

# The Burger Court Opinion Writing Database

*Lee v. Illinois*

476 U.S. 530 (1986)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Sal. - Note

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
THE CHIEF JUSTICE

December 20, 1985

RE: No. 84-6807 - Lee v. Illinois

Dear Harry:

Would you be willing to take on a dissent in this case?

Regards,

Justice Blackmun

Copies to Justices Powell  
Rehnquist

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

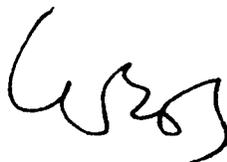
April 24, 1986

Re: No. 84-6807 - Millie R. Lee v. Illinois

Dear Harry:

I join your dissent of April 18, 1986.

Regards,



Justice Blackmun

Copies to the Conference

APR 24 1986

RECEIVED

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 13, 1985

No. 85-6807

Lee v. Illinois

No. 84-6263

Batson v. Kentucky

Dear Chief,

I'm going to try my hand at opinions for the Court in both of the above cases. Together with the two I assigned to myself last week, this brings my assignments to six, which at least approaches the total assignments to some of my colleagues.

Sincerely,

The Chief Justice

Copies to the Conference

DEC 13 6 33 PM '85

RECEIVED  
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To: The Chief Justice  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: FEB 6 1986

Recirculated: \_\_\_\_\_

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6807

MILLIE R. LEE, PETITIONER v. ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

[February —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and a co-defendant, charged with committing a double murder, were tried jointly in a bench trial. Neither defendant testified at trial. In finding petitioner guilty as charged, the trial judge expressly relied on portions of the co-defendant's confession as substantive evidence against petitioner. The question for decision is whether such reliance by the judge upon the co-defendant's confession violated petitioner's rights as secured by the Confrontation Clause of the Sixth Amendment<sup>1</sup>, as applied to the states through the Fourteenth Amendment.

I

In February 1982, police officers of East St. Louis asked petitioner Millie Lee to come to the police station to help identify a badly burned body that the police had discovered in an apartment in the housing complex in which Lee lived. While Lee was examining photographs of the body, a detective noticed that she began to cry. The detective advised Lee of her *Miranda* rights, and began to question her about the whereabouts of her aunt, Mattie Darden<sup>2</sup>, with whom Lee shared an apartment. After giving a number of con-

<sup>1</sup>The Confrontation Clause provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

<sup>2</sup>Mattie Darden was called "Aunt Beety" or "Aunt Beedie" by both Lee and Thomas.

STYLISTIC CHANGES THROUGHOUT  
SEE PAGES

and p. 8

Justice Marshall ✓  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: \_\_\_\_\_

Recirculated: **FEB 11 1986** \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-6807

MILLIE R. LEE, PETITIONER *v.* ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT  
OF ILLINOIS

[February —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in a bench trial. Neither defendant testified at trial. In finding petitioner guilty as charged, the trial judge expressly relied on portions of the codefendant's confession as substantive evidence against petitioner. The question for decision is whether such reliance by the judge upon the codefendant's confession violated petitioner's rights as secured by the Confrontation Clause of the Sixth Amendment<sup>1</sup>, as applied to the States through the Fourteenth Amendment.

### I

In February 1982, police officers of East St. Louis asked petitioner Millie Lee to come to the police station to help identify a badly burned body that the police had discovered in an apartment in the housing complex in which Lee lived. While Lee was examining photographs of the body, a detective noticed that she began to cry. The detective advised Lee of her *Miranda* rights, and began to question her about the whereabouts of her aunt, Mattie Darden<sup>2</sup>, with whom Lee shared an apartment. After giving a number of con-

<sup>1</sup>The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

<sup>2</sup>Mattie Darden was called "Aunt Beety" or "Aunt Beedie" by both Lee and Thomas.

Supreme Court of the United States  
Washington, D. C. 20543

February 19, 1986

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

Lee v. Illinois  
84-6807

Dear Sandra:

Let me say that I appreciate your taking the time to set out your concerns with my circulating opinion in the above. As it is, I do not believe that we are at all far apart, and that our approaches, to the degree that they differ, differ primarily in emphasis.

Within the next day or so, I will send you only a revised opinion which I expect will incorporate in large part, if not wholesale, your proposed draft. I certainly agree with you that this is an important case, and that it is thus important that it obtain a court.

Sincerely,



Justice O'Connor

pp 8-17 substantially revised

Justice White  
 Justice Marshall ✓  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: **FEB 21 1985** \_\_\_\_\_

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-6807

MILLIE R. LEE, PETITIONER *v.* ILLINOISON WRIT OF CERTIORARI TO THE APPELLATE COURT OF  
ILLINOIS, FIFTH DISTRICT

[February —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in a bench trial. Neither defendant testified at trial. In finding petitioner guilty as charged, the trial judge expressly relied on portions of the codefendant's confession as substantive evidence against petitioner. The question for decision is whether such reliance by the judge upon the codefendant's confession violated petitioner's rights as secured by the Confrontation Clause of the Sixth Amendment<sup>1</sup>, as applied to the States through the Fourteenth Amendment.

## I

In February 1982, police officers of East St. Louis asked petitioner Millie Lee to come to the police station to help identify a badly burned body that the police had discovered in an apartment in the housing complex in which Lee lived. While Lee was examining photographs of the body, a detective noticed that she began to cry. The detective advised Lee of her *Miranda* rights, and began to question her about the whereabouts of her aunt, Mattie Darden<sup>2</sup>, with whom Lee shared an apartment. After giving a number of con-

<sup>1</sup>The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

<sup>2</sup>Mattie Darden was called "Aunt Beety" or "Aunt Beedie" by both Lee and Thomas.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 27, 1986

Lee v. Illinois  
84-6807

Dear Sandra:

John Stevens has asked if I would change the final sentence of the carryover paragraph on page 15 of the above. I enclose a copy of the page with the changes marked per his request. As far as I can make out, the proposed change makes no difference, and I am willing to oblige him. Have you an objection?

Sincerely,



Justice O'Connor

dant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, unless the discrepancies between the statements are insignificant, the codefendant's confession may not be admitted.

In this case, the confessions overlap in their factual recitations to a great extent. However, they clearly diverge with respect to Lee's participation in the planning of her Aunt's death, Lee's facilitation of the murder of Odessa, and certain factual circumstances relevant to the couple's premeditation. For example, Lee's confession states that Thomas was "talking about doing something to aunt Beetty but he never said what," App. at 12, and does not refer at all to the joint plan to do "something to Aunt Beedie" which Thomas repeatedly mentions in his confession. *Id.*, at 17. Nor does Lee's confession give any indication that Lee and Thomas colluded to "do somthing [sic] with Odessa," *id.*, at 18, as does Thomas' statement. Lee states that she called Odessa into the kitchen only to discuss the rent and that Thomas assaulted Odessa after Odessa had left the kitchen, given Thomas a "dirty loo[k]," and was walking toward the bedroom. *Id.*, at 6. By contrast, Thomas indicates that "[Lee] was suppose [sic] to get Odessa to stand, with her back toward the front room, looking into the kitchen" so that Thomas could stab her from the back, *id.*, at 18, and that he actually attacked Odessa while she was in the kitchen at Lee's beckoning. *Id.*, at 19. Finally, there are certain factual discrepancies in the two statements which bear on Lee's alleged pre-existing in-

Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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p. 15

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-6807

MILLIE R. LEE, PETITIONER *v.* ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF  
ILLINOIS, FIFTH DISTRICT

[March —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in a bench trial. Neither defendant testified at trial. In finding petitioner guilty as charged, the trial judge expressly relied on portions of the codefendant's confession as substantive evidence against petitioner. The question for decision is whether such reliance by the judge upon the codefendant's confession violated petitioner's rights as secured by the Confrontation Clause of the Sixth Amendment<sup>1</sup>, as applied to the States through the Fourteenth Amendment.

### I

In February 1982, police officers of East St. Louis asked petitioner Millie Lee to come to the police station to help identify a badly burned body that the police had discovered in an apartment in the housing complex in which Lee lived. While Lee was examining photographs of the body, a detective noticed that she began to cry. The detective advised Lee of her *Miranda* rights, and began to question her about the whereabouts of her aunt, Mattie Darden<sup>2</sup>, with whom Lee shared an apartment. After giving a number of con-

<sup>1</sup>The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

<sup>2</sup>Mattie Darden was called "Aunt Beety" or "Aunt Beedie" by both Lee and Thomas.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 10, 1986

Lee v. Illinois  
84-6807

Dear Byron:

I am in the process of making some changes in the above to respond to Harry's dissent. Have you got any suggestions which might address some of your concerns?

Sincerely,



Justice White

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: MAY 22 1986

SEE PAGES THROUGHOUT

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-6807

MILLIE R. LEE, PETITIONER *v.* ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF  
ILLINOIS, FIFTH DISTRICT

[May —, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in a bench trial. Neither defendant testified at trial. In finding petitioner guilty as charged, the trial judge expressly relied on portions of the codefendant's confession, obtained by police at the time of arrest, as substantive evidence against petitioner. The question for decision is whether such reliance by the judge upon the codefendant's confession violated petitioner's rights as secured by the Confrontation Clause of the Sixth Amendment<sup>1</sup>, as applied to the States through the Fourteenth Amendment.

### I

In February 1982, police officers of East St. Louis asked petitioner Millie Lee to come to the police station to help identify a badly burned body that the police had discovered in an apartment in the housing complex in which Lee lived. While Lee was examining photographs of the body, a detective noticed that she began to cry. The detective advised Lee of her *Miranda* rights, and began to question her about the whereabouts of her aunt, Mattie Darden<sup>2</sup>, with whom

<sup>1</sup>The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

<sup>2</sup>Mattie Darden was known also as "Aunt Beety" or "Aunt Beedie."

Supreme Court of the United States  
Washington, D. C. 20543

June 4, 1986

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

MEMORANDUM TO THE CONFERENCE

Holds for Lee v. Illinois, No. 84-6807

(1) Richardson v. Marsh, 85-1433. Respondent was tried jointly with her codefendant in Michigan state court for felony murder and assault with intent to murder. At trial, the codefendant's confession to the police was introduced into evidence after references to respondent were deleted. The codefendant did not testify. Despite the deletions from the codefendant's statement, respondent's counsel objected to the introduction of the confession into evidence on the ground that there were "certain inferences ... raised by this statement even in its altered form that would tend to incriminate my client." The judge allowed both the confessions to be admitted. Before submitting the case to the jury, he instructed that each confession was to be considered only against the declarant.

The state courts affirmed the conviction. The federal district court denied respondent's petition for habeas, but a unanimous panel of the CA6 (Merritt, Contie, Celebrezze, Senior Circuit Judge) reversed and granted the writ. The court found that, despite the redactions, other evidence at the trial connected the defendant to the events described in the confession such that there was a "substantial risk" that the statement would be used to incriminate the defendant in violation of the Sixth Amendment and this Court's decision in Bruton v. United States, 391 U.S. 123 (1968). In other words, the issue in the case was whether redactions from a codefendant's confession are sufficient to satisfy Bruton concerns, or whether the danger of spillover that exists as a product of evidence "beyond the face of the contested extrajudicial statement" may generate constitutional error in violation of the values underlying Bruton. On the facts before it, the CA6 found that there was a "paucity of other evidence [other than the codefendant's confession]" to establish "the critical element of [resp's] intent" and that the confession was "powerfully incriminating to [the resp]." Accordingly, the court held that "the prosecution's use of the [confession] against Marsh created a substantial risk that the jury would

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 18, 1986

84-6807 - Lee v. Illinois

Dear Bill,

I shall await further writing in this  
case.

Sincerely yours,



Justice Brennan

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CHAMBERS OF  
JUSTICE BYRON R. WHITE

Supreme Court of the United States  
Washington, D. C. 20543

May 26, 1986

84-6807- Lee v. Illinois

Dear Bill,

Please join me.

Sincerely yours,

Justice Brennan

Copies to the Conference



CHAMBERS OF

JUSTICE THURGOOD MARSHALL

Supreme Court of the United States  
Washington, D. C. 20543

February 4, 1986

Re: No. 84-6807 - Lee v. Illinois

Dear Bill:

Please Join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 27, 1985

Re: No. 84-6807, Lee v. Illinois

Dear Chief:

I shall be glad to try my hand at a dissent in this case.

Sincerely,

The Chief Justice

cc: Justice Powell  
Justice Rehnquist

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 11, 1986

Re: No. 84-6807, Lee v. Illinois

Dear Bill:

In due course, I shall try my hand at a dissent in  
this case.

Sincerely,



Justice Brennan

cc: The Conference

OR FEB 15 10 20

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 18, 1986

Re: No. 84-6807, Lee v. Illinois

Dear Lewis:

Thank you for your letter of April 17. I am endeavoring to accommodate your concerns. A revision goes to the printer today and should be around shortly.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lewis", with a long horizontal flourish extending to the right.

Justice Powell

Stylistic changes, p. 2,  
and footnotes renumbered

Justice Brennan  
Justice White  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Blackmun**

Circulated: \_\_\_\_\_

Recirculated: APR 13 1986

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-6807

MILLIE R. LEE, PETITIONER *v.* ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF  
ILLINOIS, FIFTH DISTRICT

[April —, 1986]

JUSTICE BLACKMUN, with whom JUSTICE REHNQUIST joins, dissenting.

I yield to no one in my respect for the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth. And I do not denigrate the lofty precepts that have been developed to strengthen its enforcement. I feel, however, that at times this Court tends to be overly concerned with theory and pronounced principles for their own sake, and to disregard the significant realities that so often characterize a criminal case. There is a real world as well as a theoretical one.

This case, centering on two senseless and reprehensible East Saint Louis murders, is illustrative. Petitioner Millie R. Lee and her friend and codefendant, Edwin R. Thomas, each confessed to extensive and cooperative involvement in the crimes. Their corroborated and mutually reinforcing statements stand in vivid contrast to the blame-it-on-the-other-person and buck-passing posturing that usually develops when criminal accomplices are apprehended and each endeavors to rescue himself or herself at the expense of the other. We have nothing of that kind here.

I agree with the Court that this case is governed by *Ohio v. Roberts*, 448 U. S. 56 (1980). Under the principles enunciated in that case, Thomas' confession was constitutionally admissible against petitioner *only* if Thomas was "unavailable" as a witness *and* the confession bore sufficient "indicia

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 10, 1986

84-6807 Lee v. Illinois

Dear Bill:

In accord with my Conference vote, I will await the  
dissent.

Sincerely,



Justice Brennan

lfp/ss

cc: The Conference

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April 17, 1986

84-6807 Lee v. Illinois

Dear Harry,

Although I think the substance of your dissent is excellent, there are three sentences that appear to be inconsistent with our recent decision in Inadi, No. 84-1580.

On page 1 of the dissent, you state:

"Under the principles enunciated in [Ohio v. Roberts], Thomas' confession was constitutionally admissible against petitioner only if Thomas was 'unavailable' as a witness and the confession bore sufficient 'indicia of reliability.'"

Then on page 2 you state:

"Recognizing 'the Framers' preference for face-to-face accusation,' this Court has construed the Confrontation Clause to embody 'a rule of necessity.' Ohio v. Roberts, 448 U.S., at 65. When a witness is available to testify in court, his prior statement, even if reliable, generally will be inadmissible to prove the truth of what it asserts unless the witness is produced for cross-examination."

Inadi specifically held that the Confrontation Clause did not impose an across-the-board rule requiring unavailability. On page 5 of the slip op. in Inadi, we stated that "Roberts should not be read as an abstract answer to questions not presented in that case" but should be limited to "'the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial.'" (quoting Roberts, at 58). On page 4 of the slip op. in Inadi we quote, and eventually disapprove of, CA3's reliance on the same language from Roberts that you rely on at page 2 of your dissent in Lee.

As you know, Bill Brennan's opinion in Lee expressly does not deal with the issue of unavailability. Therefore, it is not necessary in dissent to address the issue of unavailability at all.

Sincerely,

Justice Blackmun

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 22, 1986

84-6807 Lee v. Illinois

Dear Harry:

Please add my name to you dissent.

Sincerely,



Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

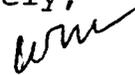
April 17, 1986

Re: No. 84-6807 Lee v. Illinois

Dear Harry,

Please join me in your dissent in this case.

Sincerely,



Justice Blackmun

cc: The Conference

APR 18 1986

①

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

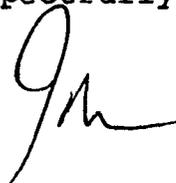
February 28, 1986

Re: 84-6807 - Lee v. Illinois

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

RECEIVED MAR 3 1986

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

February 10, 1986

No. 84-6807 Lee v. Illinois

Dear Bill,

I have read your opinion in this case with interest. I agree with the result at least insofar as the conviction for the murder of Odessa is concerned. I am concerned, however, that the opinion is somewhat inconsistent with Lewis' opinion in Inadi and that it gives too little consideration to the reliability of truly interlocking confessions. I expect I will write separately, concurring in the judgment, at least in part.

Sincerely,



Justice Brennan

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

February 18, 1986

No. 84-6807 Lee v. Illinois

Dear Bill,

In response to your request that I suggest specific changes to your circulating draft in order that I could simply join it, I have formulated the following suggestions. Unfortunately, they are, as anticipated, rather extensive. But I consider this case to be an important one. I have joined Lewis' opinion in Inadi and I want to be sure that I can be comfortable with all that is said or left unsaid in this opinion.

I believe that it is useful to emphasize at the outset of the opinion, as you have, that the Court has traditionally viewed this type of hearsay as "presumptively unreliable." But I would prefer it if the opinion then explained that this presumption is capable of rebuttal, and set out just why the presumption is not rebutted in this case. The issues of whether proof of sufficient "indicia of reliability" will justify the admission of this type of hearsay and whether there were such "indicia" in this case were raised and argued by Illinois. I do not think we can or should avoid them. In any case, we need only find that Illinois's asserted "indicia" in this case do not satisfy the reliability concerns of the Confrontation Clause, leaving the question of what "indicia of reliability" will suffice for New Mexico v. Earnest, No. 85-162, and other cases.

This said, I have the following specific difficulties with your draft:

(1) I do not feel comfortable with general restatements of Confrontation Clause principles. These statements do not advance the cause of this case, and some of them may create problems in subsequent cases presenting unique and as yet undiscussed Confrontation Clause issues. Also, I believe that much of the discussion is relevant to "unavailability" questions; because the issue of unavailability is not part of this case and because those

passages potentially conflict with Inadi, I would prefer that they be deleted. I refer, in particular, to the passages on page 9, second full paragraph (continuing to page 10); page 10, second full paragraph (continuing on to page 11).

(2) The discussion from page 14-16 is troubling. To the extent that it explains the interplay between hearsay exceptions and the Confrontation Clause I think it unnecessary because you have expressly stated that the only hearsay exception arguably applicable here, that for statements against penal interests, is not a fit subject for meaningful Confrontation Clause analysis. To the extent that the discussion is directed at reconciling generally the use of hearsay and the Confrontation Clause, I believe that it is somewhat inconsistent with Inadi to state that Roberts sets out the "test" for resolving all Confrontation Clause problems. Certainly, Roberts provides a useful point of reference but it expressly declined to state a general prescription for resolution of confrontation problems. Finally, the concerns I voice above about general restatements apply with equal force here. I would suggest deletion of the discussion running from page 14 to the first half of page 16.

(3) It would be useful to explain at the outset of part II(B) just what is necessary to rebut the presumption of unreliability, perhaps with reference to Roberts. Of course, one need not then go on to isolate all the types of things that may serve as "indicia of reliability," but I believe it important to explain more fully why Illinois's contention that Thomas's confession bears contain sufficient "indicia of reliability" is unpersuasive. Your discussion on pages 16 (first full paragraph) to 17 (end of first full paragraph) is principally a restatement of the presumption of unreliability discussion of part II(A); Illinois's claims are dealt with in rather abbreviated form only on pages 17-18. In my view, it would be desirable to explain why the circumstances in which Thomas's confession was taken do not argue for a finding of reliability and what effect the "interlocking" character of Thomas's and Lee's confession should have on the reliability determination. It is this latter point which is of particular interest to me.

In my view, a co-defendant's statement is not necessarily "reliable" and thus admissible simply because it "interlocks" to some degree with the defendant's confession. I recognize that the danger in these cases is selective reliability, and that those portions of the statement that bear on the defendant's relative culpability or participation are inherently unreliable. But if the

defendant corroborates those portions of the co-defendant's statement that detail the defendant's involvement in the crime, I see no reason why those portions should not be deemed trustworthy. Thus, I think it is desirable to expressly discuss this potential "indicia of reliability" and suggest some kind of standard, perhaps along the following lines: "if those portions of the co-defendant's statement which bear significantly on the defendant's participation in the crime are not substantiated by the defendant's own confession, the admission, without cross-examination, of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment."

I agree that the confessions here clearly diverge with respect to Lee's participation in the planning of her Aunt's death and Lee's facilitation of the murder of Odessa. I think it would be helpful to set out these disparities in more detail. I also agree that the "non-interlocking" portions of Thomas's confession were not irrelevant or trivial, and in fact were highly significant in view of the legal issues at trial. But it should be pointed out that such a finding does not necessarily foreclose the possibility that the error was harmless when assessed in the context of the entire case against Lee. As I noted in my previous letter, I am not at all convinced that the error was prejudicial as regards Lee's conviction for the murder of her Aunt. In fact, it seems to me the opinion should indicate in some manner that Lee's own description of her assault on Aunt Beedie may independently and convincingly negate any possible reliance on the defenses of self-defense or provocation, as construed by the Illinois courts.

Because the suggestions are numerous, I will certainly understand if you prefer not to make them. I offer them because of your request that I do so and because I agree with you it is desirable to obtain a court if possible.

Sincerely,

*Sandra*

Justice Brennan

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

February 20, 1986

No. 84-6807 Lee v. Illinois

Dear Bill,

You have incorporated all my suggested changes and I will be happy to join your opinion. Thanks for the prompt consideration of the suggestions. I have only one final suggestion. On p. 15 of the new draft a new sentence has been added to the end of the first paragraph. I believe the word "confessions" should be replaced with "codefendant's confession," and I think greater consistency would be attained by substituting "insignificant" for the words "trivial or inconsequential."

Sincerely,



Justice Brennan



CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

Supreme Court of the United States  
Washington, D. C. 20543

February 21, 1986

Re: 84-6807 Millie Lee v. Illinois

Dear Bill,

You have substantially revised your  
opinion in a way which satisfies my concerns.  
Please join me. I do not plan to write separately.

Sincerely,

*Sandra*

Justice Brennan

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

February 27, 1986

No. 84-6807 Lee v. Illinois

Dear Bill,

I agree with you that the proposed change  
does not alter the meaning of the sentence.

Sincerely,



Justice Brennan