this case, that no effective alternatives existed.
22 Redaction or limited use simply would not have permitted
23 the state to adequately use the confession to challenge
24 the parroting --

25 QUESTION: But didn't the Court of Criminal

1 Appeals say to the contrary?

2 MR. GRUNOW: They did, Your Honor, but they
3 did not offer any suggestion as to how it might be
4 redacted?

5 QUESTION: But they did hold, did they not,
6 that there might have been redaction without destroying
7 the state's impeachment use, didn't they?

8 MR. GRUNOW: They did hold that.

9 QUESTION: And you disagree with that.

10 MR. GRUNOW: I disagree with that, Your Honor
11 In this case, in the peculiar facts of this case, the
12 defendant did not take the stand and simply say that
13 some portions of his confession were parroted. He said
14 any time that his version varied with Peele's, the
15 sheriff would force him to replicate Peele's
16 confession. Because of that type of claim, it was very
17 relevant and in fact the most significant evidence to
18 introduce this confession for the limited purposes which
19 it was in fact introduced for.

20 QUESTION: Would it have impressed the Court
21 of Appeals or your court below if you had called the
22 other, the person who had already been convicted and who
23 was close by in jail?

24 You didn't call the confesser, did you?

25 MR. GRUNOW: No, we did not, Your Honor.

1 QUESTION: Yes. Well, first tell me why you
2 didn't.

3 MR. GRUNOW: The reason for that, Your Honor,
4 is that his testimony would have only gone to the
5 veracity of his confession, and that was wholly
6 immaterial to the use for which the state was
7 introducing the evidence. We did not -- it simply was
8 not part of the state's case. We only wanted to give
9 the jury, in assessig the defendant's claim, the best
10 possible evidence to do that, namely, Peele's
11 confession.

12 QUESTION: Well, what if you had called him
13 and he had been in the courtroom? Do you suppose that
14 would have made any difference to the court below?

15 MR. GRUNOW: I don't believe so, Your Honor.

16 QUESTION: He could have cross examined him.

17 MR. GRUNOW: He could be cross examined, but
18 on issues not --

19 QUESTION: That's what the court, that's what
20 your Court of Appeals said.

21 MR. GRUNOW: Yes, Your Honor, but on issues
22 totally immaterial to the limited purpose for which the
23 state was introducing this evidence.

24 QUESTION: And that's not what your Court of
25 Appeals said.

1 MR. GRUNOW: Your Honor, if it is not what
2 they said --

3 QUESTION: He could have been cross examined.

4 MR. GRUNOW: That is correct.

5 QUESTION: Could the defendant have called him
6 as a hostile witness and cross examined him?

7 MR. GRUNOW: Absolutely, Your Honor.

8 QUESTION: May I ask -- oh, excuse me.

9 QUESTION: Is it your position that the Court
10 of Appeals -- is that the court that decided this?

11 MR. GRUNOW: The Court of Criminal Appeals.

12 QUESTION: The Court of Criminal Appeals --
13 that the Court of Criminal Appeals would have come out
14 the same even if the confesser had been in the
15 courtroom?

16 MR. GRUNOW: I believe they would in the
17 sense, Your Honor, that the question was whether the
18 defendant was in fact subject to cross examination on
19 the stand. Availability was really not an issue.
20 Everyone seems to agree that he was in the jail next
21 door, and that made no difference whether he was
22 actually in the courtroom or over in the jail, the fact
23 that he was not taking the stand seemed to be the
24 turning point in this case.

25 QUESTION: May I ask a question about an

1 alternative way of handling the problem?

2 As I understand it, the point was that
3 Peewle's confession did not have some facts in it that
4 the defendant's confession did have, and you wanted to
5 show therefore the defendant's could not have been
6 parroted, and after reading the confession, as I
7 understand the record, the officer was asked were these
8 acxts in the confession which you just read, and he
9 denied as to each of those facts.

10 Why couldn't he have been asked those
11 questions without reading the confession, and then had
12 the confession in the courtroom in order to verify
13 whether or not the testimony was true?

14 Why was it necessary to read the confession
15 and not just identify those points?

16 MR. GRUNOW: One of the reasons why the state
17 found it important to do more was that it was not only
18 the omissions in Peele's statement that made the
19 parroting claim incredible; there were numerous
20 differences, only slight differences between similar
21 events that both narrated that would show that it was
22 impossible for them to have merely been the result of a
23 parroting claim.

24 QUESTION: So you would agree that if you were
25 focusing on the omissions, and that were the whole

1 point, it would not have been necessary to read the
2 confession.

3 MR. GRUNOW: That's correct.

4 QUESTION: So your point is there is a little
5 difference in the style and the language and so forth?

6 MR. GRUNOW: Yes, Your Honor, that it was for
7 the jury's benefit to see both --

8 QUESTION: Well, but why wouldn't the
9 impeachment have been adequate just with the omission
10 point? It seems to me that is the most persuasive,
11 because you had independent evidence I think at the
12 scene that coincided with what the defendant had said
13 and what had been omitted from Peele's confession, so
14 that I don't know why you had to -- it seems to me that
15 is by far the more persuasive impeachment of the two.

16 MR. GRUNOW: It may be the more persuasive,
17 Your Honor, but we are here arguing whether the
18 defendant's confrontation rights were violated, and we
19 believe that because of weighing the factors that I
20 mentioned initially, those factors tipped the scale in
21 favor of the state's introduction of the complete
22 statement in this case.

23 QUESTION: In the closing argument did the
24 prosecutor make much of the difference in style? I know
25 he made a great deal of the omissions.

1 MR. GRUNOW: He did, Your Honor.

2 QUESTION: He did.

3 CHIEF JUSTICE BURGER: Mr. Schwartz?

4 ORAL ARGUMENT OF JOSHUA IRA SCHWARTZ, ESQ.,

5 ON BEHALF OF THE UNITED STATES

6 AS AMICUS CURIAE IN SUPPORT OF PETITIONER

7 MR. SCHWARTZ: Thank you, Mr. Chief Justice,
8 and may it please the Court:

9 In view of the United States, the decision of
10 the Tennessee Court of Criminal Appeals represents a
11 misapplication of the doctrine of this Court's decision
12 in Bruton v. United States. Contrary to the argument of
13 respondent, this Court's decision in Bruton does not
14 hold that the reception in evidence for any purpose of
15 the inculpatory statement of a nontestifying accomplice
16 necessarily violates the confrontation clause, nor does
17 it hold that instructions that limit the use of such a
18 statement are in all cases ineffective.

19 Rather, as we understand it, the Court held
20 that in light of the inadmissibility of the hearsay
21 statement incriminating Bruton in that case, the
22 critical weight added to the prosecution's case by the
23 declarant statement there and the general availability
24 of separate trials as a device to avoid the problem that
25 existed in Bruton, there was no sufficient justification

1 for running the risk that the limiting instruction given
2 in Bruton would prove an insufficient bulwark against
3 the risk of unfair prejudice that would result if the
4 instruction were disregarded.

5 This case differs from Bruton in numerous
6 critical respects which we believe call for a different
7 conclusion here and require that the judgment of the
8 Tennessee Court of Criminal Appeals be reversed.

9 Bruton emphasizes the inadmissibility under
10 the traditional rules of evidence as against the
11 Defendant Bruton of the declarant's out of court
12 statement. Here, of course, the declarant Peele's
13 statement was admissible against respondent for a proper
14 purpose, and there doesn't really seem to be any debate
15 that the state had a legitimate objective here and it
16 was one that we deem compelling. That purpose, of
17 course, was to enable the jury to assess the
18 respondent's claim that his own statement was a coerced
19 imitation of the declarant's, and we agree with the
20 state's argument that the very best evidence available
21 to the jury to assess that claim was to look at the
22 statement itself.

23 This is partly, Justice Stevens, because of
24 the fact that -- I think it would naturally occur to a
25 juror that the best way is to look at the two statements

1 side by side to see what all the nuances are, and while
2 it may have been sufficient, I might well -- we as
3 jurors might well have been persuaded by the omissions
4 factor, a juror in assessing this claim I think would
5 want to see the whole thing, and I think it was an
6 important kind of evidence.

7 QUESTION: But isn't the argument also
8 available that the burden really was on the defendant to
9 prove his parroting claim? I mean, he's the one who
10 brought it up, and I would suppose if there were merit
11 to it, he would have been the one to put the confession
12 in.

13 MR. SCHWARTZ: Well, this case has a peculiar
14 fact in that regard. The defendant did attempt to do
15 that and failed in doing so on the grounds that the
16 statement was hearsay. At the point in the case where
17 that occurred, it may have been premature, but the
18 defendant did signal his own understanding that this was
19 the most appropriate way to prove his claim by
20 attempting to get the statement before the court. So it
21 probably does not lie terribly well in the respondent's
22 mouth to say that this is an inappropriate way of
23 demonstrating this.

24 The other factor which, if I can pick up
25 further on your colloquy with the Attorney General, if

1 the sheriff had simply denied, as he did, that these
2 particular facts were in Peele's statement, there would
3 of course have been the question of whether that was
4 true.

5 Now, you said, Justice Stevens --

6 QUESTION: Well, I am suggesting have the
7 confession in the courtroom so that the defendant then
8 would have had the opportunity to show he was lying.

9 MR. SCHWARTZ: But if that statement went to
10 the jury, I am not sure, which would ultimately have to
11 assess whether he was telling the truth.

12 QUESTION: I'm not suggesting it would have to
13 go to the jury. If the officer says A, B, and C are in
14 one statement and not the other, and they are both
15 sitting here in the courtroom and nobody submits them to
16 the jury, that testimony is pretty persuasive.

17 MR. SCHWARTZ: Well, that may be, but we
18 suggest that if there was a controversy, the jury would
19 be the judge of that. and that to one side, there were
20 significant additional factors in terms of assessing the
21 document as a whole.

22 I think the rational juror would want to see
23 the documents.

24 As for the question --

25 QUESTION: Did they see the documents?

1 MR. SCHWARTZ: It was introduced as an
2 exhibit. I don't know from the record --

3 QUESTION: Do they take exhibits to the jury
4 room in Tennessee?

5 MR. SCHWARTZ: I'm probably the wrong person
6 to ask that. I believe my colleague has a minute or so
7 of rebuttal.

8 QUESTION: All right.

9 MR. SCHWARTZ: On the question which was the
10 only question material to the state's purpose in putting
11 the statement before the jury on rebuttal, whether the
12 declarant had actually made the statement, the purpose
13 and requirements of the confrontation clause were
14 satisfied, Sheriff Papantoniou, through whose testimony
15 the statement was put before the jury initially, was
16 available for cross examination. This Court's decision
17 in Dutton v. Evans establishes, we believe, that there
18 is no, in those circumstances, there is no confrontation
19 clause problem, and we believe that that conclusion is
20 supported not only by the opinion for the plurality of
21 Justice Stewart, but also by Justice Harlan's concurring
22 opinion, and therefore was endorsed by a majority of the
23 Court in Dutton.

24 Conversely, we would emphasize, the state's
25 purpose in laying the declarant's statement before the

1 jury could not have been served by presenting the
2 declarant's testimony in lieu of his statement. Because
3 of this unique situation that the live testimony
4 wouldn't have served the state's purpose and the
5 statement did not go to the -- was not offered for the
6 truth of its content, it would have been very peculiar
7 to impse upon the state as respondent would have it and
8 as the Tennessee Court of Criminal Appeals had it, the
9 burden of calling the declarant as a witness simply so
10 that respondent could cross examine him on matters
11 outside of the scope of the state's case.

12 Indeed, if one accept's the respondent's
13 premise, one might well ask what examination the state
14 was required to undertake of Mr. Peele. Was this --

15 QUESTION: Do you mean that in Kentucky when
16 you put a witness on the stand you can ask him
17 anything?

18 Isn't that what you said?

19 MR. SCHWARTZ: I don't believe I said that.

20 QUESTION: Well, you said you couldn't limit
21 the examination.

22 MR. SCHWARTZ: Oh, I do not speak as the
23 expert on Tennessee.

24 QUESTION: If he put a witness on the stand in
25 Tennessee, couldn't the defendant ask him anything?

1 MR. SCHWARTZ: Well, there may be procedural
2 rules about scope of cross examination, but we would
3 suppose that if the scope had limited its examination,
4 that may --

5 QUESTION: Well, isn't that the normal way to
6 produce evidence, if you have got a witness and a
7 written statement, isn't it normal that you put your
8 witness on?

9 MR. SCHWARTZ: But if the purpose of --

10 QUESTION: Isn't the normal way to do it that
11 way?

12 MR. SCHWARTZ: Not if one's purpose is to
13 prove that the statement was made rather than --

14 QUESTION: You mean, not if you don't want
15 cross examination.

16 MR. SCHWARTZ: If the purpose -- if the
17 defendant's purpose was to be able to examine Mr. Peele,
18 that purpose could have been fully satisfied. The
19 Court's decision in Ohio v. Roberts makes it clear that
20 whether it is billed cross examination or direct
21 examination, a person who is physically available, as
22 Peele certainly was -- his location was known to all.
23 He was conveniently located in the county jail -- could
24 have been called as a defense witness and there is no
25 question that whether it is called direct or cross

1 examination, he could have been examined on the topics
2 that were of interest to the respondent.

3 It makes practical sense, we would submit, to
4 leave this choice in this situation to the respondent
5 because it is the respondent who wants to examine the
6 declarant on subjects that are outside the scope of the
7 state's case.

8 In this situation there were several
9 possibilities.

10 QUESTION: I thought the respondent didn't
11 want this in there at all.

12 MR. SCHWARTZ: But it is the respondent's
13 complaint that --

14 QUESTION: Don't -- please don't tell me you
15 are doing him a favor.

16 (General laughter.)

17 MR. SCHWARTZ: No doubt the respondent would
18 have preferred not to have that statement in, but we do
19 not believe the law affords him the choice of saying
20 that his -- of testifying that his was a coerced
21 imitation of Peele's confession and still not having the
22 jury have a look at that statement.

23 If respondent believed that it would be in his
24 interest to call the declarant as a witness, and he
25 deemed unacceptable the risk that the court's limiting

1 instruction would confine the jury properly, he was free
2 to call the declarant as a witness, and he was fully
3 able to fulfill any legitimate confrontation objective
4 by that process. Of course, as we said, the respondent
5 was equally available to the respondent situated in the
6 county jail.

7 If the respondent -- if the declarant -- if
8 the respondent had called the declarant, there are
9 several possibilities. The declarant might have
10 reiterated his confession, as this court's decision in
11 Nelson v. O'Neill points out. That surely would not
12 have put the respondent in a better position.

13 It is possible that he would have disavowed
14 the confession. This would have helped the defendant in
15 some sense, but if the defendant thought that would
16 occur, it is not clear to us why that could not have
17 been done. It clearly could have been done as part of
18 the defense case.

19 And finally, it is possible that the declarant
20 would have taken the Fifth Amendment and would have been
21 unavailable. And if that were to have occurred, it
22 would be a very extreme result and nonetheless hold that
23 even if that had occurred, there would have been no
24 opportunity for the state to use the statement.

25 The final point that I would like to comment

1 on if time allows concerns the bearing of this Court's
2 decision in Parker v. Randolph on this case. The
3 Tennessee Court of Criminal Appeals thought that Parker
4 v. Randolph had no bearing because this case did not
5 involve a joint trial.

6 In that respect we believe that the Court of
7 Criminal Appeals got the matter precisely backwards, as
8 is detailed in our brief.

9 Thank you, Mr. Chief Justice.

10 CHIEF JUSTICE BURGER: Mr. Rogers?

11 ORAL ARGUMENT OF LANCE J. ROGERS, ESQ.

12 ON BEHALF OF RESPONDENT

13 MR. ROGERS: Thank you, Mr. Chief Justice, and
14 may it please the Court:

15 This case involves the question how to
16 accommodate two valid competing interests. On the one
17 hand we have the state's interest in impeaching a
18 testifying defendant, and on the other hand we have the
19 defendant's interest in preserving his confrontation
20 rights

21 It is our position that both parties here had
22 an interest in the confession of Clifford Peele. The
23 state was interested in demonstrating that the two
24 confessions were not identical, and the defense was
25 interested in preserving Street's confrontation rights

1 by making sure that those portions of the confession of
2 Clifford Peele which directly accused Street of
3 committing the crime charged, were not read to the
4 jury.

5 Both of these purposes could have been served
6 in this case if the state had simply redacted the
7 portions which directly incriminated Street or abided by
8 the original agreement --

9 QUESTION: Mr. Rogers, could I interrupt you
10 for a minute and get it out on the table the thing that
11 troubles me?

12 Why, if your -- if the defense theory was
13 correct in this whole matter, why would it not have
14 served the defendant's purpose to have the fact that the
15 confession implicated the defendant brought before the
16 jury? Why would you want it redacted?

17 Wasn't that the heart of the argument you were
18 making?

19 MR. ROGERS: No, we didn't want the parts that
20 accused him of taking an active part --

21 QUESTION: But you brought it out on direct
22 examination that the confession implicated him, and
23 that's why, according to your theory, there was this
24 parroting.

25 MR. ROGERS: Well, we think an inference is a

1 little bit less prejudicial than the words from a
2 virtual eye witness to the crime as far as jury --

3 QUESTION: Was it not your theory at trial
4 that the reason your client confessed was that this
5 other man had said he was guilty of the crime?

6 MR. ROGERS: And because the sheriff forced
7 him to.

8 QUESTION: Right, but wasn't it part of the
9 whole theory that you were trying to develop was that
10 there was another confession that implicated your
11 client?

12 If that wasn't your point, what was your
13 point?

14 MR. ROGERS: No -- well, it was our point, but
15 we thought at the time that the --

16 QUESTION: Then how can you redact the heart
17 of your point?

18 MR. ROGERS: We can redact the part that
19 accuses Joe Street of actually participating in the
20 crime.

21 There were several differences in this case
22 which the state deemed critical to their position, and I
23 would like to demonstrate how. They had called Sheriff
24 Papantoniou to the stand to read Peele's confession and
25 then engaged in an agreement with the defense to merely

1 highlight the differences. That is, in response to the
2 questions from the prosecutor, they would highlight the
3 differences between the two confessions without reading
4 all of Peele's confession to the jury.

5 In pursuit of this agreement, the Court
6 instructed the sheriff to read the confession to
7 himself, which he did, and at this point the prosecutor
8 approached the bench and then requested permission to
9 read the entire text into evidence. The Court reminded
10 him of the original agreement, but the prosecutor
11 claimed it would be more coherent if he read the entire
12 text into evidence.

13 He then read the entire text into evidence and
14 then proceeded to do precisely what he said he could not
15 do, and that is have Sheriff Papantonious highlight
16 differences between the two of them in response to
17 questioning without mentioning any of the portions of
18 the confession which accused Joe Street of participating
19 in the crime.

20 There were seven critical distinctions, and on
21 closing argument, the prosecutor again went through
22 those seven distinctions.

23 It is our position that the confrontation
24 clause was violated once the state went beyond what was
25 necessary to show that the two statements were not

1 identical and that this violation was not cured either
2 through limiting instructions or by simply labeling it
3 non-hearsay.

4 QUESTION: Counsel, I am really a little
5 puzzled by how the confrontation clause should require
6 the state to call the declarant when the statement of
7 the declarant is not introduced for purposes of proving
8 the truth of the contents of the statement.

9 MR. ROGERS: Well, it is our position --

10 QUESTION: That's such a basic rule of
11 evidence, it is hard for me to understand how the
12 confrontation clause comes in at all.

13 MR. ROGERS: Well, we think that the heart of
14 the Bruton decision is that a jury is simply unable to
15 disregard the dramatic impact of an accomplice's
16 confession, particularly --

17 QUESTION: Well, that might invoke a due
18 process concern, but it is very hard for me to see how
19 it raises a confrontation issue.

20 MR. ROGERS: Well, I think it was labeled a
21 confrontation issue in Bruton because Evans was not
22 available for cross examination regarding that
23 statement, and I think we can say the same thing about
24 Clifford Peele.

25 QUESTION: But he was available certainly to

1 the defense if they had chosen to call him, wasn't it?

2 MR. ROGERS: If we could have called him and
3 gotten him -- and labeled him a hostile witness, we
4 still would have been faced with the situation where the
5 state had already accomplished what they had wanted to
6 accomplish and gotten the confession before the jury
7 because as I see it, the confrontation clause has two
8 prongs. It is cross examination and requiring the
9 declarant to make the accusation under oath in a
10 judicial forum.

11 Well, the first prong had already been removed
12 because Peele had already made the statement through
13 Sheriff Papantoniou's mouth.

14 QUESTION: Yes, but as I understand it, the
15 trial judge's theory of admitting that was that it was
16 independently admissible of the truth to rebut your
17 client's contention that his confession was just kind of
18 a parrot job on Peele's confession.

19 MR. ROGERS: Right, because it was not being
20 offered for the truth of the matter asserted, a
21 hearsay --

22 QUESTION: And there you don't have -- if it's
23 a legitimate hearsay exception to the confrontation
24 clause, you don't have those two requirements, I don't
25 think.

1 MR. ROGERS: I still think that under Bruton,
2 labeling it hearsay -- I don't think there's any
3 distinction between telling the jury don't use this
4 confession against this defendant, use it against that
5 defendant, and don't use this confession for the truth
6 of the matter asserted, but do use it against the
7 defendant.

8 I think the jury is very quickly able to
9 pierce through to the important part of the confession,
10 and that is the accusatory part.

11 QUESTION: Well, was there any independent
12 grounds for admissibility in Bruton such as there was
13 here?

14 MR. ROGERS: Not against Bruton himself, no,
15 there wasn't, but I don't believe that that's the
16 critical -- I don't think that's critical to the decision
17 in Bruton.

18 QUESTION: Well, isn't this much like or
19 analogous to the situation in the Harris case where it
20 was held that you could properly admit for impeachment
21 purposes statements that were inadmissible under
22 Miranda, not for the truth of those statements but for
23 impeachment, and isn't this the same thing?

24 MR. ROGERS: No, I don't believe it is,
25 Justice O'Connor. In Harris and Hass and that line of

1 cases, the sword/shield cases, we engage in a balancing
2 test, balancing the reason for the admission against the
3 reason for the exclusion. In those cases we exclude --
4 evidence that was reliable and trustworthy was excluded
5 and the truth was frustrated in order to deter police
6 misconduct, in order to get them to comply with Miranda,
7 but there was nothing wrong with the statements
8 themselves. They were not involuntary or coerced.

9 So the balancing test favored using the
10 evidence to enhance the truth finding function of the
11 trial.

12 In this case, though, Peele's statement was
13 excluded precisely because it did constitute a threat to
14 truth determination either under a hearsay analysis or
15 confrontation analysis. Under Bruton, the in-custody
16 confession of an accomplice is inevitably suspect, and I
17 think that makes the distinction between this case and
18 the sword/shield cases.

19 QUESTION: Is it the fact that your client
20 today sought to introduce the same statement himself
21 earlier in the trial, Mr. Peele's statement?

22 MR. ROGERS: Yes, that's a fact.

23 QUESTION: So the argument rings just a little
24 bit hollow, doesn't it?

25 MR. ROGERS: Well, at that point in the trial

1 the state had given every indication that they were
2 going to call Clifford Peele on direct examination, and
3 so as a tactical matter, there was an interest in trying
4 to diffuse what we thought would be his potentially
5 incriminating, indeed, devastating testimony against Joe
6 Street, and also to introduce it for whatever relevance
7 it would have on the parroting point.

8 At a minimum, though, our position there is no
9 more inconsistent than that of the state because the
10 state objected at that point to introduction of that
11 statement.

12 It is our position that to the jury, that the
13 impeachment value of Clifford Peele's confession was not
14 that the two statements were not identical, but rather,
15 that it rebutted Joe Street's alibi defense by placing
16 him at the scene of the crime and assigning him an
17 active role in the murder. There was no physical
18 evidence linking Joe Street to the crime, and there were
19 no eye witnesses presented by the state.

20 Peele's confession, however, provided the
21 state with its missing eye witness testimony free of the
22 risk of cross examination and free of the risk of the
23 jury viewing his demeanor.

24 We believe also that the Tennessee Court of
25 Criminal Appeals properly interpreted the interlocking

1 confession doctrine by holding that it does not apply to
2 severed trials. At joint trial the state has a
3 compelling interest in introducing the confessions of
4 the codefendants. The state is presented with a
5 dilemma. They have two or maybe even three perfectly
6 valid confessions which they wish to introduce against
7 the confessors, but under a rigid Bruton application,
8 they are prohibited from introducing those confessions
9 against the confessors.

10 Parker and the similar interlocking confession
11 cases allows them to introduce the confessions against
12 the confessors, but they had already accomplished that
13 purpose in this case, and we feel that that is a
14 distinction.

15 We also believe that this Court should decline
16 to reverse pursuant to the doctrine of harmless error.
17 The Tennessee Court of Criminal Appeals concluded, after
18 examining the record, that they could not say beyond a
19 reasonable doubt that the confrontation violation here
20 had no effect on the verdict or that the evidence of
21 guilt was otherwise overwhelming. They could not say
22 that the jury would have returned the same verdict
23 without Clifford Peele's confession. Other than Joe
24 Street's own recanted confession, there was no physical
25 evidence or eye witnesses presented by the state.

1 QUESTION: What if -- what if Peele had been
2 there and the state had put him on the stand and they
3 had -- they asked about his confession and he confirmed
4 that he made those statements and he says they are
5 still correct, what -- could the state use that
6 confession then against -- to prove your client's
7 guilt?

8 MR. ROGERS: If they called Clifford Peele on
9 direct, yes, they could.

10 QUESTION: And if they had called him and he
11 had been in the courtroom, could they have used it for
12 impeachment?

13 MR. ROGERS: I think it would also be relevant
14 on the impeachment.

15 QUESTION: And it would have been admissible,
16 his confession would have been admissible.

17 MR. ROGERS: Yes.

18 QUESTION: For impeachment purposes.

19 MR. ROGERS: Yes.

20 QUESTION: And to prove the guilt of the
21 defendant.

22 MR. ROGERS: Yes, if he had been there in the
23 courtroom personally.

24 QUESTION: Are you sure they could have
25 impeached their own witness? You are willing to concede

1 that, put the man on the stand and --

2 MR. ROGERS: I'm sorry, I have misinterpreted
3 Tennessee law. You have to have --

4 QUESTION: I have tried a lot of cases where I
5 couldn't do it, I know.

6 MR. ROGERS: Yes, I'm sorry.

7 It is our position that Peele's confession
8 provided the state with its missing eye witness
9 testimony and that it also provided the jury with all
10 the requisite elements of the homicide had they chosen
11 to believe that Joe Street's confession was
12 involuntary.

13 Getting back to my original point, I think
14 this really is a simple case requiring the accommodation
15 of two valid competing interests, the state's interest
16 in showing that the two confessions were not identical,
17 and the defense interest in keeping out those portions
18 of the confession which directly accuse Joe Street of
19 committing the crime charged. Both purposes could have
20 been satisfied by either redacting the statement or
21 abiding by the original agreement to merely have the
22 sheriff highlight those seven differences which the
23 state demonstrated that they could well do, and they
24 demonstrated again in closing argument when they
25 highlighted the seven differences again for the jury

1 without referring to any of the portions of Clifford
2 Peele's confession which incriminated the respondent.

3 QUESTION: Well, Mr. Rogers, are you
4 suggesting that any time you have the sort of competing
5 interests that you say could have been balanced here,
6 the question of how they are balanced is a question that
7 a state court has to look to the federal constitution
8 on?

9 MR. ROGERS: I think that there they could
10 look to either the federal or state constitution on the
11 issue, but when there is a confrontation problem
12 involved, I think it is important to look at the
13 balancing and competing interests precisely because of
14 the reasons, when I responded to Justice O'Connor's
15 question regarding the sword/shield cases. You need
16 that balancing, the reasons for the admission versus the
17 reasons for the exclusion, and if they can accomplish it
18 in this case without referring to those portions that
19 directly accuse him of committing the crime charged, I
20 think we should weight that on balance.

21 It is our position that the confession of
22 Clifford Peele devastated the case for the respondent.
23 He presented an alibi defense with 13 witnesses in
24 support of that alibi defense. He took the stand and
25 asserted that alibi defense and presented a plausible

1 explanation for his own confession. The state presented
2 no physical evidence, presented no eye witnesses against
3 Joe Street. All they had was his own recanted
4 confession. Except for Clifford Peele, reading his
5 confession not only was unnecessary but provided the
6 state with its missing eye witness testimony.

7 QUESTION: Is that entirely correct? Isn't it
8 true -- now, maybe my recollection is wrong, but there
9 were some things in his statement that were corroborated
10 by physical evidence at the scene.

11 Is that wrong?

12 MR. ROGERS: Only to the extent that Clifford
13 Peele's confession corroborated certain things found at
14 the scene.

15 QUESTION: But there was -- even without
16 Peele's confession, you say there was nothing in the
17 Defendant's confession that was corroborated by physical
18 evidence like, for example, the rope and things like
19 that?

20 MR. ROGERS: Well, yes, I think items like
21 that, but I meant there weren't -- there were extensive
22 tests, hair, fingerprints, things like that, and none of
23 these were found in this case.

24 We respectfully request that this Court affirm
25 the Tennessee Court of Criminal Appeals.

1 CHIEF JUSTICE BURGER: Do you have anything
2 further, Counsel?

3 You have one minute remaining.

4 ORAL ARGUMENT OF ROBERT A. GRUNOW, ESQ.

5 ON BEHALF OF PETITIONER -- Rebuttal

6 QUESTION: Mr. Attorney General, could I ask
7 one?

8 In Tennessee, is there any procedure in a
9 criminal case where when the defendant in this case made
10 that kind of a statement, that I was made to do this,
11 the other confession can say -- have a side bar
12 conference and tell him that if you pursue that line of
13 testimony, I am going to let this confession in?

14 Is there any way to do that in Tennessee?

15 MR. GRUNOW: By a side bar conference, there
16 could be, but there's no formalized procedure that way.

17 QUESTION: But it could be done that way.

18 MR. GRUNOW: I suppose it could, yes.

19 QUESTION: I'm looking to the future, that's
20 all.

21 MR. GRUNOW: In response to the question about
22 taking the confession into the jury room, there is no
23 indication in this record that that was done. However,
24 in the appendix on page 350 it indicates that pursuant
25 to an objection which was overruled, the jury was

1 allowed to read Peele's confession before deliberating.

2 Unless there are any further questions, I have
3 nothing further.

4 CHIEF JUSTICE BURGER: Thank you, gentlemen.

5 The case is submitted.

6 We will hear arguments next in City of
7 Cleburne v. Cleburne Living Center.

8 (Whereupon, at 10:55 o'clock a.m., the case in
9 the above-entitled matter was submitted.)
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CERTIFICATION

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83-2143 - TENNESSEE, Petitioner V. HARVEY J. STREET

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BY Paul A. Richardson

(REPORTER)