ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5939

TITLE EULOGIO CRUZ, Petitioner V. NEW YORK

PLACE Washington, D. C.

DATE December 1, 1986

PAGES 1 thru 49

ALDERSON REPORTING
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- x

EULOGIO CRUZ, :

Petitioner, : No. 85-5939

v. :

NEW YORK :

- x

Washington, D.C.

Monday, December 1, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

ROBERT S. DEAN, ESQ., New York, N.Y.; on behalf of the petitioner.

PETER D. CODDINGTON, Assistant District Attorney, Bronx County, New York; on behalf of the respondent.

ROBERT H. KLONOFF, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting respondent.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument now in Number 85-5939, Eulogio Cruz versus New York.

Mr. Dean, you may begin whenever you are ready.

ORAL ARGUMENT OF ROBERT S. DEAN, ESQ.

ON BEHALF OF THE PETITIONER

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

The questions presented in this case were the ones left unresolved by this Court's decision in Parker versus Randolph. First, is the Bruton holding applicable where the state seeks to introduce confessions against both defendants?

And secondly, if the Bruton rationale does not apply if confessions interlock, when do confessions interlock? In this case, the only direct evidence linking either Petitioner Eulogio Cruz or his co-defendant Benjamin Cruz to the crime were their confessions which the state introduced against them.

QUESTION: Mr. Dean, a moment ago you said there were two questions presented in this case. There is also a question, isn't there, as to whether this evidence was sufficiently reliable. It might have been

independently admitted against the Petitioner.

MR. DEAN: Yes. The state is seeking to raise that point now for the first time before this Court, and in response we have two essential responses.

One is that in fact, looking at the evidence that's available, they have not met their heavy burden of showing that the presumptive -- the unreliable co-defendant's confession is reliable. But in the first place, this Court should not even consider that question because it was not presented in the petitions for certiorari or the response to the petition.

It was not pressed or passed in the state courts, and therefore petitioner was not given an opportunity to make or contribute to the record on the question of whether this co-defendant's confession is reliable as evidence connecting petitioner to the crime.

The only question in the state trial courts and in the state appellate courts was whether this confession impacted upon the defendant, Eulogio Cruz.

QUESTION: Don't you think, counsel, that there is a difference between arguing that it is admissible under a hearsay exception, and making that the basis for the admission, which is not what the state is trying to do here, and on the other hand arguing that the fact that it would have been had one sought to do

that, renders the co-defendant's confession admissible?

MR. DEAN: I understand the question, but I think the crucial thing here is that they are pointing to evidence which came out periodically through the record for reasons unrelated to this question. We never had a chance to contribute to the record on this question.

We never got a chance, because it wasn't an issue below, to help make the record to indicate that this confession was unreliable evidence as to our defendant.

QUESTION: What sort of a record would it take, beyond what you have, to determine whether the normal hearsay exception for admissions against interest, against penal interest, would apply here? What additional evidence would be necessary, or helpful?

MR. DEAN: Okay. First of all, the motivation that Benjamin might have to falsely implicate the petitioner. We don't know what the relationship is between the brothers.

The state is assuming that there is some sort of presumption of brotherly love between two brothers, which I don't think in history or in practicality exist.

QUESTION: Would you normally be able to introduce that evidence if somebody tried to get it in

under the hearsay exception?

MR. DEAN: Oh, absolutely. If a state is trying to introduce the co-defendant's confession as evidence of petitioner's guilt, surely we would have the opportunity to introduce, before the judge or the jury, evidence to indicate that he had a motive to falsify against the petitioner.

QUESTION: Well, you could certainly introduce it to the jury on the basis that they shouldn't believe it, therefore. But do you have the right to introduce it for the purpose of saying that therefore the normal exception to the hearsay rule should not be applied?

MR. DEAN: Oh, absolutely. We have the right to help -- to litigate an issue of the admissibility of evidence under a certain doctrine, but take the declaration --

QUESTION: Do you know any cases that decline to apply the admission against penal interest exception to the hearsay rule on the basis that, even though it was an admission against penal interest, there are other indicia of --

MR. DEAN: Yes, all the New York State cases. First of all, as to declaration against penal interest, this Court said in Lee versus Illinois that that was too broad a bevy of cases for confrontation clause

analysis. But furthermore, whether a confession would be admissible as a declaration against penal interest, which is purely an evidentiary doctrine is of state law.

This co-defendant's confession and its accusations in it against petitioner would not have been admissible under state law for a host of reasons. One is that New York has a special rule when it comes to accomplices' confessions at the station house, that not only must it be against penal interest but it must be shown that there was not even a theoretical motive to fabricate.

That is to say, at that point in time the co-defendant was not cooperating with the police. So, under the New York doctrine and the case of People versus Geoghegan which is cited in my reply brief, for that reason alone it wouldn't have been admissible as a matter of New York State law as a declaration against penal interest.

But even more than that, under New York's rule only the self-accusatory portion of the statement would be admissible against the other defendant. So, if "A" is the co-defendant in this case, and he says, "A" and "B," "B" meaning my client, committed murder, under New York's doctrine only that portion, "A" committed murder, would be admissible against the defendant.

And furthermore, under New York law, whatever the other evidence as to declaration against penal interest might be, the party against whom they seek to admit it would always have the opportunity to indicate by introduction of evidence that they would have the opportunity to show that the evidence was in fact unreliable and that the standard indicia of admissibility as a declaration against penal interest are illusory.

That's New York State law. Had respondent sought to introduce the co-defendant's confession as substantive evidence against petitioner in this case, in New York State courts, it would not have been admissible under New York State law.

That argument is fully laid out in our reply brief.

QUESTION: Haven't we recognized that there is a presumption against the reliability of co-defendants post-arrest confessions, and whether they contain admissions against penal interest or not?

MR. DEAN: Right, as in Lee versus Illinois.

QUESTION: Yes, as contrasted with pre-arrest, pre-custody statements against interest?

MR. DEAN: Actually, I don't read that difference in Lee versus Illinois.

QUESTION: You mean, between the --

MR. DEAN: Between the pre-arrest and the post-arrest statement. If it's there, I don't see it.

QUESTION: Well, it may not be. If there isn't any difference, the business about the admissibility of statements against penal interest is an empty thing.

MR. DEAN: Well, perhaps so. But in any event, the co-defendant's videotaped confession was made after he was placed under arrest. So, we're dealing with a post-arrest videotaped confession.

The videotaped confession of the co-defendant in this case was a 22-minute videotape taken by a Bronx County Assistant District Attorney. The alleged confession that the state introduced against petitioner was introduced through the testimony of a single witness, Norberto Cruz whose testimony, we submit, was generally unworthy of belief.

And furthermore, he specifically had a motive to frame petitioner for this crime -- excuse me, Your Honor?

QUESTION: In the confession that is sought to be admitted against your client by the co-defendant, he didn't seek to frame your client. He admitted that he pulled the trigger.

MR. DEAN: No, I'm talking about the --

QUESTION: -- the other confession?

MR. DEAN: Confession that was introduced through Norberto Cruz.

QUESTION: I'm sorry.

MR. DEAN: But in reference to that, the co-defendant in his videotaped confession said that, "My brother, he announced the robbery. He demanded money from the attendant. He said, we will kill you if you don't give it over. He started fighting with him."

And only when he was unarmed did Benjamin then shoot the attendant in defense of my client, Eulogio Cruz. So, assuming that Benjamin Cruz is not well versed in the law of felony murder, which I think it is safe to assume, and that therefore he would not know that a killing in self defense is not a defense to felony murder, I think that one can safely assume that the "against penal interest" quality of that confession is certainly ambiguous.

QUESTION: Maybe, but one would think that if there was anything he was going to lie about, it would be about the question of who pulled the trigger.

MR. DEAN: Well, that might not be true if to pull the trigger --

QUESTION: And he said, "I pulled the

trigger," and not your client?

MR. DEAN: Right, but he pulled the trigger in self defense of his brother, and of course self defense for a defendant with no prior involvement with the law and the mentality of a five-year old child could very well be a defense to murder. And then, all he would be guilty of is the mere robbery.

In fact, he was fully --

QUESTION: If you're going to lie about it, it seems to me you'd tell a more intelligent lie to say, "My brother pulled the trigger."

MR. DEAN: Well, in fact there was testimony in this case that Benjamin is not an intelligent individual. Furthermore, he initially confessed in order to convince the police that he was not guilty of the Jerry Cruz homicide.

Jerry Cruz is the brother of Norberto Cruz who is the principal witness against my client in this case. Jerry's brother was killed and the police were investigating that particular homicide, and they suspected Eulogio Cruz and Benjamin Cruz of committing the crime.

So, they left word in the neighborhood that they wanted to speak to these fellows about the crime. Benjamin Cruz came to what turned out to be the wrong

precinct, and eventually he hooked up with the officer and they asked him what he knew about the Jerry Cruz homicide. And he says, "I don't know anything about the Jerry Cruz homicide. If I knew anything about it, or if I did it, I would tell you because I have big balls. I killed this guy who was shooting at my brother at a gas station in the Bronx."

So, what he was trying to do, as the government points out in their amicus brief, is he was trying to get himself off the hook for another homicide when he made that, what the District Attorney now calls a spontaneous statement.

We don't actually know what all the facts and circumstances were, surrounding the making of that first statement or what happened between the making of that first statement, and the ultimate confession on videotape, because as far as petitioner was concerned that wasn't an issue in the case at that time, how much of petitioner's involvement was suggested to the co-defendant before he named petitioner in the statement, what things might have been said to Benjamin in order to suggest in his mind that it would be worthwhile for him to frame petitioner.

None of these things were the subject of inquiry in the trial court, simply because they weren't

in issue in the trial court because counsel knew that this statement was only going to be admitted against the co-defendant. And the argument that he was going to be making on appeal to the jury was, please, please obey the judge's instructions to ignore that evidence as to my client.

QUESTION: Is it clear that there would have been a procedural bar to this issue being raised in the New York Court of Appeals?

MR. DEAN: Yes, absolutely. Under New York procedural --

QUESTION: So, it couldn't have been raised and decided in the highest court of the state?

MR. DEAN: That's right. Absent it being litigated in state court, since we had no opportunity to put in evidence to counter that fact, and since it cannot be said that there is nothing we could have done to counter that fact, under the People versus Nieves case which is cited in our reply brief, respondent would have been barred as a state procedural matter from raising that issue for the first time, either in the Appellate Division or in the New York Court of Appeals.

In the trial court and in the appellate courts, they both recognized the radical difference in the level of reliability that the confessions in this

case were actually uttered. But the court said that, once you find factual interlocking -- interlocking is the factual content -- that is the end of the analysis.

There is no more analysis that needs to be done.

QUESTION: By the court?

MR. DEAN: By the court, but once --

QUESTION: But that's a jury question, then.

MR. DEAN: Of course. A jury question, the defendant can always argue that he never made the confession, as he did in this case.

QUESTION: Or that it is unbelievable?

MR. DEAN: That is exactly what he argued. That was his entire defense in this case.

However, we submit that the differing levels of reliability, that the confessions were actually uttered, makes Bruton fully applicable to this case because the essential question in Bruton is, does the state's case against the defendant, the petitioner in this case, become much more persuasive against the defendant when viewed in the light of the videotaped confession.

QUESTION: Well, Mr. Dean, you seem to be arguing that the more reliable the co-defendant's confession is, the less the Court should be inclined to

allow it into evidence, and I would have thought that the reverse would be true, that greater reliability would lead one to think it should be admitted.

MR. DEAN: The co-defendant's confession, we concede, is reliable evidence of a certain sort. It's definitely reliable as evidence against its declarant, Benjamin Cruz. What we are arguing is that it's not reliable evidence against our client, Eulogio Cruz.

But in another case, a case where the question is litigated in the state courts below and were the co-defendant's confession is found to be reliable under the Lee analysis, the confession is going to come in and Bruton has nothing to do with that case, just as if the confession had come in under some other evidentiary doctrine.

Our argument is that it's not admissible in this case because, first, it's not reliable and secondly, because of the procedural bar. This case might have been different had it been litigated in state court.

We submit that the jury in this case would naturally look to the co-defendant's confession in order to resolve its doubts about whether petitioner's confession was ever uttered.

From a trial lawyer's standpoint, if I'm a

trial lawyer and I'm representing Eulogio Cruz in state court, the only evidence against my client other than a lot of forensic evidence which indicates that a crime took place but none of it directly linking my client to the crime, the only evidence is the testimony of Norberto Cruz who didn't tell the police about this alleged confession for six months and only told the police after his brother had been shot and petitioner, as the witness said, took him to the place where they had killed his brother.

Furthermore, the Court could examine the record in this case. Norberto's testimony in relevant part is fully printed in the Joint Appendix. You can read it for yourselves, and you can see that cross examining this man was like pulling teeth.

On direct examination he testified he was an auto mechanic by profession. On cross examination he conceded he had never practiced in a shop or hadn't for the last ten years. The last ten years he practiced his trade on the street.

But, of course, later he admitted that at the first trial he had testified that he hadn't worked for the past two years; he had been receiving welfare. And of course, the jury would naturally wonder, what is this able-bodied man doing receiving welfare, and of course

they'd be wondering whether he had reported his side income to the welfare board.

But, all these factual matters were for the jury. But we submit that a good case was made out that this evidence was in itself unreliable.

So, as a trial lawyer going into court with this evidence, a lot of forensic evidence which basically establishes a crime that was committed, and Norberto's testimony, I'd be fairly confident of an acquittal in that sort of case. But if you pin onto my client the co-defendant's confession, which we know is uttered, it comes before the jury in a length of 22 minutes so they are not going to be able to blank it out of their mind in an instant.

And, that confession fully implicates our client in the crime and we have no method of cross examining it. We can't bring out his earlier hearing testimony as a prior inconsistent statement, the hearing testimony being completely different from what he said on the videotape.

We're not entitled to an instruction from the Court that as an accomplice his testimony must be corroborated as a matter of law by other evidence materially linking petitioner to the crime. We're not entitled to any of that.

We're not entitled to introduce other evidence to show the bias of this declarant as if he had been a witness on the stand. We're not entitled to do any of this.

All we have is this co-defendant's confession which we have no way of challenging, and under those circumstances I'd be very worried about taking that case to trial because the state's case under those circumstances seems very persuasive, and we submit that that exactly is what the Bruton case is all about.

Now, in relating the Lee versus Illinois case to the Bruton rule, we submit the relationship is simply this: if a co-defendant's confession is admissible under Lee versus Illinois, and this is of course assuming that the issue was litigated in the state court, then certainly there is no Bruton problem because the evidence comes in as substantive evidence.

QUESTION: You mean, if it's admissible against the defendant?

MR. DEAN: It it's admissible and admitted against the defendant, if the state litigates the question, then of course there is no Bruton problem. The reliable evidence comes in for what it's worth.

But if the evidence is not reliable, and Bruton says that these confessions of the co-defendants

are presumptively unreliable, the evidence is not reliable, the defendant should not be saddled with going to trial with that confession coming before the jury with no way to challenge it. Either the judge should redact or the judge should sever.

If the judge severs, then what's going to happen is that there is going to be two fair trials taking place, and that is the result that should have happened in this case.

And, if the Court has no further questions --

QUESTION: Then, the New York Court of Appeals, of course, said that they interlocked.

MR. DEAN: The New York Court of Appeals says that they interlocked as a factual matter and any difference in the level of interlocking as to any other form, whether its reliability that it was actually uttered, or voluntariness, or truth was irrelevant to the confrontation clause question, citing Parker versus Randolph.

QUESTION: Well, don't you think the plurality in Parker against Randolph pretty much crossed this bridge?

MR. DEAN: Well, the plurality crossed the bridge, although the plurality in Parker did not actually address the question of when confessions

interlock, although there is a broad reading of it which would say that any time the defendant confesses, that should be the end of the inquiry because any time the defendant has himself confessed, then there's nothing that he could have done in order to challenge the co-defendant's confession in any event. And in any event, the effect on the defendant's case is not going to be devastating.

But, this case is an example of why you really have to look closer at whether interlocking occurs, because of course the jury is going to look to the co-defendant's confession in order to resolve its doubts about appellant's guilt. Just because the state introduces evidence that a co-defendant confessed, doesn't mean that the defendant has no case left and that there is no further point in challenging the co-defendant's confession.

Just as one example, under Crane versus Kentucky, the defendant has the option of relitigating the voluntariness of his confession to the jury, even if he has lost on that issue in a pretrial suppression hearing. Suppose he convinces the jury in a case where a judge has failed to redact or sever and there are two confessions, let's say the defendant convinces the jury that his confession was involuntary and therefore the

jury should ignore it.

Then, the case becomes factually indistinguishable from Bruton. What we have is no confession on one side, and a confession on the other side that the jury is not going to be able to ignore.

The same thing is present in our case. If the defendant, despite the odds, with the co-defendant's confession being before the jury, convinces the jury that he never made his confession in the first place, then there's still the co-defendant's confession before the jury and the case is exactly the same, analytically and factually, as was presented in Bruton.

QUESTION: Mr. Dean, I understand you don't like an interlocking rule anyway, but if the Court were to follow the plurality in Parker, what is your understanding as to what interlocking should require?

MR. DEAN: Okay. If there is anything in or about the co-defendant's confession that is far more damaging, or even significantly more damaging to the petitioner's case than his own confession, then they do not interlock. Anything factually in the confession in terms of the wording or anything about the confession may have been a very good case that it was involuntary, or never made, or just untruthful.

There's no reason why those factors should be

excluded from the weighing analysis as to whether confessions interlock. If the jury is naturally going to look to the co-defendant's confession to resolve its doubts about the defendant's own confession, then those confessions don't interlock.

So, the answer to your question is, if there is anything in or about the co-defendant's confession which is more damaging to the defendant's case than his own confession.

QUESTION: To describe that concept --

MR. DEAN: I didn't first use the word.

QUESTION: Well, your description is not that of the plurality?

MR. DEAN: That's correct. Our position is actually that harmless error analysis is the analysis that should be adopted. But even if the question is whether -- is not harmless error but whether there's an error under Bruton at all, still there should be an examination as to whether confessions genuinely interlock and not just a question of whether the defendant confessed or whether there is some interlock in the words of the --

QUESTION: You don't mean genuinely interlock? You've just acknowledged that interlock is not the right word to describe what you genuinely do?

MR. DEAN: I'm using a shorthand, yes.

QUESTION: Right.

MR. DEAN: There should be a genuine look at whether this co-defendant's confession is damaging to the defendant's case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dean.

MR. DEAN: I will reserve the rest of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Yes. Mr. Coddington.

ORAL ARGUMENT OF PETER D. CODDINGTON, ESQ.

ON BEHALF OF RESPONDENT

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

This Court's precedents over the last, almost century have made it clear that the purpose of the confrontation clause is to advance the accuracy of the truth finding function in a criminal trial. The precedents make clear that cross examination may be dispensed with at trial when outweighed by public policy and the necessities of the particular case.

Now, this case arises from the affirmance of a murder conviction in New York State, and it gives the Court the opportunity to emphasize that the Sixth Amendment recognizes that a criminal trial is a search for the truth and that the admission of a co-defendant's

interlocking confession in one trial advances the accuracy of the truth finding function.

Now, as Mr. Dean said --

QUESTION: May I ask you just there, Mr. Coddington, do you take the position that the co-defendant's confession was admitted or not admitted against the defendant?

MR. CODDINGTON: It was admitted with limiting instructions within the meaning of Parker v. Randolph. I submit further that it also would have been admissible in view of this Court's --

QUESTION: I understand you are arguing separately, it would have been admissible but it was not expressly admitted against the defendant, was it?

MR. CODDINGTON: No, it was not, Your Honor. That theory was not argued below. But I think this Court should reach that issue, Your Honor.

It's fairly supported by the record. It's fairly supported by the law. And I submit that it's fairly included within question one of the cert petition.

In view of the fact that Levy-Illinois was an intervening decision, and in view of the fact that our record, I think, clearly supports subsequent admissibility, I think this Court should take this opportunity and make that kind of ruling in this case.

QUESTION: Why do you suppose it was not argued to be admissible in the New York courts?

MR. CODDINGTON: Well, first because we thought that it was admissible under Parker v. Randolph with limiting instructions, and for our purposes --

QUESTION: Wouldn't you have been better off without the limiting instruction?

MR. CODDINGTON: I certainly would have, Your Honor.

QUESTION: Do you not presume the jury followed the limiting instruction?

MR. CODDINGTON: Yes, I do, Your Honor. I think there's no doubt about that.

QUESTION: Then, if you do, what relevance does the probative value of the second confession have?

MR. CODDINGTON: Well, Your Honor, that goes to substantive admissibilty, obviously, in the Lee question. With respect to --

QUESTION: Well, for the moment, just confine your -- I understand you make that separate argument, but under your interlocking argument, if you presume that the jury followed the limiting instructions, what difference does it make whether the second confession was probative or not?

MR. CODDINGTON: Well, it makes a great deal

of difference to the co-defendant who is tried jointly with the petitioner.

QUESTION: We're not arguing about the co-defendant's case, now. We're just talking about the impact on the petitioner.

MR. CODDINGTON: That's true, but we're trying them both at the same trial, Your Honor, and we have to prove both of them guilty beyond a reasonable doubt at one trial. Therefore, I think the probative value really does -- is very important in the trial with respect --

QUESTION: It's important in the trial of the co-defendant.

MR. CODDINGTON: That's correct.

QUESTION: But what relevance is it insofar as your arguing about the conviction of the petitioner?

MR. CODDINGTON: I submit that that would have no importance at all. The jury was instructed to disregard that. We submit that --

QUESTION: So, then it would be totally irrelevant that the confession either interlocked or did not interlock, wouldn't it?

MR. CODDINGTON: Well, no, Your Honor. That gets to the Bruton aspect of this case.

QUESTION: Well, that's right.

MR. CODDINGTON: And I think this Court should point out that Bruton really is an exception to the general rule. Well, the general rule is that the jury follows the instructions.

However, in Bruton where only one defendant confesses, then the Court held that the admission of that confession is devastating and the jury cannot follow those instructions. Where both defendants confess, however, Bruton does not apply, I submit.

And for that reason, the probative value is relevant to that extent, Your Honor. Where both defendants confess, I submit there is no Bruton problem and that this Court should apply the rule that the jury can --

QUESTION: Why is there no Bruton problem? I don't understand. I know you say that, but what is the reason for saying that?

MR. CODDINGTON: The reason for that, Judge, is that both defendants have had their say. The jury has heard both defendants' account of the crime out of their own mouths, albeit through other witnesses.

Therefore, there is not the temptation to fill in the gaps. Where they have heard one defendant confess on the one side and heard nothing from the other, then there is a natural temptation to fill in the

gaps by looking to the co-defendant's confession.

Where, however, both defendants have confessed, I submit that that temptation is far less, to the extent that in a joint trial with interlocking --

QUESTION: Is it any less whether there is an interlock or not?

MR. CODDINGTON: I submit that probably it is, Your Honor, because if they interlock then you have both defendants in effect saying the same thing, and therefore there is even less temptation to look to both confessions. They have it out of both defendants' mouth.

Therefore, I think they can --

QUESTION: It seems to me it would work just in reverse. If you hear them both say the same thing, you're more apt to believe them both.

MR. CODDINGTON: Well, I disagree, Your Honor.

QUESTION: You are more apt to rely on both.

MR. CODDINGTON: I think the jury, under those circumstances, will be more prone to follow the Judge's instructions, perhaps because -- well, as a matter of common sense, they really don't need to look to the other defendant.

QUESTION: They don't need to look to it because they've heard it and it corroborates the defendants --

MR. CODDINGTON: Well, that would make it inadmissible under Levy-Illinois, and under Parker v. Randolph, I submit that the limiting instructions were correct. Now, I submit that on the Lee point, I think there's no doubt at all that this confession should be substantively admissible.

It was thoroughly substantiated by Benjamin's confession. It interlocks as to date, as to place, as to motive, as to participants, and as to the manner in which the crime was committed.

Moreover, all of these elements were substantiated, thoroughly substantiated by forensic, photographic and ballistics testimony. The confessions are obviously describing the same crime.

I don't think that there's any doubt at all that these confessions are substantively admissible within the meaning of Levy-Illinois, and I submit that although that theory was not specifically argued below, if these confessions are substantively admissible it completely answers any Bruton problem. It completely answers any Parker problem. And this is the entire way that case was argued below.

QUESTION: If the confession was inadmissible, so you couldn't have any of the confessions in the case?

MR. CODDINGTON: I'm not quite sure I

understand Your Honor's question.

QUESTION: Well, didn't both defendants confess?

MR. CODDINGTON: That's correct, Your Honor. Both confessed.

QUESTION: So, you couldn't -- if you lost this case, neither confession should be admissible, because the other defendant will object to -- the other defendant will always object to the admitting the other confession.

MR. CODDINGTON: Well, I disagree.

QUESTION: Which means that you would have to try them separately.

MR. CODDINGTON: That's certainly true, Your Honor, and I submit that that's a very, very poor result. There are a number of public policy arguments that support joint trials.

First and foremost is the fact of a speedy trial. Trying two defendants at once is obviously faster for both defendants, and moreover the local jails are populated with prisoners who are awaiting speedy justice in their cases.

Clearly, it gives them the advantage of a speedy trial. Also, it decreases the cost to the state. That makes more money available for social needs

and other things that are of state concern.

And in New York, as a matter of fact, Your Honor, New York, as you may not know, is a transactional immunity state so severance and a grant of immunity to Benjamin would require us to completely immunize the shooter from any liability for this murder. Now, that is an absurd result and I don't think the Court should make us do that.

QUESTION: Then why would you give immunity to Benjamin, because under your theory -- the case was tried on a theory that his testimony wasn't admitted against this defendant anyway.

MR. CODDINGTON: That's right.

QUESTION: So, how would transactional immunity for Benjamin even hurt you?

MR. CODDINGTON: Well, as I understand my adversary's argument --

QUESTION: It seems to me your argument boils down to the fact that you need the co-defendant's confession and you want to establish its admissibility.

MR. CODDINGTON: I want to do that under Lee. Under Parker, I want joint trials for all the reasons that I've just stated.

QUESTION: But one of the reasons was transactional immunity for a witness that you say you

didn't need. Therefore, what's wrong with it?

MR. CODDINGTON: Well, I don't want to immunize a murderer, Judge.

QUESTION: But you don't need his testimony under your view of the facts.

MR. CODDINGTON: Well, this I think gets into, perhaps, harmless error as I understand Your Honor's question, and I submit that Benjamin's testimony, if error at all -- and I submit that it wasn't, or rather his confession, certainly was harmless error.

Now, Eulogio confessed to each and every element of the crime to a person who I submit --

QUESTION: Again, if it's harmless error, it's another way of saying you didn't need his testimony. So, I don't understand your transactional immunity argument. That's all I'm saying.

MR. CODDINGTON: Well, Your Honor, we do want to try these defendants jointly for the reasons of economy, of speedy justice for all the defendants. These are worldly public policies that we want to advance.

Clearly, it makes much more sense for everybody's sake to try them jointly.

QUESTION: Did they ask for a joint trial?

MR. CODDINGTON: Excuse me?

QUESTION: Did they ask for a joint trial?

MR. CODDINGTON: No, we did.

QUESTION: Pardon me?

MR. CODDINGTON: We did.

QUESTION: But the defendants didn't want a joint trial?

MR. CODDINGTON: No, they didn't.

QUESTION: They would rather have taken the extra delay that was involved in two separate trials?

MR. CODDINGTON: The defendants would, but I wonder if this Court should allow these defendants to speak for all the other defendants who are sitting in jail awaiting trials in their cases. We only have 35 working courts in Bronx County, and we've got probably 5,000 pending indictments.

There are a lot of people out there that want a speedy trial, and trying two defendants at once increases the odds of speedy justice in all of those cases.

QUESTION: Could I ask you, your argument about substantive admissibility --

MR. CODDINGTON: Yes, Your Honor.

QUESTION: -- wasn't raised in the state courts?

MR. CODDINGTON: No, it wasn't, Your Honor.

QUESTION: And could you have raised it in the New York Court of Appeals?

MR. CODDINGTON: That'a a good question, Your Honor.

QUESTION: Well, yes or no.

MR. CODDINGTON: Unclear, actually.

QUESTION: Unclear?

MR. CODDINGTON: Unclear.

QUESTION: You think there's no procedural bar to it?

MR. CODDINGTON: Well, the Nieves, that case came out of our office. That involved whether an admission was admissible as a dying declaration or an excited utterance under state law.

At trial, our Assistant conceded and said affirmatively that it could never be an excited utterance, had to be a dying declaration. On appeal we argued both.

The intermediate appellate court said, you were wrong in your concession. It's not a dying declaration. It's an excited utterance.

Then we went to the Court of Appeals. They said we couldn't make that argument because we'd expressly disclaimed it below.

On this record, however, the facts are

somewhat different. Here we argued Bruden. We argued reliability. So, I think it's an open question.

QUESTION: Well, let's assume no procedural bar. Nevertheless, there's a rule around here that we don't consider issues from a state court that weren't presented and decided by the highest court in the state.

MR. CODDINGTON: Okay. The highest court --

QUESTION: Isn't that -- you understand that?

MR. CODDINGTON: Oh, I understand that rule, yes.

QUESTION: Well, then why should we reach it?

MR. CODDINGTON: Well, here the highest court in the state expressly decided the Parker v. Randolph issue.

QUESTION: Oh, yes?

MR. CODDINGTON: Expressly decided the Bruton issue. Although it did not expressly decide the Lee issue, the New York telephone case, Penn v. Roberts, that line of cases, say that this Court can reach any issue that the law and the record support.

And in view of the fact that the Lee case was an intervening decision that came down after the highest state court reached this issue --

QUESTION: You just don't recognize any difference between a case that's here from a federal

court and from a state court, insofar as the ability of the respondent to raise any issue that would defend the judgment?

MR. CODDINGTON: I understand the rule to be the same in state and federal courts, Your Honor.

QUESTION: You do?

MR. CODDINGTON: Yes, I do.

Your Honor, in sum, Justice White notwithstanding, I believe that the Court can reach this case. I believe it is substantively admissible under Levy-Illinois.

For that reason, I think that any Parker v. Randolph question has been clearly answered and I submit that there was no error below. But in the event that this Court should find that there were error, I think harmless error is the appropriate answer.

And were this Court to make the finding that these cases, these confessions cannot interlock under any set of facts, then I think this Court should remand the case to the New York Court of Appeals to consider these issues. However, I think that relief would be inappropriate here because I think, one, that it is substantively admissible; two, that it's admissible with limiting instructions under Parker v. Randolph, and accordingly I would ask this Court to affirm the

conviction.

If there are no other questions --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Coddington. We'll hear now from you, Mr. Klonoff.

ORAL ARGUMENT OF ROBERT H. KNONOFF, ESQ.

AS AMICUS CURIAE, SUPPORTING RESPONDENT

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

With the Court's permission I would like to first begin by addressing the Parker versus Randolph point and then move back to the Lee versus Illinois point as a secondary point.

On the Parker versus Randolph issue, let me say at the outset that the position of the United States is that the plurality decision in Parker was correctly decided and correctly reasoned. We would ask the full Court to accept that rationale.

This is not simply an issue of semantics or focus. It has enormous practical significance from the standpoint of a trial judge, and what the trial judge should be doing, because if the Court adopts a harmless error approach, then the result is that even in an interlocking confession case it's error and the trial court is required either to sever the cases or to exclude the confession.

If the Court adopts an interlocking confession rationale, on the contrary, the Court would be able to make an inquiry on whether there is in fact true interlocking, and if there is, proceed to a joint trial. And the Parker versus Randolph case itself dramatizes the significance of the distinction.

QUESTION: And how do you define "interlocking"?

MR. KLONOFF: We defined it, Justice Blackmun, as the two confessions being substantially the same and consistent on all the major elements of the offense. It's the approach that's been taken by the Second Circuit, and we cite a number of cases in our brief.

The Parker case is a dramatization of this. Justice Blackmun observed in his concurring opinion that there was no substantial prejudice to any of the defendants as a result of the admission at the joint trial. And there were five defendants that were tried together in Parker versus Randolph.

Now, if there was no substantial prejudice to any of the defendants, then the United States does not understand a rule that would nonetheless require severance, and in Parker we submit that it may have required five separate trials even though we agree that none of the defendants was prejudiced.

So, we think that the better approach to a harmless error is a question of interlocking confessions, and the definition we suggest to the Court deals with many of the problems that were addressed by Justice Blackmun and by the defendant Parker, because we concede that there does have to be full interlocking.

A statement such as the one in Justice Stevens' hypothetical about somebody who simply acknowledges being with someone else at the time of a crime, that's enough -- that's not enough under the government's view. That would not be interlocking. So, that hypothetical would not apply.

The statements would have to agree on the elements of the offense so that one would not supply anything that the other one would not have.

QUESTION: Do you think the confessions in this case satisfy your test?

MR. KLONOFF: We do, Justice Stevens, and we would note that all of the courts below that addressed the matter found that the statements interlocked and that both of them independently established all of the elements of the offense. So, we would submit that there is interlocking under the facts of this case.

Now, the rationale of Parker versus Randolph -- Justice Stevens had asked the question -- there are

several points that should be made in that regard, as to why the rationale of the plurality is correct.

First of all, it proceeds from the assumption that juries can and will follow instructions, and that is the general rule, and we submit that Bruton is the exception. We would also say that that rule is not a fiction. If it were, defense lawyers and prosecutors would not argue at length about the precise wording of instructions that go to juries, and appellate courts would notreverse convictions because of --

QUESTION: But then, if you make that assumption, why do you have to have all of the elements interlock, if you presume that the jury follows the instruction and disregards the co-defendant's confession?

MR. KLONOFF: Because, for example, if one confession makes out all of the elements to, say, a murder and the other one only makes out the elements to a manslaughter, then the jury might be tempted to fill a gap. It's precisely the analysis in Parker, is will the jury be tempted to look to the co-defendant's confession in order to fill a gap.

And when they interlock, then there really is nothing in the co-defendant's confession that is not also in the defendant's confession. So, it's the interlocking on the elements of the offense that would

really make the jury resist looking at the co-defendant's confession.

Now, the Parker case really has two separate but related rationales. The first is that the defendant who has also confessed is harmed less by a jury's failure to follow the instructions to keep the confession separate, the type of a harmless error analysis, and really it could be -- a related point is that cross examination of the co-defendant in that circumstance would be less useful.

An the second point is simply that in this context, where the confessions genuinely interlock, there is less temptation on the part of the jury to look to the co-defendant's confession and we would not that many, many courts have adopted this doctrine. It's a doctrine that was adopted by the Second Circuit almost immediately after the Bruton case because of its logical appeal.

Now, also on the point of whether these confessions interlock, I would make one point, to -- just to clarify the record in terms of perspective. There's been constant reference to a 22-minute confession. The confession -- the tape of the confession has been lodged with the Court and I would urge the Court to examine it because much of it has to

do with the translation, with the advising of rights, and really the confession of the co-defendant dealing with the crime in question occupies six pages of the Joint Appendix

So, there is not really the disparity that the shorthand reference of the 22-minute --

QUESTION: Oh, but there is this disparity, that there's no question at all that that confession was in fact made. But at least it's arguable that the witness was lying about the second confession.

At least, there is that difference.

MR. KLONOFF: Well, we would disagree with petitioner's characterization that there really is a serious question about whether the confession was made.

QUESTION: Well, at least you can make the argument. You can't even make the argument with respect to the tape recorded confession.

MR. KLONOFF: That's correct. There is a difference. But we would just suggest, as the New York Court of Appeals pointed out in footnote 2 of its opinion, there is absolutely nothing in the record to suggest that Norberto had any motive to falsely accuse the petitioner of the offense.

That was just thoroughly rejected by the New York Court of Appeals based on a review of the record.

So, there really is not that motive in this case. In fact, as this Court noted in Chambers versus Mississippi, a statement made to a long-time friend may in fact be the most reliable type of statement.

Let me, if I could, move to the Lee versus Illinois point in the time remaining. In terms of the distinction between this case and Lee versus Illinois, there are really three points that should be emphasized because the Court in that case found that the co-defendant's confession was not sufficiently reliable to come in as substantive evidence.

And by the way, the substantive evidence argument, let me indicate, is not that it was actually introduced as substantive evidence, but that since it could have been introduced as substantive evidence, the defendant is not in a position to complain where the confession in fact was introduced only against the co-defendant with limiting instructions. So, it's an a fortiori type argument.

But there are three important distinctions between this case and Lee, and the first case -- and in fact, it relates to your point, Justice Stevens -- the fact that the confession was on videotape makes this case totally different than Lee. It really enhances the reliability from the Lee versus Illinois analysis.

And really, the jury was able to focus on the demeanor of Benjamin and they were able to see the circumstances of the statement as the statement was given. So, although there was not cross examination, there were still other aspects that the confrontation clause was designed to protect.

Secondly, the videotaped confession could be looked at, really, as only a more extensive --

QUESTION: To the extent that it is more reliable and more credible, the more likely the jury is to have ignored the instruction and relied upon it? I mean, the two arguments are just crossing one another.

MR. KLONOFF: And they cross for the petitioner who throughout the litigation had argued strenuously that the co-defendant's confession was strongly reliable. So, there is that kind of --

QUESTION: One of the beautiful things about the legal profession.

MR. KLONOFF: That's correct. We would agree with Justice O'Connor's observation that where a confession is strongly reliable, that really ought to suggest that it should be admitted, that there is less of a confrontation problem.

But the second point, in addition to the videotape aspect, is the fact that the videotape really

was almost like a summary of what had already gone on before. It was the third statement, and there were two spontaneous statements preceding the videotape.

There was the statement to the friend, the civilian, a lifelong friend, and then there was the spontaneous statement made to the police before the co-defendant was really under investigation as a target for this offense. So, that distinguishes the station house situation that was present in Lee versus Illinois, a custodial situation where the co-defendant did not want to talk at all at first, wanted to think about the matter, and only agreed to talk after prompting. This was a spontaneous statement twice made both to civilians and to the police later.

Third, there are no important differences between the confessions of the defendant and the co-defendant, and this is a dramatic distinction from Lee. First of all, in Lee the co-defendant's confession was the confession that supplied the element of premeditation. In this case, as I indicated and as the courts below found, both of the confessions agreed on the elements of the offense and both confessions established all of the elements of felony murder.

Similarly, in Lee versus Illinois there was a serious question concerning whether or not the defendant

Lee was actually taking the blame for one of the two murders. In fact, there was indication that she was denying it.

I see that my time is up, and I would simply ask this Court to affirm the conviction. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klonoff. Mr. Dean, do you have something more? You have four minutes remaining.

ORAL ARGUMENT OF ROBERT S. DEAN, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. DEAN: I would just like to address a few points that my opponents made. One is with regard to Justice O'Connor's question as to the more reliable the co-defendant's confession becomes the more there seems to be a Bruton problem.

The co-defendant's confession is much more reliable than the defendant's confession in this case in the sense that we know that it was made. Furthermore, it's reliable evidence against the co-defendant. But in no way are we conceding that it has any reliability connecting petitioner to the crime, which would be the essential question in determining its admissibility against my client.

Also as to Justice White's question concerning, would there have been a procedural bar if

respondent had first argued the substantive admissibility in the New York State Court of Appeals. In the Nieves case which is cited on footnote 2 of page 4 of my reply brief, the Court of Appeals repeated an oft-stated New York rule which is that an appellate court can affirm a judgment of conviction on an issue not raised by the prosecutor below, only if had the prosecutor raised the issue below, the other party could have put in, quote unquote, "no possible answer" to that issue when it had been raised below.

I think that a simple -- a quick reading of the Nieves cite would answer Justice White's question in that respondent would have definitely been barred in the New York Court of Appeals from raising that issue. That's on page 4 of our reply brief.

Okay. Just to emphasize a few more points, one is, if the question is one that should be determined prior -- if the question of severance is one that should be determined prior to trial by the trial judge, merely subject to appellate review on harmless error analysis, there's no reason why the trial judge should not feel free to consider all factors as to whether confessions interlock, not just whether they interlock as to factual content.

All the other factors, how good a case the

defendant could make as to voluntariness, as to whether it was made at all, as to whether it was true, all those factors could be taken into account by a trial judge before the trial.

I'd just like to emphasize that our point is essentially this: that in determining whether the defendant's confession was actually uttered at all, they are naturally going to look to the co-defendant's confession in this case. And then even if they convince the jury, notwithstanding that, that the confession was never uttered, even then they have the same problem that was outlined in Bruton versus the United States.

QUESTION: I suppose whether you want to consider all those other factors for purposes of determining whether they interlock, depends on what you think the purpose of interlocking is, and perhaps if the purpose is what the government suggests, that it will make it less likely that the jury will disobey its instructions, you may be right.

But, what if the purpose of the interlocking requirement is simply not to say that the jury will be less likely to ignore its instructions, but to demonstrate that their ignoring of those instructions is less likely to be harmful?

MR. DEAN: Right, but in this case --

QUESTION: Then in that case all you really need is the interlocking facts.

MR. DEAN: No, because in this case, assuming that the jury is not going to be able to obey the limiting instructions and that they are going to consider the co-defendant's confession, and the question is really, does that damage the defendant's case. That's the essence of the question.

If they are not going to obey those limiting instructions, is the result going to be devastating to the defendant's case, and we submit it would be in this case because the co-defendant's confession is far more powerful and far more damaging to the defendant.

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Dean.

MR. DEAN: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 1:53 o'clock p.m., the hearing in the above-entitled matter was submitted.)

CERTIFICATION

erson Reporting Company, Inc., hereby certifies that the
ached pages represents an accurate transcription of
ctronic sound recording of the oral argument before the
reme Court of The United States in the Matter of:

-5939 - EULOGIO CRUZ, Petitioner V. NEW YORK

: that these attached pages constitutes the original
nscript of the proceedings for the records of the court.

BY Paul A. Rickardson

(REPORTER)