

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 34-6807

TITLE MILLIE R. LEE, Petitioner v. ILLINOIS

PLACE Washington, D. C.

DATE December 9, 1985

PAGES 1 thru 50



(202) 628-9300
20 F STREET, N.W.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x

MILLIE R. LEE, :

Petitioner, :

V. : No. 84-6807

ILLINOIS :

- - - - -x

Washington, D.C.

Monday, December 9, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:05 o'clock a.m.

APPEARANCES:

DAN W. EVERS, ESQ., Mt. Vernon, Illinois; on behalf of
the petitioner.

JILL WINE-BANKS, ESQ., First Assistant Attorney General
of Illinois, Chicago, Illinois; on behalf of the
respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
DAN W. EVERS, ESQ.,	
on behalf of the petitioner	3
JILL WINE-BANKS, ESQ.,	
on behalf of the respondent	18
DAN W. EVERS, ESQ.,	
on behalf of the petitioner - rebuttal	44

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Lee against Illinois.

4 Mr. Evers, you may proceed whenever you are
5 ready.

6 ORAL ARGUMENT OF DAN W. EVERS, ESQ.,

7 ON BEHALF OF THE PETITIONER

8 MR. EVERS: Mr. Chief Justice Burger, may it
9 please the Court, this is the case of Millie R. Lee
10 versus Illinois. I represent the petitioner, Millie R.
11 Lee, who was convicted in the Circuit Court of St. Clair
12 County, Illinois, of the murders of Odessa Harris and
13 Mattie Darden.

14 The issue presented before this Court today is
15 one involving significant rights under the Sixth and
16 Fourteenth Amendments of the Constitution of the United
17 States involving the confrontation clause.

18 The specific issue involved in this case is
19 whether those amendments were violated when the trial
20 judge in this case sitting as the trier of fact stated
21 on the record that he was considering the co-defendant's
22 confession against my client, Millie R. Lee, in finding
23 her guilty of the two murders of Odessa Harris and
24 Mattie Darden.

25 The issue arises specifically because in this

1 case in a bench trial the judge noted that he was
2 considering this as substantive evidence.

3 QUESTION: Was the confession admitted in
4 evidence earlier in the trial?

5 MR. EVERS: Your Honor, the confession of
6 Edwin Thomas was admitted by the trial court judge
7 earlier, and it was found to be admissible against Edwin
8 Thomas by the trial court judge at that time, yes.

9 QUESTION: And Thomas was being tried at the
10 same time as she was?

11 MR. EVERS: And it was a joint trial. The
12 petitioner Millie Lee and the co-defendant Edwin Thomas
13 had waived jury trial previously, and the day of trial
14 they came in and waived out a motion to sever the case
15 from each other, and they agreed that a bench trial
16 would be proper if the judge considered the appropriate
17 evidence only against each defendant.

18 At trial --

19 QUESTION: Well, was there any objection to
20 the admission of the co-defendant's statement?

21 MR. EVERS: There was no objection made to the
22 admission of the statement into evidence except with the
23 understanding that the evidence was to be considered
24 separately. At the beginning of trial when they said
25 that their motion to sever would be moot or disregarded,

1 it is because they went in on the understanding that the
2 judge would be able to consider the evidence separately
3 against each defendant.

4 The general rule of law, of course, is that
5 the judge can compartmentalize his mind and separate the
6 evidence and consider the evidence separately. That is
7 why --

8 QUESTION: Did he say what was in the
9 co-defendant's confession as it relates to this
10 petitioner would not be considered as to this
11 petitioner?

12 MR. EVERS: At the very beginning of trial,
13 when they talk about the judge considering the evidence
14 separately, Judge Hobin, who was the trial court judge,
15 does state that he would do that, and so this trial
16 began on the basis that the judge would separate the
17 evidence and consider the admissible evidence only
18 against each co-defendant.

19 QUESTION: And did he say later that
20 nevertheless he was now going to consider it against
21 this petitioner?

22 MR. EVERS: When he finds my client, Millie
23 Lee, guilty at the end of the presentation of the
24 evidence and at the end of arguments by counsel, the
25 trial court judge states in his finding of guilt that

1 the petitioner is guilty as charged, and he states, I
2 reject -- basically he says, I reject her defense
3 because her argument is that she was not guilty of the
4 murder of Odessa Harris because she had no intent to
5 kill, did not plan to kill, and did not know that Edwin
6 Thomas was going to kill Odessa Harris, and that her
7 second defense was that the killing of Mattie Darden
8 would be voluntary manslaughter.

9 The trial court judge says, I reject that
10 because whether there is a plan to kill is disputed by
11 the co-defendant's confession. The co-defendant's
12 confession clearly shows that there was premeditation,
13 and then he also says that he rejects voluntary
14 manslaughter because the co-defendant's confession says
15 that Edwin Thomas had asked her to go in and take care
16 of Mattie Darden.

17 QUESTION: Asked her meaning asked the
18 petitioner?

19 MR. EVERS: Asked the petitioner. The general
20 basic facts of the confession by the co-defendant Edwin
21 Thomas and the statement by Millie Lee is, there is a
22 great difference. I would argue that there is no
23 confession to murder in Millie Lee's statement.

24 Her statement only involves that she was in
25 her apartment with her boyfriend, Edwin Thomas, her

1 aunt, Mattie Darden, and another woman by the name of
2 Odessa Harris, and there had been some conflicts
3 earlier, but in an argument with Odessa Harris, Odessa
4 Harris was leaving, and Edwin Thomas snuck up behind her
5 and stabbed her in the back.

6 Edwin Thomas's statement, his confession says
7 that Millie Lee and Odessa Harris were standing in the
8 kitchen talking, and he went up to sneak up behind her
9 in the kitchen and stab her in the back, but Odessa
10 Harris caught him, and he had to wrestle her to the
11 floor, and stabbed her in the chest or stomach area.

12 There is a great difference. The problem is
13 in this case Edwin Thomas's confession says that they
14 had talked for months about the problem with Mattie
15 Darden, and that they had talked about the need to kill
16 Mattie Darden, and that that night they talked about it
17 and talked about the need to kill Odessa Harris.

18 There is no such admissions, there are no such
19 statements in Millie Lee's statement.

20 QUESTION: What did -- Did you try the case?

21 MR. EVERS: No, sir.

22 QUESTION: What was said by trial counsel when
23 the judge revealed that he was relying on the
24 co-defendant's confession?

25 MR. EVERS: The trial counsel does not make

1 any objection on the record, and I do not know whether
2 that is because trial counsel did not hear the
3 statement, was not listening and inattentive at that
4 time, and just went on assuming the trial court judge
5 was keeping the evidence separate for --

6 QUESTION: Well, how could he assume that when
7 he said he wasn't?

8 MR. EVERS: I am not sure how that could
9 happen, Your Honor. All I know is that there was no
10 objection at that time during trial.

11 QUESTION: Do you suppose that the failure to
12 object was on the grounds that there was no point in
13 calling more attention to it and that it didn't make any
14 difference in the long run given the totality of the
15 evidence?

16 MR. EVERS: I do not believe that that would
17 be a good assumption in this case.

18 QUESTION: Do you suggest that the evidence
19 was not strong, the evidence of guilt was not strong
20 independent of this evidence?

21 MR. EVERS: I believe that the evidence of
22 guilt is closely balanced, and is not clearly showing
23 that she had -- that the state proved her guilty beyond
24 a reasonable doubt of the murder of Odessa Harris. You
25 have to make a number of inferences in the case to reach

1 that.

2 In this case, the trial court judge had to
3 reach out and grab hold of the co-defendant's confession
4 in order to make that. The trial court judge was
5 reaching for something more solid than a number of
6 inferences from the petitioner's statement. I don't
7 think that the trial court attorney, the attorney for
8 Millie Lee at trial really heard what the judge was
9 saying, for whatever reason which I don't know.

10 QUESTION: Wouldn't you expect trial counsel
11 to be listening when the judge is sentencing his
12 client?

13 MR. EVERS: I would expect that to occur, and
14 I could only speculate as to why trial counsel was not
15 listening at that time.

16 QUESTION: Maybe he didn't know that
17 confession was not admissible against Lee.

18 MR. EVERS: I really don't see how that would
19 be possible under Illinois law since --

20 QUESTION: It sounds like it is more possible
21 than that he didn't hear what the judge said.

22 MR. EVERS: I really don't think that's
23 possible, Justice White, since she, counsel had filed a
24 motion to sever when the jury trial was still a
25 possibility, and in that motion to sever she alleges

1 that prejudice would occur if trial would be conducted
2 with the co-defendant, and the major reason why prejudice
3 would occur is because of co-defendant's confession.

4 QUESTION: How in the world can I assume that
5 a lawyer didn't hear something that was said in open
6 court? How in the world can you assume that? Is there
7 anything in the record that would give you the slightest
8 idea? The answer is no.

9 MR. EVERS: From the record --

10 QUESTION: How can you as counsel assume that
11 which is against your client?

12 MR. EVERS: From the record, I can only state
13 that the attorney either did not hear it or was not
14 paying attention for some reason at that point in time.

15 QUESTION: Or agreed.

16 MR. EVERS: Or just let it pass her by.

17 QUESTION: Or agreed. Or agreed to let it go.

18 MR. EVERS: I do not believe that it can be
19 said that trial counsel at that time agreed to let it
20 go --

21 QUESTION: Mr. Evers --

22 MR. EVERS: -- because she also filed a
23 post-trial motion asking that a new trial be granted in
24 which counsel again reiterates the defense of her client
25 at trial, which was that there was no intent to kill

1 based upon the statement, and that voluntary
2 manslaughter was also a possibility as a verdict due to
3 the petitioner's statement --

4 QUESTION: Mr. Evers --

5 MR. EVERS: -- and if she believed that the
6 co-defendant's confession was admissible and usable
7 against Millie Lee, then there would be no need to put
8 that into the post-trial motion.

9 QUESTION: Mr. Evers, I didn't want to
10 interrupt you, but I think I understood you to say at
11 the outset that the trial court had agreed that it would
12 not consider in response to the motion to sever the
13 evidence introduced by one party against the other
14 party. Did the judge say that on the record?

15 MR. EVERS: The trial attorneys indicate that
16 the motion is no longer needed to be heard because with
17 a bench trial the judge would consider the evidence
18 separately. The judge says it will be done so.

19 QUESTION: So your position is, the judge did
20 agree in advance that he would not consider the evidenc
21 with respect to Thomas in his consideration of whether
22 Lee was guilty or not?

23 MR. EVERS: Yes, Your Honor.

24 QUESTION: He didn't mention the confession,
25 so the confession wasn't specifically mentioned,

1 because --

2 MR. EVERS: At the beginning?

3 QUESTION: -- because the confession of the
4 co-defendant surely relates to Lee.

5 MR. EVERS: The confession of the
6 co-defendant?

7 QUESTION: Yes.

8 MR. EVERS: Millie Lee is mentioned in the
9 co-defendant's confession.

10 QUESTION: So what makes you think -- the
11 judge never said he wouldn't consider the co-defendant's
12 confession against Lee. He never said that
13 specifically. He didn't say he would observe -- that he
14 would keep the two confessions separate.

15 MR. EVERS: Admittedly they do not say on the
16 record exactly what the evidence is that they are going
17 to be keeping separate. They also conduct during this
18 joint bench trial the suppression motion for both Millie
19 Lee and Edwin Thomas. That also is to be kept
20 separate.

21 The point is that they moved, both Edwin
22 Thomas and Millie Lee moved to sever their cases when
23 they were proposing to have a jury trial, and in Millie
24 Lee's motion to sever, it alleges prejudice would occur
25 if the co-defendant was tried with her, and in that case

1 the most prejudicial evidence against Millie Lee is the
2 co-defendant's confession.

3 QUESTION: Mr. Evers, may I go back for a
4 minute to your suggestion that maybe the lawyer didn't
5 hear what the judge was saying? We are talking, as I
6 understand it, about the judge announcing his ruling and
7 explaining his reasons for the ruling.

8 MR. EVERS: Yes, Your Honor.

9 QUESTION: Is it customary in Illinois for a
10 lawyer to interrupt a judge who is ruling and tell him
11 he objects to the ruling as it is being delivered?

12 MR. EVERS: It would be possible to --

13 QUESTION: It would be possible, but is that
14 customary?

15 MR. EVERS: It is not customary.

16 QUESTION: The practice has changed since I
17 was there if it is.

18 MR. EVERS: It may be possible to object at
19 that time, but it is not customary, and as far as what
20 was going on, I am not sure, as far as how the courtroom
21 scene was set up.

22 QUESTION: Isn't the typical way to object to
23 a judge's ruling by filing a post-trial motion? And
24 isn't that exactly what was done in this case? So why
25 do you have to assume that the lawyer didn't hear? I

1 imagine the lawyer has to be courteous to the judge.

2 QUESTION: Would it not also be a logical time
3 when the judge concluded his statement to object then
4 and there?

5 MR. EVERS: That would also be possible. I
6 would admit that, Your Honor. The important point,
7 though, is that even though no objection was made, that
8 this is a significant constitutional right, and one that
9 implicates a fair trial?

10 QUESTION: Did the motion for a new trial talk
11 about Bruton?

12 MR. EVERS: The motion for a new trial did not
13 talk about Bruton.

14 QUESTION: Did it say specifically that the
15 co-defendant's -- did it call to the judge's attention
16 that the co-defendant's confession was not admissible
17 against Lee?

18 MR. EVERS: It does talk about the only
19 evidence against Millie Lee is her statement, and that
20 her statement does not indicate an intent to kill.

21 QUESTION: Did it say to the judge, look,
22 judge, you made a mistake by considering the other
23 confession against Lee?

24 MR. EVERS: No, Your Honor.

25 QUESTION: Well, for heaven's sake.

1 QUESTION: Putting Justice White's question
2 somewhat differently, assume that Thomas had been tried
3 earlier, and that his confession has been admitted
4 against him in that trial. Would the confession have
5 been admitted against Lee in a later trial?

6 MR. EVERS: No, Your Honor. Illinois law
7 would make that inadmissible, and from what occurred at
8 trial, if Millie Lee and Edwin Thomas had a jury trial,
9 under Illinois law the judge would have been required to
10 sever the cases so that the confession of Edwin Thomas
11 would not prejudice Millie Lee at the jury trial.

12 What the Court appears to be worried about is
13 whether there is waiver of this constitutional right in
14 this case, and I do not believe that that could be found
15 on this record. The record is silent as to why no
16 objection was made at the time, and to suggest that it
17 was waived would be waiving out a significant
18 constitutional right, and the Sixth Amendment
19 confrontation clause was not suggested by the State of
20 Illinois in the appellate court below or in this Court,
21 and the general rule in Illinois is that any error made
22 at a bench trial is preserved for appellate review
23 without filing a post-trial motion.

24 QUESTION: And in this case I guess the
25 Illinois appellate court did review the merits.

1 MR. EVERS: The appellate court of Illinois
2 did review the merits of this case. The appellate court
3 of Illinois apparently extended the plurality opinion
4 written by Justice Rehnquist in Parker versus Randolph
5 to this case stating that this was an interlocking
6 confession case.

7 Parker versus Randolph distinguished Justice
8 Brennan's opinion in Bruton, and indicated that there
9 was no error in admitting the co-defendant's confession
10 at a joint jury trial, but even in Parker versus
11 Randolph the jury was instructed by jury instructions
12 from the judge that they were not to consider the
13 co-defendant's confession against each other.

14 In Parker versus Randolph, it was clear that
15 the jury was instructed that the co-defendant's
16 confession was not to be used against the defendant who
17 it did not involve, so I believe that there is a clear
18 constitutional violation here in that the trial judge
19 stated on the record that he was using the
20 co-defendant's confession and not just a problem of
21 prejudicing the jury by hearing the confession of the
22 co-defendant and then being instructed to disregard it.

23 If there would be no other questions, Your
24 Honors, I would request that you reverse her convictions
25 of the two murders, remand for a new trial where she

1 would not be prejudiced by this confrontation clause
2 Sixth Amendment violation.

3 QUESTION: Do you ask also that it be referred
4 to a different judge for trial?

5 MR. EVERS: I believe that would be
6 appropriate, Your Honor.

7 QUESTION: Well, do you ask for it?

8 MR. EVERS: Yes, I would ask for it.

9 QUESTION: In your pleadings, in your papers
10 filed with this Court?

11 MR. EVERS: I did not put it into the
12 pleadings, because as I understand it now the trial
13 court judge is not doing criminal cases in St. Clair
14 County. But I would indicate that it would not be
15 proper for Judge Hobin to hear it again.

16 QUESTION: Mr. Evers, do you know of any case
17 coming from a state court system where this Court has
18 ever said that the case should be tried before a
19 different state trial judge?

20 MR. EVERS: No, Your Honor, I am not, but I
21 had not really thought about that problem since I
22 understand that the trial court judge was taken off the
23 criminal bench.

24 CHIEF JUSTICE BURGER: Very well.

25 Mrs. Wine-Banks.

1 ORAL ARGUMENT OF JILL WINE-BANKS, ESQ.,

2 ON BEHALF OF THE RESPONDENT

3 MRS. WINE-BANKS: Mr. Chief Justice, and may
4 it please the Court, respondent's position, simply
5 stated, is that there was no constitutional error in
6 this case in the admission and use of the co-defendant's
7 confession against the defendant, and secondly, that if
8 there was any error, it was harmless.

9 The tension that has long existed between the
10 use of hearsay in a criminal case and the rights of
11 confrontation under the Sixth Amendment can be lessened
12 by the opinion of the Court in this case. The Sixth
13 Amendment, of course, does not bar all hearsay.
14 Competing rights and public policy interests may
15 outweigh the defendant's right to confront the witnesses
16 against him at a trial without any cross examination.

17 Ohio v. Roberts establishes a two-pronged test
18 for determining what hearsay is admissible without cross
19 examination and without violation of the confrontation
20 clause. By applying the logic and the sensible
21 principles and the very workable guidelines of Roberts
22 to the facts of this case, respondents believe that
23 their position is supported and that the Court can find
24 that the petitioner's rights under the Sixth Amendment
25 were not violated or infringed by the use of her

1 co-defendant's confession against her at the trial.

2 For this reason, we urge that no error be
3 found, and that the petitioner's conviction be left
4 intact. The evidence in the record before this Court is
5 overwhelming of her guilt beyond a reasonable doubt,
6 even absent consideration of the co-defendant's
7 remarks. For this reason, too, the opinion of the
8 Illinois appellate court should be upheld.

9 QUESTION: May I just ask on that point, is it
10 correct, as I understand your opponent's brief to say
11 that the trial judge did rely on some facts that were in
12 the co-defendant's confession that were not in the
13 petitioner's confession?

14 MRS. WINE-BANKS: Only in rebutting the
15 petitioner's defense or claimed defense of self-defense,
16 the judge did make one brief reference to a fact in the
17 co-defendant's confession. However, in response to
18 another question asked of my opponent, had there been an
19 objection or this error called to the judge's attention,
20 he could have just as easily rebutted her claimed
21 defense on the basis of her own confession.

22 If we look at her confession --

23 QUESTION: But it is correct that at least in
24 his explanation of his ruling, he did rely on evidence
25 that was in the co-defendant's confession and not in the

1 petitioner's confession.

2 MRS. WINE-BANKS: In the statement,
3 absolutely, that is true.

4 QUESTION: And what you are saying is that we
5 should assume that if he had been interrupted when he
6 was making his ruling, he would have placed his ruling
7 on a different ground.

8 MRS. WINE-BANKS: That is our secondary
9 argument, yes. Our first argument is that having done
10 so, it was not error, that under the --

11 QUESTION: If we are to follow your reasoning
12 on the harmless error point, what standard of harmless
13 error should we announce? Do we have to be convinced
14 beyond a reasonable doubt that he would have done that,
15 or do we just think it is very likely that he would have
16 done it?

17 MRS. WINE-BANKS: I think that the test is,
18 would the case against petitioner have been
19 significantly reduced by the absence of the
20 co-defendant's confession.

21 QUESTION: And what case states that harmless
22 error test?

23 MRS. WINE-BANKS: In Schnable I believe that
24 is what the Court says. But if you went on a harmless
25 beyond reasonable doubt standard, I believe that that,

1 too, is satisfied because the evidence against the
2 petitioner is so overwhelming in this case, I do
3 disagree with my opponent on that. I think that a fair
4 reading of her confession proves that she has admitted
5 all of the elements of murder of both Odessa Harris and
6 Mattie Darden. Premeditation is total surplusage.

7 QUESTION: Now, is our inquiry that we think
8 she is guilty beyond a reasonable doubt, or we are
9 convinced the trial judge would have reached the same
10 conclusion and we know that beyond a reasonable doubt?

11 MRS. WINE-BANKS: I believe that you are free
12 to look at the record and make a determination of what
13 the trial court judge, what a reasonable trier of fact
14 would have concluded, and that you will conclude that
15 indeed there is no -- it would be a travesty to reverse
16 this case where the evidence is so overwhelming, but it
17 would also be wrong to reverse where under Roberts the
18 evidence is so reliable that it was not error to use
19 that evidence.

20 We believe that rather than having a
21 conviction saved by the harmless error argument after
22 the fact, that it would be better for this Court to rule
23 that it was admissible, and to give guidance so that
24 prosecutors and trial courts know what evidence may be
25 used in advance.

1 Roberts really makes the touchstone for
2 admissibility reliability, and under the two-pronged
3 test of Roberts this was clearly the kind of reliable
4 hearsay that the courts have long regarded as
5 admissible.

6 QUESTION: So that -- and I suppose this would
7 be the case if there were a jury there, and so Roberts,
8 you think, puts a gloss on Bruton?

9 MRS. WINE-BANKS: Yes, Your Honor, and I think
10 I would go even further and say not only would this
11 apply at a jury trial as well as a non-jury trial, but
12 it would apply at separate trials. If our theory is
13 correct, this would be admissible at a separate trial.

14 QUESTION: Exactly, so that Bruton is really
15 sort of beside the point, you are saying.

16 MRS. WINE-BANKS: Yes, Justice White, I do
17 think so.

18 QUESTION: You think Roberts overruled
19 Bruton?

20 MRS. WINE-BANKS: I think that it establishes
21 a different test. I think perhaps the Bruton case would
22 come out the same way under our test because in that
23 case where you have only one confession and you have the
24 overwhelming prejudice, if nothing else, under the
25 Court's inherent power to keep our prejudicial evidence

1 that is outweighed because of its prejudicial effect,
2 that the result would be the same in Bruton.

3 But where you have completely interlocking
4 confessions, that --

5 QUESTION: Well, they weren't interlocking in
6 the sense that the said the same things. The
7 co-defendant's confession said things that Lee's did
8 not.

9 MRS. WINE-BANKS: That is correct, but
10 although there has never been a clear definition of what
11 interlocking means, and indeed if you read the cases it
12 seems as if wherever there are two confessions the
13 courts say they interlock. I think that we could
14 propose a very sensible rule defining what interlocking
15 means, and that rule would be one that says where the
16 confessions interlock on all of the elements of the
17 offense, where they interlock on the relative
18 culpability of the actors, and on all the salient facts
19 of the crimes admitted, that that is an interlock, and
20 in this case if we look at those three criteria, we will
21 find that it is indeed a fully interlocking. The only --

22 QUESTION: May I interrupt right there?

23 MRS. WINE-BANKS: Yes.

24 QUESTION: If you use that test, you don't
25 need the other confession.

1 MRS. WINE-BANKS: Yes, Justice Stevens, that
2 is correct. I believe that this was probably
3 unnecessary.

4 QUESTION: It is just cumulative evidence
5 then.

6 MRS. WINE-BANKS: Yes, I think it is. That is
7 correct.

8 QUESTION: Then why should you bother
9 admitting it?

10 MRS. WINE-BANKS: I think that a prosecutor
11 should not have the constrictions of saying that they
12 may not use evidence which may indeed be necessary.

13 QUESTION: It doesn't hurt to prosecute her
14 under your analysis.

15 MRS. WINE-BANKS: That is true by hindsight,
16 but in the press of trial, I know from having been both
17 a trial lawyer and an appellate lawyer, you look at the
18 trial record as an appellate lawyer and you say, my
19 goodness, why did they do that, that is overkill, but in
20 the press of the trial you do not know what will be
21 persuasive, and that anything that is reliable, such as
22 this, should be admissible. The prosecutor should not
23 be barred from using it just because it is unnecessary.

24 QUESTION: It seems to me your argument also
25 -- your argument on reliability, you didn't need -- you

1 only needed one confession, and you could have used
2 either one under your analysis. You were free to use
3 the co-defendant's or the petitioner's.

4 MRS. WINE-BANKS: That is correct. They
5 both --

6 QUESTION: And either one would have been
7 sufficient.

8 MRS. WINE-BANKS: That is correct. But
9 because I am willing to concede that in a one-confession
10 case you might have a different rule, the existence of
11 the two confessions does make a difference, and here,
12 where you have the two confessions and they interlock,
13 the reliability is definitely enhanced under the Roberts
14 test.

15 QUESTION: But how does the interlock enhance
16 the reliability of the portion of the confession that
17 does not duplicate the other confession?

18 MRS. WINE-BANKS: I think that we would argue
19 that because a confession, once it is deemed to be
20 interlocking and reliable, the entire portion -- the
21 entire confession, including the surplusage and the
22 cumulative, comes in. There is nothing inconsistent, I
23 should point out, in Millie Lee's confession. She has
24 not admitted all of the facts, but I don't think that we
25 can say that Edwin Thomas's confession is less

1 reliable. Perhaps more damaging, but not less reliable,
2 because it contains more information than Millie Lee's.

3 QUESTION: Mrs. Wine-Banks, what again is your
4 theory under the law of evidence limited by the
5 Constitution as to how Thomas's confession comes in
6 against Lee?

7 MRS. WINE-BANKS: Justice Rehnquist, we would
8 argue that it comes in as a statement against penal
9 interest, which is reliable enough to meet the test of
10 Roberts, which determines, we believe, when any type of
11 hearsay is admitted. There have been several -- at
12 least two courts of appeal have admitted statements
13 against interest by accomplices against the defendant,
14 and have done so under the Roberts test, but they were
15 reliable enough to be admissible, so the question then
16 is, is a confession different enough from other
17 statements against penal interest to have a different
18 rule apply, and we would say that at least when there
19 are interlocking confessions that are corroborated by
20 other testimonial evidence in addition to being
21 corroborated by the interlock, and are corroborated by
22 the physical evidence, that those are so reliable that
23 they can be treated as our other statements against
24 penal interest.

25 QUESTION: Supposing you had a five-page

1 confession that went into great detail as to just how a
2 crime had been committed, and perhaps implicated several
3 other people. Would the fact that the bottom line of
4 the confession, so to speak, is against penal interest
5 of the person making it make that all admissible just
6 without limitation?

7 MRS. WINE-BANKS: Other than the limitations
8 that we are proposing, which is that it interlocks -- if
9 that was a single confession, no. But where it is
10 corroborated by all the other defendants admitting
11 exactly the same elements and the same relative
12 culpability and the same facts, yes, that would be fully
13 admissible.

14 QUESTION: Did either of the defendants take
15 the stand in this case?

16 MRS. WINE-BANKS: Only as part of the motion
17 to suppress, which was part of the trial, so that after
18 the state rested, both defendants testified on their
19 suppression hearing.

20 QUESTION: But they didn't testify as to the
21 merits, so to speak?

22 MRS. WINE-BANKS: No, although there is some
23 suggestion, I believe, that because Edwin Thomas went
24 beyond the suppression hearing, he was asked, "And so
25 then you told the police exactly what happened," and he

1 answered, "Yes." I believe that perhaps that goes
2 beyond the suppression --

3 QUESTION: In that case Bruton wouldn't apply.

4 MRS. WINE-BANKS: Yes, that is correct.

5 QUESTION: If he were available for cross
6 examination.

7 MRS. WINE-BANKS: Yes, and we do argue in our
8 brief that he was available for cross examination.

9 QUESTION: Mrs. Wine-Banks, what is the
10 Illinois law regarding admission of evidence if there
11 were a single confession by Thomas, no confession by
12 Mrs. Lee, and the Thomas confession was inculpatory? Is
13 it admissible, the entire thing, as a statement against
14 penal interest against Ms. Lee?

15 MRS. WINE-BANKS: It would be admissible only
16 against the declarant in the single confession
17 situation, but there -- Illinois --

18 QUESTION: All right. Does Illinois as a
19 matter of state law of evidence say that where there are
20 two confessions, as here, that they are both admissible
21 against the other as a matter of statements against
22 penal interest?

23 MRS. WINE-BANKS: Well, there are two halves
24 to my answer to that. One is that clearly Parker has
25 been adopted by or actually was -- preceded Parker where

1 they said that the harm of instructions will be deemed
2 to not exist in the situation of corroborating
3 interlocking confessions. So that it would be
4 admissible at a joint trial against the declarant. We
5 believe that in this --

6 QUESTION: If they are interlocking.

7 MRS. WINE-BANKS: If they interlock. Yes.

8 QUESTION: And has Illinois defined for itself
9 what interlocking means and what happens when they are
10 only partially interlocking?

11 MRS. WINE-BANKS: Justice O'Connor, I am
12 afraid that Illinois has done no better than any other
13 court in being specific in its definition of
14 interlocking.

15 QUESTION: So we don't know what the Illinois
16 law of evidence is that applies here.

17 MRS. WINE-BANKS: Well, we know that they have
18 adopted, for example, the Chambers standard for the use
19 of an exculpatory statement against penal interest, and
20 used the test of Chambers in admitting that kind of a
21 statement against penal interest. We also know that in
22 this case the evidence was admitted, that the appellate
23 court affirmed the conviction without addressing or at
24 all looking at or commenting on the admissibility
25 question, and that is waived.

1 Illinois is a very strict res judicata state,
2 and --

3 QUESTION: Under Illinois law, you say that
4 any objection to the use of the confession was waived.

5 MRS. WINE-BANKS: Yes, Your Honor. There is
6 no way that the petitioner could get a hearing on that
7 issue at this point now that the direct appeal route is
8 finished.

9 QUESTION: When was the earliest time that an
10 objection could properly have been made in your view?

11 MRS. WINE-BANKS: I believe right at the
12 trial, at the time of the statement by the judge that he
13 was using that one sentence to rebut her defense.

14 QUESTION: That was in reading his findings?

15 MRS. WINE-BANKS: Yes, Your Honor.

16 QUESTION: That was after he had made them,
17 but he was reading them in public, and at that time you
18 say Illinois required an objection to be made.

19 MRS. WINE-BANKS: Well, I don't think that it
20 would have necessarily been waived. I think that there
21 could have been a post-trial motion challenging it, but
22 that motion was limited --

23 QUESTION: But there was --

24 MRS. WINE-BANKS: I am sorry.

25 QUESTION: There was neither an objection nor

1 a post-trial motion?

2 MRS. WINE-BANKS: The post-trial motion did
3 not raise that issue. The post-trial motion raised the
4 confrontation issue, which has been fully briefed and
5 decided by the court --

6 QUESTION: And you take the position that is a
7 waiver under Illinois law.

8 MRS. WINE-BANKS: Yes. The courts have
9 frequently in Illinois, the appellate courts frequently
10 in Illinois raise sui sponte such an issue of
11 admissibility where it sees a problem. They did not see
12 the problem in this case.

13 QUESTION: Do you agree there was an agreement
14 by the judge to limit the use of the confessions?

15 MRS. WINE-BANKS: It is only a statement --

16 QUESTION: And where would we find that in the
17 material before us?

18 MRS. WINE-BANKS: In the transcript, and I
19 don't have the page reference, but I could provide it in
20 a supplemental brief, in the very first few pages of the
21 trial transcript. The waiver or the withdrawal of the
22 severance motion is based on the fact that he will
23 compartmentalize the evidence. There is absolutely no
24 specific reference to the confessions. That is all that
25 is said, is a very brief remark that because the judge

1 can keep things straight and separate the evidence
2 against each, we will withdraw the motion now that we
3 have a non-jury trial, but there is no specific
4 reference to the confessions, no specific promise about
5 the confessions, and it is quite obvious when he is
6 announcing his verdict that he has indeed used to rebut.

7 And I would like to pursue that because if we
8 look at the language of Millie Lee's confession, within
9 the four corners of that confession we have a full
10 confession to two murders. There is no question about
11 that. We also have within hers the rebuttal to the
12 self-defense, and really that is all we are talking
13 about here, is the rebuttal to her claim of
14 self-defense.

15 The reason I say that she has totally admitted
16 to all the facts that waive her self-defense claim is
17 that, let's take it from the point where after she runs
18 into the room and stabs her aunt, she then has disabled
19 her aunt, who is lying prone, but still alive. At that
20 point her self-defense is gone. There is no physical
21 threat possible from Mattie Darden to the petitioner.

22 But what does she do at that point? She gets
23 a skillet from the co-defendant and pounds her aunt on
24 the head. The skillet is hit with such force that it
25 shatters, and so she sends the co-defendant for a second

1 skillet, and again pounds her, and the pathologist in
2 the transcript at Pages 77 and 78 makes it clear that it
3 is not the stab wounds that killed her aunt, but that
4 indeed it was the blunt blows to the head that killed
5 her.

6 So, the murder occurred after the
7 self-defense, if ever there was one, and I think that
8 her confession even earlier makes clear there is none,
9 but certainly there is no doubt about it at that point,
10 and Illinois case law on this is very clear that she
11 would not have a self-defense left at that point.

12 QUESTION: The evidence as to Odessa is not as
13 clear, is it, against Ms. Lee, based on her own
14 confession alone?

15 MRS. WINE-BANKS: Yes -- no, Justice O'Connor,
16 I would not agree with that. What I think her
17 confession viewed alone and excluding any reference to
18 the co-defendants shows is that when the co defendant
19 was stabbing Odessa Harris, she ran into the bedroom,
20 and when her aunt indicated a desire to help her friend
21 by saying, get out of my way or I will kill you, which
22 was her way of saying, don't stop me from helping my
23 friend, what did she do?

24 She didn't get out of the way. She got a
25 knife and began to stab her aunt. By precluding her

1 aunt -- I am not suggesting she had an obligation to
2 help Odessa, but she was guilty by accountability of
3 murder for preventing her aunt from assisting Odessa
4 Harris, and again, the cases we cite, the Illinois cases
5 in our brief make that very clear, that that has been a
6 specific holding. Where a defendant prevents assistance
7 from being rendered, they become guilty by
8 accountability of murder.

9 So, I believe within her own confession it is
10 absolutely clear that she has admitted to the murder of
11 Odessa Harris.

12 QUESTION: Will you clarify some trial facts
13 for me, please, ma'am?

14 MRS. WINE-BANKS: If I may, Justice Powell.

15 QUESTION: Did Thomas testify in his own
16 defense?

17 MRS. WINE-BANKS: Only as part of the
18 suppression hearing. Neither defendant put on a
19 defense. They both took the stand after the state
20 rested as part of and solely for the purpose of their
21 suppression motion. That was the only testimony that
22 they put on.

23 QUESTION: So although Thomas was in the
24 courtroom -- well, he was in the courtroom. Was any
25 effort made by Lee to put him on the stand?

1 MRS. WINE-BANKS: No effort at all, which
2 makes the --

3 QUESTION: If she had undertaken to use him as
4 a witness, he could have invoked his privilege, could he
5 not?

6 MRS. WINE-BANKS: Yes, Your Honor. We believe
7 that is why he is an unavailable witness, but if he
8 hadn't invoked his privilege, then he would have been
9 available for cross examination, and either way, the
10 availability becomes a red herring, because if he had
11 not taken the Fifth Amendment, as was his right, then he
12 would have been available for cross examination, and
13 there would be no confrontation clause problem for this
14 Court to address.

15 It is only because he was unavailable because
16 of the existence of the Fifth Amendment privilege that
17 we have the confrontation question.

18 QUESTION: Thank you.

19 MRS. WINE-BANKS: One of the problems that has
20 occurred in reading the cases is that there is a
21 question about whether a confession is different than
22 other statements against penal interest, and there has
23 been perhaps some argument that there is a presumption
24 against the reliability of such confessions.

25 While even if a rebuttable presumption is

1 warranted, we think that the creation as is suggested by
2 this case of an irrebuttable presumption, that that is
3 not required by the Sixth Amendment, nor is it
4 consistent with this Court's rulings or with good public
5 policy.

6 Indeed, a reverse presumption of
7 trustworthiness may even be warranted. As this Court
8 said in California versus Green and in Matlock, a
9 confession to murder has its own indicia of
10 reliability. As Oliver Wendell Holmes said in his
11 dissent in Donnelly, no other statement is so much
12 against interest as a confession to murder. It is far
13 more calculated to convince than the dying declaration.

14 Because of the reliability of a murder
15 confession, especially when coupled with the
16 corroborative elements such as exist in this case,
17 respondents urge this Court to find under Roberts that
18 petitioner's co-defendant's confession had sufficient
19 indicia of reliability to be properly admitted without
20 trial cross examination.

21 Such a holding would be consistent with
22 Roberts and Pointer, California versus Green, Barber and
23 Moates, which all permitted the inculpatory use against
24 a defendant of preliminary hearing testimony where there
25 was cross examination of the declarant, or perhaps even

1 where there was only an opportunity for cross
2 examination is suggested.

3 It is also consistent with Dutton, wherein the
4 Court ruled that a Georgia rule of evidence which
5 permitted a concealment phase conspiracy statement to be
6 admitted without violating the Sixth Amendment, and with
7 Mancusi versus Stubbs-Maddox, which held the admission
8 of a transcript from the first trial to be admissible
9 without violation of the Sixth at the second trial.

10 The ruling that we urge the Court here to find
11 is also consistent with the purpose of the Sixth
12 Amendment. According to Parker, the Sixth Amendment is
13 intended to be a safeguard to ensure the fairness and
14 accuracy of criminal trials. According to Dutton, the
15 mission of the confrontation clause is to advance a
16 practical concern for the accuracy of the truth
17 determining process in criminal trials by assuring the
18 trier of fact a satisfactory basis for evaluating the
19 truth of the prior statements.

20 Following the decisions and logic of this
21 Court's rulings in Roberts and other cases, we believe
22 that there is a satisfactory basis for evaluating the
23 truth of the underlying statement, and at least two
24 Federal Courts of Appeals have ruled that the admission
25 of an inculpatory statement against penal interest is

1 admissible against a defendant, and two courts have
2 ruled that a co-conspirator confession statement
3 inculcating the defendant is also admissible.

4 These decisions and the logic and policy
5 underlying them support the result respondents urge
6 before this Court today, which is that the
7 co-defendant's interlocking confession be included with
8 other inculpatory statements against penal interest in
9 the category of reliable and therefore admissible
10 hearsay despite the absence of cross examination at the
11 trial.

12 Where the courts have found that the
13 substantive use of hearsay is permissible against a
14 defendant, the courts have said that although there is a
15 preference for a face to face confrontation as a means
16 of testing the truth of the underlying statement, that
17 right of cross examination may be replaced by other
18 guarantees of trustworthiness.

19 QUESTION: Perhaps you have already answered
20 this. Did you say that if they are granted separate
21 trials, that the co-defendant's confession would have
22 been admissible against Lee?

23 MRS. WINE-BANKS: Yes, Your Honor, that is the
24 result of our position.

25 QUESTION: I know, but how about under

1 Illinois law?

2 MRS. WINE-BANKS: Yes, Your Honor.

3 QUESTION: What?

4 MRS. WINE-BANKS: We believe that it would be
5 admissible at a separate trial because to the extent
6 that this --

7 QUESTION: You think that is the rule in
8 Illinois now, or would you just like it to be?

9 MRS. WINE-BANKS: Well, because it has never
10 come up, of course, I am only predicting that based on
11 the fact that Illinois has no codified rules of
12 evidence, it is perhaps unique in this regard, so that
13 rules --

14 QUESTION: So you think if there had been an
15 objection, the judge would have said, this is perfectly
16 admissible against Lee?

17 MRS. WINE-BANKS: I think that the argument we
18 are making here today, had it been made before the trial
19 judge, would have been accepted by him, because Illinois
20 has adopted and shown a trend to making its rules of
21 evidence fully coterminous with the fullest extent of the
22 constitutional guarantees, and to the extent we think
23 this is fully consistent with the Sixth Amendment, we
24 believe that the Illinois court would have even at a
25 separate trial had that been the case found this

1 reliable enough to be admissible.

2 QUESTION: Even in a jury trial?

3 MRS. WINE-BANKS: Even in a jury trial.

4 Like the cases that we have cited,
5 petitioner's do-defendant's confession here is the type
6 of hearsay that can be admitted against a non-declarant
7 in a criminal trial without cross examination. The
8 Roberts test, of course, requires unavailability, which
9 we have already discussed and demonstrated why the
10 declarant was unavailable, but there is also a
11 substitute for that, which is that the cross examination
12 would be of so little value that it is unnecessary, and
13 again clearly here there would have been no benefit to
14 the defendant in cross examining when she would have
15 still been faced with the admission of the full crime in
16 her own confession. The other test in Roberts is that
17 the evidence be reliable. Again, clearly because of the
18 nature of the corroborating evidence outside the
19 interlocking confession and the nature of the
20 interlocking confession, we can conclude that it was
21 indeed reliable, and that the whole confession should be
22 admissible.

23 QUESTION: Mrs. Wine-Banks, can I interrupt
24 with one question about the trial?

25 MRS. WINE-BANKS: Justice Stevens.

1 QUESTION: To what extent was there other
2 evidence relied upon other than the two confessions?

3 MRS. WINE-BANKS: In addition to the two
4 confessions, there was a great deal of testimony. There
5 was the testimony of the store owner who sold Millie Lee
6 the can of charcoal lighter fluid which was used to burn
7 the bodies and to dispose of them. There was testimony
8 of all the investigators who heard the confession and
9 who investigated, and who corroborated the confessions
10 by, for example, when the knives were identified, they
11 were asked, where are the knives.

12 QUESTION: And was all that evidence
13 admissible against both defendants?

14 MRS. WINE-BANKS: Absolutely.

15 QUESTION: So the only really point in the
16 trial where there might have been some evidence
17 admissible against one but not the other was the two
18 confessions.

19 MRS. WINE-BANKS: That is correct.
20 Absolutely. In any event, under Ohio v. Roberts, we
21 urge that no constitutional error be found, and that
22 alternatively if any error should be found, although the
23 evidence, we believe, is overwhelming, the error should
24 be deemed to be harmless. The test, we believe, would
25 be whether the case against petitioner would be

1 significantly less persuasive without the confession of
2 her co-defendant, and clearly here it would not have
3 been diminished one iota because of the existence of her
4 own confession which fully admits the guilt for both
5 murders and rebuts her only defense.

6 And I would point out that she only claimed a
7 self-defense defense. She did not claim sudden and
8 intense passion as a defense. Co-defendant claimed
9 that. And there has been some confusion, I believe, in
10 the record on that, but as I said, in addition to her
11 own confession, we have all of the evidence in addition
12 to that.

13 And Odessa Harris's murder, as I said earlier,
14 is fully admitted, because all it requires to prove her
15 guilt of that is that she intended to assist or
16 facilitate before or during her co-defendant's acts, and
17 on her own confession, as I have pointed out, that is
18 admitted.

19 She did admit stopping her aunt from helping
20 here, which under People v. Gill and People v.
21 Richardson is enough to make her accountable for the
22 murder of Odessa.

23 Her confession is also complete as to the
24 murder of her aunt. It also is replete with admissions
25 that rebut her self-defense. Having hit her aunt with

1 two different skillets after she was disabled totally
2 eliminates that under People v. Thornton.

3 Additionally, to the extent that petitioner
4 has claim a sudden and intense passion or there has been
5 any question about that, by looking at her confession we
6 find that there is not one shred of evidence to support
7 that claimed defense, and therefore once again her
8 confession is complete and leads to the denial of her
9 request here.

10 In conclusion --

11 QUESTION: But didn't the trial judge rebut
12 that suggestion by reference to the co-defendant's
13 confession?

14 MRS. WINE-BANKS: Yes, he did, and it was
15 unnecessary to do so, because --

16 QUESTION: Well, he didn't refer to her
17 confession for that purpose.

18 MRS. WINE-BANKS: He did not, but he could
19 have, and for harmless error purposes that is what the
20 test is.

21 QUESTION: You say it wasn't error anyway.

22 MRS. WINE-BANKS: That is correct, it wasn't
23 error because it was admissible and he was proper in
24 using it. That is exactly our point, is that the
25 constitutional right --

1 QUESTION: Is 25 and 26 in the joint appendix,
2 is that the sole -- is that the only statement the judge
3 made?

4 MRS. WINE-BANKS: Yes, Your Honor, this is the
5 full announcement of his verdict.

6 QUESTION: Yes. Thank you.

7 MRS. WINE-BANKS: In conclusion, we believe
8 that the constitutional right of the petitioner to
9 confront the witnesses against her is designed to ensure
10 that the truth is accurately determined in a criminal
11 trial. That right is fully protected by the admission
12 against petitioner of her co-defendant's confession,
13 which fully interlocks with her own confession on every
14 material element of the crime and on every salient fact.

15 Thank you, Your Honors.

16 CHIEF JUSTICE BURGER: Do you have anything
17 further, Mr. Evers?

18 ORAL ARGUMENT OF DAN W. EVERS, ESQ.,

19 ON BEHALF OF THE PETITIONER - REBUTTAL

20 MR. EVERS: Yes, Your Honor.

21 QUESTION: Previously you said you thought it
22 was clear under Illinois law that if there had been
23 separate trials, the co-defendant's confession would not
24 have been admissible.

25 MR. EVERS: Yes, Your Honor, and I think --

1 QUESTION: I take it your --

2 MR. EVERS: -- there are a number of Illinois
3 Supreme Court cases which we cite in the reply brief,
4 People versus Clark, People versus Buckminister, People
5 versus Eddington, and other cases --

6 QUESTION: And you think the same rule applies
7 in a joint trial.

8 MR. EVERS: In a joint trial, Your Honor --

9 QUESTION: Well, it is admissible against the
10 one defendant, but not the other.

11 MR. EVERS: That would be governed by Illinois
12 Pattern Jury Instruction Number 3.08, in which it
13 instructs that one co-defendant's statement is not to be
14 used against another, and that is the standard
15 instruction which I believe is also used in federal
16 trials.

17 QUESTION: Is that backed up by state supreme
18 court cases?

19 MR. EVERS: Yes, Your Honor. Illinois Pattern
20 Jury Instruction 3.08 is formulated by a committee
21 formed by the Illinois Supreme Court. The Illinois
22 Supreme Court directs them to draft pattern jury
23 instructions for use in Illinois trials, and they adopt
24 them. An Illinois Supreme Court rule which I believe is
25 612, Illinois Supreme Court Rule 612 directs the trial

1 court to instruct where there is an applicable Illinois
2 pattern jury instruction.

3 QUESTION: Do you have -- is there an Illinois
4 case in which there was a bench trial of two defendants
5 and it held that the confession of one is not admissible
6 against the other?

7 MR. EVERS: I am not aware of their saying
8 that it is not admissible as far as an Illinois Supreme
9 Court case. I am aware of one case called People versus
10 Davis in which there was a bench trial with co-defendant
11 confessions and the trial court judge in that case
12 stated on the record that he would not consider the most
13 inculpatory parts that were not interlocking. In that
14 case, one co-defendant said, I shot -- the other
15 co-defendant shot the victim, and the other co-defendant
16 blamed the other one, and the judge said, I won't
17 consider that part, but I will consider this, and they
18 said there was no reversible error. They did not say
19 that it was admissible. They did not say that it was
20 proper. They just said that under Parker versus
21 Randolph and some other Illinois cases, that it was not
22 error. How they came to that conclusion, I am not
23 really sure, but that is what they said.

24 The state's position today is at variance with
25 what their position was in the response to the cert

1 petition filed by Millie Lee. In the response to the
2 cert petition the state conceded that this was
3 inadmissible. In the cert petition the State of
4 Illinois said, "A co-defendant's confession may be used
5 only against the declarant, and the trial court should
6 not in any way have considered the co-defendant's
7 confession against the petitioner."

8 Now, that is what they conceded in the
9 petition for certiorari response. How they come into
10 this Court today and say that Illinois law would make
11 this admissible I don't know. Their brief when they
12 talk about Illinois law indicates that the Illinois
13 Supreme Court may have some rule in the future, but they
14 do not cite anywhere in their brief any case which would
15 make this admissible. And as far as what the appellate
16 court of Illinois decided in this case, they implicitly
17 decided that it was admissible evidence.

18 I would like to sum up and say that Your Honor
19 should hold this as a violation because there is no
20 reliability demonstrated by the State of Illinois in
21 this case as to the parts that the judge used in finding
22 Millie Lee guilty. The parts that the judge used are
23 not parts corroborated by any other evidence. Your
24 Honors in Bruton pointed out the extreme difficulties
25 and unreliability of co-defendant confessions. Justice

1 White himself pointed out those problems. These
2 statements used by the trial court judge standing alone
3 are no more reliable than if he had just merely said we
4 plan to kill, we killed, and that is it. Instead, he
5 gave an eleven-page written confession which is
6 corroborated as to how certain events occurred after the
7 killings occurred, but as to how the killings occurred,
8 there is no reliability on the co-defendant's
9 confession.

10 QUESTION: Do you suggest any significant or
11 material differences in the utterances of the two
12 defendants?

13 MR. EVERS: There are significant differences
14 in that Millie Lee --

15 QUESTION: Bearing on guilt?

16 MR. EVERS: Bearing on guilt. The state's
17 position is based on their premise that Millie Lee's
18 statement is overwhelming in implicating her guilt, yet
19 if it was so overwhelming, why did the trial court judge
20 feel the need to reach out and use the co-defendant's
21 confession?

22 If there was the sufficient evidence within
23 the petitioner's statement, there was no need to reach
24 out and grab hold of this prejudicial confession. There
25 is a difference in the intents put into the different

1 statements, and I would suggest that there is a problem
2 with the co-defendant's confession in that it is
3 unreliable.

4 He gave the confession only after he knew that
5 Millie Lee had given a statement implicating him in the
6 killings. What effect that had upon him is not certain,
7 but he would have a motive for malice, he would have a
8 motive to lie about Millie Lee's involvement, whether to
9 drag her down or to take her and implicate her more
10 deeply in the killings, it is not certain, but what is
11 certain is that his statements standing alone as to how
12 the killings occurred and what motivated them are
13 uncorroborated.

14 The major point in that is that the state
15 points to Millie Lee's statement where she witnessed the
16 murder of Odessa Harris and then ran into her aunt's
17 bedroom, was confronted by a knife, and she ran out.
18 Now, they try and use that and say she had no need to
19 come back, voluntary manslaughter would not be
20 appropriate, but I would suggest that that is just a
21 matter of fact. The point is that the judge also
22 pointed to the idea in Edwin Thomas's confession that he
23 originally gave Millie Lee a knife and said go keep your
24 aunt quiet, and gave her a knife and sent her into the
25 bedroom to stab her. Those are two different things.

1 What happened in this trial is, the judge used
2 that statement by Edwin Thomas to impute her helping,
3 her aiding in the killing of Odessa Harris to Millie
4 Lee. Millie Lee's statement only says she ran into the
5 bedroom. Now, whether she did that to aid does not
6 appear in her statement. She may have been just running
7 away in a slightly shocked manner in which to get away
8 from this very hideous killing by Edwin Thomas.

9 But it cannot be said that her statement
10 reflects that she was trying to aid Edwin Thomas by
11 stopping Mattie Darden. That does not appear. That is
12 just speculation brought out of the co-defendant's
13 confession.

14 I would also like to point out that the state
15 could have brought Edwin Thomas in to testify. The
16 state could have -- my time is up, Your Honors. I would
17 ask that you reverse the case, please.

18 CHIEF JUSTICE BURGER: Thank you, counsel.
19 The case is submitted.

20 (Whereupon, at 11:05 a.m., the case in the
21 above-entitled matter was submitted.)
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-6807 - MILLIE R. LEE, Petitioner V. ILLINOIS

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'85 DEC 16 AM 1:35