

21-6778

ORIGINAL

In The
Supreme Court Of The United States

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SUPREME COURT, U.S.

The People of the State of Illinois
Respondent

- VS -

Wesley Casey - IDOC # Y35126
Petitioner

Petition For Writ Of Certiorari

Pro Se Petitioner:

Wesley Casey
IDOC # Y35126
Menard Correctional Center
P.O. Box 1000
Menard, IL 62259

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Question Presented

Has the State of Illinois entered a decision in conflict with the decision in a United States Supreme Court case, Michigan v. Mosley, thereby, violating Mr. Carey's V amendment rights against self-incrimination, as well as, the XIV amendment right to due process of the law?

Parties

Petitioner, pro se:

Wesley Carey - IDoc # Y35126 P.O. Box 1000 Menard, IL 62259

For Respondent the people of the State of Illinois:

Kwame Baoul, Attorney General of the State of Illinois,
100 West Randolph street, 12th Floor Chicago, IL 60601

Prior Opinions and Orders

- Fall 2018 trial Conviction for first degree murder Sangamon County, Illinois, Case No.: 16-CF-61.
- May 19, 2021 Direct Appeal, affirmed; The People of the State of Illinois v. Carey, 2021 IL App (4th) 190097-U.
- November 03, 2021 The Illinois Supreme Court denied Mr. Carey's Petition for Leave to Appeal.

Basis Of Jurisdiction

Jurisdiction is conferred on this Court by U.S. Sup. Ct. Rules 10(c) and 13(1). The state court decision was a final adjudication and the denial conflicts with the Due Process Clause of the United States V, and XIV Amendments.

Table of Authorities Cited

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Illinois v. Perkins, 496 U.S. 292, 297, 110 S.Ct. 2394,
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People v. Gibson, 55 Ill.App.3d 929, 934-35 (1st Dist. 1977)

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Miranda v. Arizona, 384 U.S. 436, 448-50, 455, 86
S.Ct. 1602, 16 L.Ed.2d 694 (1966)

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In re W.C., 167 Ill.2d 307, 327 (1995)

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Statement Of Facts

In January 2016, Wesley Carey and Nicole Maxey, Carey's girlfriend, were drinking at Maxey's apartment. (R. 941, 946) They were listening to music and talking. (R. 941) Around 3:30 pm, Carey searched YouTube for the recording artist "Immortal Technique," whom he had met. (R. 942) The song, "Dance with the Devil," populated. (R. 942) After Maxey took a phone call from her ex-boyfriend, Carey played the song. (R. 943) About 30 minutes later, Carey, who was "really drunk," took a nap. (R. 943, 947)

Some time later, Maxey woke Carey and "told [him] that she wanted to be intimate." (R. 949) Carey told her that he "just wanted to go back to bed." (R. 950) Maxey berated Carey over the status of their relationship. (R. 950-51) Eventually, Carey said "this just isn't going to work.... I don't want to be with you." (R. 951) Maxey shouted, "I knew you were going to leave," and punched Carey "right in the mouth." (R. 952) Maxey "kept ... swinging," but Carey was "just trying to avoid the punches." (R. 952)

Eventually, Carey pushed Maxey to "back up." (R. 952-53) He took Maxey's phone and threatened to call 9-1-1. (R. 953) When Carey placed the call, Maxey grabbed him around the neck, pulled him backwards, slipped, fell, and "whacked her head on [a] chair." (R. 954-55) The chair broke into pieces. (R. 954) Maxey took her phone and left the apartment. (R. 955) Carey went to the bedroom to gather his things and "get

out of there." (R. 956) Not more than a two minutes later, as Carey tried to exit the apartment, he saw Maxey holding a knife. (R. 957) Maxey moved toward him with the knife. (R. 957)

Carey knew that Maxey had stabbed her ex-boyfriend. (R. 929) Just three weeks prior, Maxey was "bragging" to Carey about her actions. (R. 961) He grabbed Maxey's wrist in an attempt to pull the knife out of her hand. (R. 958) Carey and Maxey tussled over the knife as they fell to the ground. (R. 958) During the fall, Carey wrested control of the knife from Maxey. (R. 958) Carey threw the knife above his head. (R. 958) He saw blood pouring out of Maxey's arm as she continued to reach for the knife. (R. 958-59) Maxey's 18-month-old son, Asher, entered the room. (R. 959)

Emergency personnel transported Carey and Maxey to the hospital. (R. 768) When Carey woke up in the hospital, he could not remember the incident. (R. 321-22) He asked Officer Eric Bertoni to tell him what happened. (R. 274, 321) Bertoni read Carey the Miranda rights. (R. 274) Carey agreed to speak with Bertoni. (R. 274) Bertoni told Carey that he, Carey, had stabbed Maxey. (R. 275, 321) Carey "said he didn't want to talk anymore." (R. 275, 321-22)

Later, Carey saw Bertoni speaking on the phone. (R. 287, 324) Carey, Bertoni took him to the Sangamon County Jail. (R. 276, 330)

Interrogation
Detective Mike Mc Masters and Chief Jan Bowsher

interrogated Carey. (People's Exhibit 47) Carey agreed to speak with them after receiving a second set of Miranda warnings. (People's Exhibit 47, 09:43-10:33)

Throughout the interrogation, Carey stated that he did not remember the incident. (People's Exhibit 47, 00:13:33-00:13:44, 00:16:15-00:16:27, 00:17:01-00:17:10, 00:20:04-00:20:13, 00:29:17-00:29:20, 00:42:52-00:42:57, 00:49:07-00:49:09, 00:51:43-00:51:46, 00:59:50-01:00:01, 01:02:06-01:02:11, 01:08:00-01:08:10, 01:18:29-01:18:40) Carey believed that he must have stabbed Maxey because that is what Bertoni told him. (People's Exhibit 47, 00:14:35-00:14:52, 00:16:34-00:16:42, 00:22:30-00:22:38, 01:05:13-01:05:28, 01:15:36-01:15:52, 01:21:48-01:21:54)

Carey recalled that he and Maxey were drinking heavily and listening to music. (People's Exhibit 47, 00:44:07-00:44:12) They talked about religion, the devil, and Carey's weakness with alcohol. (People's Exhibit 47, 00:12:47-00:13:27) They listened to "Dance with the Devil, a song Carey described as "evil," "horrible," and "sad." (People's Exhibit 47, 00:14:09-00:14:17, 00:15:42-00:15:46, 00:15:57-00:15:59, 00:19:49-00:19:54) Carey explained that "there's no real relevance to the song," but it was "the last memory... of any of this." (People's Exhibit 47, 00:51:04-00:51:12)

Carey offered a theory of the incident based on what he was told by Bertoni: he "went bye-bye and Hank went crazy." (People's Exhibit 47, 01:04:02-01:04:18) Carey explained that

"Hank" was his nickname for the "really drunk guy" who can "stay awake and party for three more hours." (People's Exhibit 47, 00:23:30-00:23:52) Carey said that he "blacked... out." (People's Exhibit 47, 00:52:25-00:52:28) His black-outs from alcohol were a "normal pattern." (People's Exhibit 47, 00:27:25-00:27:29)

Carey also mentioned an incident in which Maxey was upset with "Hank" and locked him out of the apartment. (People's Exhibit 47, 00:13:47-00:13:58, 00:55:40-00:56:35) Carey pounded on the door, asking for his phone so that he could leave. (People's Exhibit 47, 00:56:01-00:56:08) Maxey refused to give Carey his phone. (People's Exhibit 47, 00:55:51-00:55:55) Carey broke the front window of Maxey's apartment. (People's Exhibit 47, 00:56:29-00:56:35) The State charged Carey with First degree murder. (C. 36-38)

Pre-trial

Defense counsel filed a motion to exclude or redact Carey's interrogation on the basis of relevance. (C.146; B.186-87) Specifically, counsel argued that Carey's statements were not relevant because they were "really the product of what... Bertoni shared with [Carey]." (B.189) The trial court denied the motion. (B.188)

A second motion sought suppression of the interrogation based on law enforcement's failure to "scrupulously honor [Carey's] unequivocal invocation" of his Fifth Amendment privilege against self-incrimination. (C.191) The trial court

denied the motion. (R.354)

The court also denied a motion to exclude introduction of evidence related to Carey breaking the front window of Maxey's apartment; and a motion to prohibit any mention of the song, "Dance with the Devil." (C.178-79; R.373)

Because Carey intended to raise self-defense, the court granted defense counsel's motions to admit evidence of Maxey's violent character, including, an incident in which Maxey stabbed her ex-boyfriend, and Maxey's prior conviction for domestic violence against her step-father. (C.68-72, 170-72; R.175, 222-23)

Trial

At trial, Carey testified to the incident as recounted above. (Op. br., pp.4-5) Additionally, Carey explained that his responses during the interrogation were the result of an intense interrogation situation and memory loss caused by an alcohol-induced blackout that he suffered during the altercation with Maxey. (R.965, 971, 975) He explained the full context of why he broke Maxey's apartment window. (R.934-38)

He confirmed that "Hank" was a nickname for his personality when he is intoxicated. (R.971) Carey also confirmed that the song, "Dance with the Devil," had nothing to do with his altercation with Maxey. (R.991)

Keith Underwood, Maxey's ex-boyfriend, testified that Maxey stabbed him. (R.1010) After drinking heavily, Maxey

bumped into a shelf, causing a printer to fall. (R. 1010, 1015) Underwood pushed Maxey away from the falling printer. (R. 1015) Maxey had a knife in her hand and stabbed Underwood with it. (R. 1014)

Renee Ackman, Maxey's friend and neighbor, heard a "pounding on [her] door around 9 p.m." (R. 717) Maxey was standing at the door, with a minor cut or bruise above her right eye. (R. 718, 724) Maxey said, "please go save my baby." (R. 718) Ackman told her daughter to call 911 because "[t]here had been another altercation a couple [of] weeks prior." (R. 725) When Ackman entered Maxey's apartment, she saw Maxey and Carey lying on the floor. (R. 719) She grabbed Asher, and ran from the apartment. (R. 719-20) Ackman recalled seeing a knife, but stated: "I don't know who had it." (R. 726)

William Walsh, Maxey's neighbor heard screaming, yelling, and screaming coming from Maxey's apartment. (R. 655) As Walsh exited his apartment, he saw Ackman running from Maxey's apartment with Asher. (R. 656-57) When Walsh entered Maxey's apartment, he saw Maxey and Carey lying on the floor; a knife within arm's reach of Carey; and a lot of blood. (R. 658-59, 666-67) Walsh later told the police that he heard Carey say "let me finish it." (R. 633)

Walsh placed a rag over the knife and moved it because he knew that "it was potentially evidence of a crime." (R. 662, 668) Neither Carey nor Maxey prevented him from moving the knife. (R. 669-70)

In addition to the exchange that he had with Carey at the hospital (P. 689-91, 707-08), Bertoni testified that when he entered Maxey's apartment, he "[saw] a male and female laying on the floor covered in blood." (P. 675) The apartment appeared as though two people had been engaged in a physical struggle. (P. 699)

Bertoni observed "tell-tale signs that Carey was highly intoxicated." (P. 705-06) Bertoni told Carey that, if he was not hurt, then he needed to move to allow emergency personnel to attend to Maxey. (P. 683) Carey initially refused to comply, but ultimately allowed medical personnel to take him to the hospital. (P. 677, 684-85, 710)

Bertoni collected a knife with blood on it as evidence. (P. 686) The trial admitted the knife without objection. (P. 687)

Elmer Neal, an EMT, observed that Carey was not responding to Bertoni's verbal commands. (P. 732) He determined that Carey did not have any injuries despite being covered in blood from "head to toe." (P. 733) Neal recalled that Maxey said that she had been "stabbed multiple times and punched." (P. 737)

Paramedic David Detmers testified that Carey admitted to drinking and smelled of alcohol. (P. 767-68) Carey was "belligerent and combative" in the ambulance. (P. 764, 768)

Nathaniel Peterson, an expert in forensic pathology, performed Maxey's autopsy. (P. 822) Maxey died of blunt-force head trauma and blood loss caused by sharp-force injuries. (P. 836) She had no skull fractures or other broken bones. (P. 848-849)

Peterson's examination did not determine how Maxey received the injuries. (R. 853-55) During Peterson's testimony the trial court admitted several autopsy photos without objection. (R. 823-24)

McMasters testified that Carey never admitted to stabbing Maxey because he remembered doing so. (R. 888-89) Rather, Carey said he must have stabbed Maxey based on the information he received from Bertoni. (R. 880-87) Still, McMasters maintained that "[e]verything [Carey] told me was based on his experiences, not something he was told." (R. 900-01)

McMasters testified that "Dance with the Devil," contained themes related to violence against, and the murder of women. (R. 868) "The one line that stood out" to McMasters read, "it takes a real thug to stab someone until they die while looking them in the eyes." (R. 868) He also stated that the last line in the song references a "dance with the devil." (R. 869)

The State played a recording of the 9-1-1 call for the jury. (R. 621, People's Exhibit 1) The court admitted several pictures of Maxey's apartment as it appeared after the incident. (R. 779-784) People's Exhibit 18 depicted a broken chair leg with blood and a single strand of hair on it. (R. 784; E.28) McMasters speculated the hair belonged to Maxey. (R. 908) The knife that Bertoni recovered from Maxey's apartment, the broken chair leg, and Maxey's blood standards from the autopsy were not submitted for forensic analysis. (R. 874)

On the final day of trial, the trial court allowed the State to

present the testimony of a rebuttal witness, Dorothy Brisson. (R.1056) Brisson witnessed the window-breaking incident at Maxey's apartment. (R.1094) She testified that Carey was intoxicated and became angry at Maxey. (R.1095-96) Maxey locked Carey out of the apartment, and insisted that Carey calm down before she would unlock the door. (R.1097-98) Carey broke the front window of Maxey's apartment. (R.1099) The trial court instructed the jury that it could consider Carey's interrogation statements as substantive evidence over defense counsel's objection. (R.1066, 1165, C.269) The trial court also instructed the jury on self-defense, and second degree murder based on serious provocation and unreasonable self-defense. (R.1167-68, C.276-77, 279) The jury convicted Carey of first degree murder. (C.308, R.1178) Defense counsel filed a motion for a new trial, alleging that the error when it admitted: an unredacted video of Carey's interrogation; evidence of the window-breaking incident, as well as Brisson's rebuttal testimony; song lyrics and context of "Dance with the Devil." (C.314-15) The motion also alleged that the trial court erred when it allowed the jury to consider Carey's interrogation as substantive evidence. (C.315) The trial court denied the motion. (R.1187)

Sentencing

At the sentencing hearing, Carey presented the testimony of four mitigation witnesses: Lee Graber, Andrew Furlong, Doctor Casey Younkin, Joe Ruppik (R.1204, 1212, 1217) Each

witness testified that Carey had regularly attended Alcoholics Anonymous ("A.A.") meetings while in the county jail; become a leader within the group; and should genuine remorse for his actions. (R.1207-08, 1209, 1214-15, 1218, 1221-22) Carey gave a statement of allocation in which he "fully accepted" responsibility "for a 'horrible act' (R.1239-41) The trial court rejected Carey's expression of remorse and acceptance of responsibility as well as the testimony of the witnesses, and sentenced Carey to 45 years imprisonment. (R.1246; C.324)

Appeal

Carey filed an Appeal with the 4th District Appellate Court, Illinois. On May 19, 2021, the Appellate Court held: "The appellate court affirmed, concluding (1) the State proved defendant guilty of first degree murder beyond a reasonable doubt; (2) the trial court did not abuse its discretion when it admitted other-crimes evidence and rebuttal testimony; (3) the court properly denied defendant's motion to suppress and appropriately admitted a nonredacted recording of defendant's police interrogation at trial; (4) the court did not abuse its discretion when it allowed testimony regarding the lyrics and content of the song 'Dance with the Devil,' and (5) the court did not err in imposing a 45-year sentence.

Illinois Supreme Court

Carey filed a Petition for leave to Appeal which was denied on November 3, 2021.

Argument

The trial court erred when it admitted a recording of Wesley Carey's interrogation. The interrogation should have been suppressed where law enforcement deprived Carey his fifth and fourteenth amendment privilege against self-incrimination when it failed to scrupulously honor his request to remain silent.

In fact, before questioning suspect in custody, law enforcement officials must inform suspects that: 1) they have the right to remain silent; 2) their statements may be used against them at trial; 3) they have the right to the presence of an attorney during questioning; and, 4) if they cannot afford an attorney, one will be appointed for them. No additional warnings are required. These rules were established in *Miranda v. Arizona* and are protections to the Fifth Amendment privilege against self-incrimination. Miranda warning must be given only when a suspect is both in custody and about to be subject to a government interrogation. To introduce a defendant's statements at trial made in response to a custodial interrogation, the prosecution must demonstrate either that the statements were obtained in compliance with *Miranda* or, that some exception applies. It is important to recognize *Miranda* rights do not need to be read simply because an individual speaks with a police officer. With the case at hand, Carey was in custody and after the *Miranda* warnings he invoked his right to remain silent.

Carey informed Officer Bertoni that he did not remember the incident and did not want to talk (R. 323) While en route to the County jail, Officer Bertoni told Carey that the "only way this was going to be over" was to speak with the investigators. (R. 330) Carey said, "I don't want to talk to these people, I can't do this (R. 330) Officer Bertoni responded, "You [have] to talk to them, just go in there and tell the truth.... You have to try, buddy." (R. 330-31) Carey felt "wrecked.... [He] didn't have any fight left.... [He] was emotionally done." (R. 331) See *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) This court reasoned that custody and interrogation "may create mutually reinforcing pressures" that can overcome the suspect's will.

At the county jail, Officer Bertoni did not tell Detective Mike McMasters and chief Jan Bowsher, (investigators) that Carey did not want to talk with them. (R. 291, 307, 317) During the interrogation, Carey stated he did not remember the incident; but, based on his conversation with Bertoni, Carey told the investigators that he must have stabbed Maxey. (People's Exhibit 47, 00:13:33-00:13:44, 00:14:35 - 00:14:52, 00:16:34-00:16:42, 00:20:04-00:20:13, 00:20:30-00:22:38, 01:02:06-01:02:11, 01:05:13-01:05:13-01:05:28, 01:15:36-01:15:52, 01:18:29-01:18:40, 01:21:48-01:21:54) See *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964) (holding that the Fourteenth Amendment incorporates the right against

self-incrimination)

Once a defendant has invoked his right to silence, interrogation may only resume if the suspect's initial invocation was "scrupulously honored." *In re B.C.*, 108 Ill.2d 349, 353 (1985), citing *Michigan v. Mosley*, 423 U.S. 96, 103-104 (1975). In evaluating whether a defendant's right to silence was adequately honored, courts of review

"consider whether (1) the police immediately halted the initial interrogation after the defendant invoked his right to remain silent; (2) a significant amount of time elapsed between the interrogations; (3) a fresh set of Miranda warnings were given prior to the second interrogation; and (4) the second interrogation addressed a crime that was not the subject of the first interrogation." *People v. Nielson*, 187 Ill.2d 271, 287 (1999), citing *Mosley*, 423 U.S. at 104-05.

The prohibition on further interrogation is to prevent "repeated efforts to wear down the defendant's resistance and cause him to change his mind." *People v. Gibson*, 55 Ill.App. 3d 929, 934-35 (1st Dist. 1977)

Failure to scrupulously honor a request to remain silent renders any subsequent statements involuntary and inadmissible. *Miranda*, 384 U.S. at 373-74; *B.C.*, 108

Ill. 2d at 353, citing Mosley, 423 U.S. at 103-104. The State has the burden of proving by a preponderance of the evidence both that a confession was voluntary, and that it was not obtained in violation of a defendant's fifth amendment rights. 725 ILCS 5/114-11 (d) (2007); People v. Braggs, 209 Ill. 2d 492, 505 (2004); In re W.C., 167 Ill. 2d 307, 327 (1995)

As a threshold matter, there is no question that Carey was in custody or that he unequivocally invoked his right to remain silent at the hospital. (R. 350) However, the manifest weight of the evidence demonstrates that Officer Bertoni did not "immediately halt [] the initial interrogation after [Carey] invoked his right to remain silent." Mosley, 423 U.S. at 104-05.

At the hearing, Officer testified to two brief interactions with Carey. (R. 274-75, 287) According to Officer Bertoni, he did not ask Carey any questions. (R. 275)

Conversely, Carey remembered specific details about his interaction with Bertoni. Those details included a discussion about general information for Officer Bertoni's incident report. (R. 322) The conversation "kind of got a little more in-depth after that," when Bertoni repeatedly asked Carey what he remembered about the events at Maxey's apartment. (R. 323-24, 326) Then, despite Carey's protestations that he did not want to speak with Detective McMaster and Chief Jan Bowsher, Officer Bertoni insisted that he try

to "go in there and tell." (P. 330-31)

Carey also recalled several details that were not germane to Maxey's death, including Bertoni's military service and his prior arrest of Carey (P. 327-29). Notably, Officer Bertoni confirmed the accuracy of those otherwise trivial details. (P. 335-36) Moreover, although Bertoni testified that his incident report contained the extent of his interactions with Carey, he simply did not remember all the details of his conversation with Carey. (P. 333-34)

Perhaps more importantly, the trial court recognized that Officer Bertoni's conversation with Carey continued even after Carey "indicated he didn't want to talk about the circumstances anymore." (P. 350) Yet, the court found that any further dialogue was "innocuous" without recognizing that Officer Bertoni's persistence was designed to keep Carey talking about the incident. (P. 322-23, 327-29, 351) Therefore, the manifest weight of the evidence showed that Officer Bertoni continued to press for information regarding Maxey's death after Carey invoked his right to silence.

Viewed this way, the police did not scrupulously honor Carey's request. First, Officer Bertoni did not cease the interrogation immediately, Officer Bertoni continued questioning him about the events not more than five minutes after Carey "said he didn't want to talk anymore." (P. 322-23) Despite Carey's protestations that he did not remember

anything, Bertoni persisted in questing him about the events at Maxey's apartment, and insisting that he speak with Detective McMaster and Chief Jan Bowsher. (R. 326, 328, 330-31)

Second, and as a result, no meaningful amount of time elapsed between Carey's invocation of his right to silence and Officer Bertoni's resumption of the interrogation.

Mosley, 423 U.S. at 104-05. Third, although Carey received a new set of Miranda warnings prior to speaking with Detective McMaster and Chief Jan Bowsher, the subject matter of the subsequent interrogation was identical to the first. (People's Exhibit 47, 09:43-10:33); Mosley, 423 U.S. at 104-05

In sum, because law enforcement did not comply with three of the four Mosley factors, the State did not prove by a preponderance that it scrupulously honored Carey's invocation of his or that he voluntarily spoke with the investigators. Accordingly, the trial court erred when it admitted Carey's interrogation at trial. (R. 871)