Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

VIVEN HARRIS, Petitioner, vs. THE STATE OF NEW YORK Respondent.	**Docket No.** 206

Place Washington, D. C.

Date December 17, 1970

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

VIVEN HARRIS, Petitioner,	:	
vs.	:	No. 206
THE STATE OF NEW YORK, Respondent.	:	

Washington, D. C.,

Thursday, December 17, 1970.

The above-entitled matter came on for argument at 1:55 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

JOEL MARTIN AURNOU, ESQ.,
White Plains, New York
Counsel for Petitioner

JAMES J. DUGGAN, ESQ.,
Administrative Assistant District Attorney
Westchester County, New York
Counsel for Respondent

APPEARANCES (Continued):

SYBIL H. LANDAU, ESQ.,
Assistant District Attorney
New York County, New York
(for the District Attorney of New York
County, as amicus curiae)

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 206, Viven Harris vs. The State of New York.

Mr. Aurnou, you may proceed whenever you're ready.

ARGUMENT OF JOEL MARTIN AURNOU, ESQ.,

ON BEHALF OF PETITIONER

MR. AURNOU: Thank you. Mr. Chief Justice, and may it please the Court. The petitioner in this case was arrested on January 7 of 1966 and subsequently charged in a two-count indictment with two identical counts of sale of a narcotic drug to an undercover agent, the same undercover agent, two days apart. And these two offenses occurred allegedly the day before and three days before the date of his arrest.

After his arrest, and the time factor is not found in the record, he was removed to the office of the District Attorney of Westchester County at our court house and there in the presence of a number of law enforcement officers, detectives, assistant district attorneys, and so forth, and a stenographer, a written statement was taken from him which does appear in its entirety in the record before you.

However, that statement itself discloses that it followed a period of questioning, the length of which is never disclosed, by the same district attorney, the same law enforcement officers, and there is no place in this record where the facts of the prior questioning are elicited.

It so happened that this case was tried before one of our most beloved and respected judges, and when the statement came up he, realizing precisely the point that was at issue, the difference between the Miranda view of impeachment that I take and the New York Court of Appeals view in the Kulis case, asked the prosecutor who tried the case, who was the same prosecutor who took the statement, Mr. Facelle, "Did you give this man any warning other than appears in this statement?" and the prosecutor said he had not.

Q Who was the trial judge?

A Judge Robert E. Dempsey, Your Honor.

Now, what that meant was that coupled with the statement itself, which shows you -- in repeated places the prosecutor says to him, all I want you to do is tell us what you already told us before, and Mr. Harris -- well, he was 23 years old, he did have a tenth-grade education, such as it was, he was an addict, and he was suffering from withdrawal symptoms.

And Mr. Harris said, in the fact of the fact that he had been questioned without warning and he was now being questioned by a reporter, he said "I would like to see a laywer." He said, "I don't think I should keep on before I see a lawyer." And at that point Mr. Facelle told him that he had an absolute right to a lawyer. He said I will have him taken out; he can get a lawyer.

But the petitioner was indigent. He had no prior felony convictions. He had minimal involvement with the law, in my view, and I don't think for a moment that he understood either that he had a right to counsel then and there, or that he had a right to free counsel then and there. And his answer is --

Q As I understand that time he didn't have either of those rights under the United States Constitution, did he?

A At that date, Your Honor, Miranda had not come down and the standard had not been explicitly decided.

Q Right.

A On the other hand, it is my view, and I commend to you, that Escobedo was in existence at that time --

Q Well, that is not a fact and not a matter of opinion.

A -- that the opinion which I believe Your Honor wrote said that a confession obtained under such circumstances could not be used -- that was the word you used, and I prefer that to admissibility, because use and admissibility have some distinctions in this case. But what I am saying is this: When he asked for the lawyer, it was not only a question of rights that were available to him, because he didn't appreciate what they were at all. But the prosecutor did. Lo and behold, when you get to the end of this statement, the prosecutor said to him, "By the way, when you kept on going after you asked for a

lawyer, you meant to waive a lawyer, didn't you?" And Viven Harris said, "Huh?" He didn't understand.

And the young lady from New York County makes the point in her brief that they explained it to him. Well, they told him what the word "waiver" meant but they didn't tell him a thing about the consequences of it in that three-word explanation. So Mr. Harris found himself in what I believe to be the situation of the type of defendant that you have been most alert to protect, one who is in no position to comprehend or to appreciate what right it is he is said to have waived because he doesn't understand the nature of it at the time.

Now, when you come to the question of fairness to law enforcement officers, it is suggested that, well, as Mr. Justice Stewart raises, maybe that wasn't the law at the time. I think that law was reasonably inferrable from what this Court had been doing, and I think the prosecutor did infer it or he wouldn't have asked him to waive it, which is the traditional way of trying to get around Miranda.

But something more important happened, and that was the decision of this Court in Johnson, because on the day that Mr. Harris came to trial, there wasn't any question about what the law was. His legal aid attorney, trying one of his first cases, knew exactly what the law was and made the proper objections. The judge -- and perhaps it is the reason we respect him so highly -- pointed out to the prosecuting attorney,

he said, "If you do this, it will have to be decided in an appellate court."

Q Counsel, let me ask a further question. I haven't had a chance to review the entire record. Is there any claim anywhere along the line that the contents of the statement are untrue?

A Yes, Judge. I have to explain that in terms of the respective positions, Justice Blackmun, of each of the parties herein. Miss Landau, in the New York County brief, makes the unequivocal statement that as to one date it is true and as to one date it is not true. Mr. Duggan makes the statement in the Westchester County brief that the jury must have believed him or they would have convicted on both counts rather than solely on the second count.

Q Well, this is my next question, is whether you are arguing prejudice in the light of the acquittal on the one count?

A Yes, I would like to explain my view on that. Perhaps your question makes it the appropriate time. I think that what happened was this: The statement had a vast difference intrinsically as to the two counts. On the first count, the statement indicated that Viven Harris had acted solely as the agent of the police officer, that is the agent decided to make the buy, the agent paid for it, Viven Harris derived nothing from the act of being a conduit and in fact Judge

Dempsey expressly charged the jury that if they found him to be an agent, they must acquit. I think that happened.

On the second count, however, it was unbelievably damning in this sense: Petitioner's testimony at the trial was that he had in fact through a scheme and deception provided two bags of a substitute for heroin, there was no heroin in these bags at all, which he gave.

Q It was a substitute for heroin?

A I believe that is correct, Judge, but the point was that he had just enough of a kick to deceive anybody who was a snorter, which was their impression of what Detective Bermudez was masquerading as.

Q That he was.

A However, the statement contained the suggestion that not only did he get monetary payment for it, but he got a taste of heroin from those two bags. It meant that the entire statement would be meaningless unless in fact there was heroin in those two little bgas.

Now, Mr. Duggan has suggested that it wasn't so significant as to the second count because how could he refuse the heroin that was offered to him without giving away the game that they were playing. The answer is that you cannot find in this record that it was ever offered to him. What you find is that he took it in payment, but you do not find any testimony that Bermudez, the detective, offered this to him

voluntarily. He wanted it as far as appears from the statement.

Q I have trouble with the facts of this case, Mr. Aurnou, but am I right in inferring these two inferences: First, that the statement he made, the statement he made, standing independently, was not in any sense of the word a confession, wasit?

A We disagree on that, Your Honor.

Q Standing independently --

A As to the second count --

Q -- as to the statement he made.

A Yes, as to the second count.

Q Tell me how was the confession --

A Because it indicated (a) that he had furnished the heroin, and (b) that by taking back the taste it was in fact heroin that he had furnished and received money for, and that is his the charge to the jury under the statute to be sufficient to convict in New York.

But as to the second count, Judge, and I am limiting myself to the second count respectively, I think in fact it was a confession, but in any event certainly an admission. And when you come down to that --

Q I thought it was only when combined with the testimony that he gave in court --

A No.

Q -- and it became damaging to him.

A Excuse me, Your Honor. No, I am suggesting something quite different, Your Honor. I am suggesting that it had a separate independent effect when combined with his testimony to demonstrate the possibility of falsehood --

Q Right.

A -- either at the time of the prior statement or at the trial.

Q Right.

A But it also had an independent evil effect of its own as a confession, and I would not have you think I conceived that --

Q Getting back to the second count, at least?

A Right.

Q All right. Now, secondly, is there any claim here that the statement was coerced or --

A Unfortunately, Judge, that aspect of the record was foreclosed by the prosecution. Now, Mr. Pajanski, the young man who tried this case for legal aid, made such an objection, and he made it by referring to Jackson vs. Denno and to section 813(f) of the Code of Criminal Procedure in New York, which is the statute dealing with a hearing on the question of voluntariness. The prosecutor objected at that time, and certainly New York County at least still takes the position, that it makes no difference what happens at a

voluntariness hearing because you can just proceed to impeach him with it anyhow, even if it is involuntary, in a McNair situation for example.

Q I didn't quite understand the -- I heard what you said, but my question was is there any claim that it was coerced?

A Well, I am sorry if I have been wordy, Judge, I didn't mean to --

Q Well, that is what --

A What I meant to say was when we attempted to raise it in New York, when we asked for a hearing on that issue, we were foreclosed by the prosecution's objection that the result of such a voluntariness hearing wouldn't prevent him from using it, and the trial judge, as learned and wonderful as he was, he is a wonderful man, he agreed with that on the authority of Kulis, but having read Miranda he told Mr. Facelle that "you face the problem that the appellate court may very well determine that this is not permissible," and of course he had the dissent of Judge Keating in the Kulius case and Judge Fultz' subsequent dissent in Harris -- I shouldn't say dissent, I should say concurring opinion, indicating his adherence to the dissent in Kulius, indicates that there was a great deal of authority and, as I think my brief has shown you, every federal circuit court in the country that has considered this, and there are six of them, has reached the view,

which I respectfully espouse today.

Q Well, then, as to coercion, the involuntariness of this statement, do I understand it to be your submission that because of the attitude the prosecutor took, the ruling of the court was that even assuming it was coerced it could still be used?

A Exactly, but I also say --

Q We should decide this case therefore on the hypothesis, whatever the facts may be, that this was coerced?

A Exactly. I say further than that, I say that when you foreclose a defendant from proving involuntariness, it is ill to lie in your mouth to say that the confession was voluntary, as the briefs continually urge, for that was the very thing that we raised and were prevented from questioning. And I would say to you that this was no light question that we raised because the statement itself intrinsically bore evidence of a very clever prior questioning which may well have been deliberate. I have no way of knowing. But the warnings were not given, thanks to Judge Dempsey's solicitation of that fact, and what happened was we had a secret inquisition, something in the nature of a subtle star chamber proceeding, and then we proceeded to a recorded statement for posterity which is the one we are not afraid to show to the Supreme Court of the United States. I think that is wrong.

I think it is very much like the cases where you have

probable cause and search and seizure and then the police come in and testify that all of a sudden defendants are dropping things on the sidewalk in front of them, which they then pick up. It is too convenient, and I say when a district attorney, not just an average police officer, but an educated man, an experienced lawyer, deliberately interrogates privately and then publicly, that circumstance is suspect.

Now, when it came to the trial, I think it is conceded that all the proper objections were made, certainly the New York courts treated them that way. And when it came to verdict, the jury was unable to agree as to the first count, which was an identical sale, and I subsequently had that dismissed during the appellate process for lack of prosecution.

As to the second count, which I believe the distinction is explained by the effect of the statement itself, he was convicted and sentences to six to eight years. He served that sentence. He is out on parole. And so at the present time he is technically in custody but in fact -- I suppose the phrase would be "live and well in New York."

I would like to discuss first, taking first the statement and the manner in which it was obtained, I think it was clearly illegally obtained and I point out respectfully that that was conceded all the way through the New York courts. It was treated as such. It was not conceded to be involuntary in the classic sense, but by our foreclosure from it, by the

trial judge's reading of Kulis as allowing this in an involuntary case, I think that is the posture in which this case comes before this Court.

Now, I say that when a thing is unconstitutionally obtained, it is inadmissible for any purpose, but I don't mean merely inadmissible, I mean it may not be used against it.

Q Are you suggesting that the Walder case be overruled then?

A Yes, I am, Judge, but I think it can also be read consistently with the position that I take.

Q Well, Walder was clearly an unconstitutional search, as I recall it --

A That was the first distinction, Your Honor.

Q -- search and seizure, wasn't it?

A Yes. What happened was in Walder they had seized certain narcotics. Mr. Walder moved to suppress and made an affidavit that he in fact had them in his possession, and it was that affidavit that was subsequently used against him.

Now, I think your Simmons case clearly says that that procedure is no longer permissible. But I think that Escobedo itself, and the language that any statement elicited by the police during the interrogation may not be used against him. I think that word means exactly what it says.

Q You have gone over that rather fast. It isn't

as clear to everyone as it seems to be to you that the Walder case is overruled.

A No, I didn't say that Walder had been overruled. I said I think Simmons --

Q Well, that is the effect of what you said.

A -- removed the rationale from Walder, and I would like to explore that, if I may, Judge. I think, first, Walder was a case in which the impeaching material itself was not addressed to the merits of the crime with which Walder was then charged. It related solely to evidence of his general character on a previous occasion, and the rule has always been that when a defendant takes the stand, evidence of his general character is made relevant.

Q Well, in the second trial that came before the court, when the decision was made, that was another narcotic charge, wasn't it?

A Yes, it was, this was evidence of a prior offense and to some extent perhaps a predisposition to commit this type of offense. But it was not evidence of this charge.

Q Well, it wasn't admitted for impeachment on that purpose, was it?

A That is correct.

Q It was admitted --

A It was admitted solely --

Q -- denied that he ever had --

A Because he went beyond the latitude of the denial of the charges itself.

Q Right.

A It has not been said that Viven Harris did that. But even if he had, I am suggesting this, that Walder itself was a statement, the one that was admitted, which had not itself been obtained illegally. It was only in the Simmons sense that it was obtained illegally, namely he had to make it in order to exercise a constitutional right to suppress something which in turn was illegally seized.

Moreover, I think that if you could impeach him with a signed statement, as the case is here, why can't you admit the signed statement in evidence and then just hand it to the jury? I think what was done here was the same thing. And I think that the vice in Walder is that you are more concerned with the possibility of a single instance of perjury or lying than you are with the myriad instances of vindicating the constitutional right against self-incrimination and deprivation of counsel.

I think one of the most unfortunate things that comes about through the rules announced by the New York Court of Appeals in this case is that when you take it down to the level of your neighborhood police officer, he is going to say, well, it doesn't matter if I make a mistake under the Miranda rules any more, because there is always something I can use it

for.

Q Not unless he takes the stand.

A I beg your pardon?

Q Not unless the defendant takes the stand.

A No, I disagree with that because it also has its value in discouraging him from ever taking the stand.

Q Well, that is a fact of life, though, that if you contemplate perjury when you take the stand, it is somewhat discouraging.

A I don't think that is the only situation in which it can arise, Your Honor. That is the implication of the respondent and amicus briefs, but I think of this: Very often when a young and inexperienced person is before the police, and that is what happened here and that is the only case that makes a difference, because your professional criminal just doesn't get involved in this. He may give a false exculpatory statement whereas the truth were to acquit him, but he doesn't know that, and he is afraid to tell the police what happened. He thinks he had better talk to his lawyer first. So he makes up a false exculpatory statement. He can be torn to shreds at the trial by an experienced prosecutor. That is just what happened here. But it doesn't prove that the statement that he makes in his testimony at the trial is false, because it may well be, that the statement unconstitutionally obtained was false.

When you for bid a hearing on the issue of voluntariness, how can you then come in good grace and say he willingly gave this true statement? I think that in the unique factual setting of this case, the difficulty on the merits, that is the substantive view that I take was compounded by the procedural refusal to ever have a hearing which could have determined once and for all the voluntariness or involuntariness of his statement. And I emphasize again that one of the most serious things in this case is that the question of voluntariness was not lightly or haphazardly raised. It had its germination in the statement itself which showed what had happened, and in Judge Dempsey's question to Mr. Facelle about those warnings.

Now, I have referred to the various cases in the circuit courts, discussing the view that this Court took in Miranda. I don't wish to belabor them, but I will point out that in neither brief is there one word distinguishing any of those six cases. Of those six cases, five dealt directly with impeachment, and the sixth was a case of impeachment by rebuttal rather than by cross-examination.

There are a number of state cases which support the same view. But the argument I make basically is, in the words of former Chief Justice Warren, in Burgett vs. Texas, I think this case is a rule which erodes the procedural rights of the defendant and assumes avalanche proportions, just

burying beneath it the integrity of the fact-finding process. You can completely destroy the ability to tell which statement was true and what happened on the merits, and I go back to Kulis and Mr. Justice Jackson, where he says the naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigate fictions.

Well, I agree with that. I think that was what Bruton stood for, and I think in this case it would be equally naive to assume that the jury could put that second aspect of the confession, that is confession as related to the second count, out of their minds as a substantive thing.

As my brief indicates, I don't think Judge Dempsey did that. I think that when he charged them (a) on the first count, he was taking the substantive material from the confession itself, from the statement itself.

Q So in your approach Miranda should be fully retroactive, should it not?

A Well, I will say this: I think -- and I think the opinion in Johnson indicated that Miranda could have been fully retroactive.

Q And you are operating here on fortunate chronology. Had Johnson said that retroactivity was directed to the time of the taking of the statement rather than to the time of the beginning of the trial, would you be here today?

A Yes, because in that posture could they possibly have denied us a hearing on voluntariness? Even then the procedural defect in this case is so great that we would be here on that second point in any event. I think myself, Justice Blackmun, that we would be here on the first point, because what I am saying is this: Even under Escobedo an argument could fairly be made that the overruling of the defendant's request for counsel at that point was an unfair, improper under the then law taking of an involuntary statement.

Now, with the court's permission, I would like to reserve five minutes for rebuttal.

Q Was the question reported accurately in full on pages 72 to 78 of the appendix?

A Mr. Duggan and I have stipulated that it is.

Q And that is an accurate statement, so whether or not it is --

A To the best of our knowledge it is.

Q -- an admission or a confession --

A Yes. I only say to you that we never had the opportunity for a hearing to establish otherwise, despite our request.

Q Was there any evidence in this record that this statement was taken under conditions which would make it coercive as distinguished from just violative of Miranda?

A Your Honor, you have to appreciate first that I was assigned by the court in the appellate division, so that I do not know what transpired at the trial.

Q In the record?

A In the record, I can only say that every attempt to explore that was forbidden because in the trial judge's view it made no difference.

Q But the Miranda point was thoroughly explored?

A The Miranda point --

Q Which goes to the circumstances at the time, was there a waiver of counsel or wasn't there, something like that.

A Well, I can only say to you that the Miranda point was raised, not explored. Of course, what happened was the trial judge told the prosecutor, you can do this but you run the risk that an appellate court will overturn it under Miranda. Judge, the only way I can express it to you is this:

Many trial judges in my experience will say if I have a doubt on this ruling, I will allow the prosecution to do it because they can't appeal, and then let the defendant take his appeal and we will find out what the law really is.

Well, Viven Harris spent some five years in prison finding out, and it may just be that he was right.

Q These rules that you're talking about, all of them, Miranda, all the way back to McNab, these were judicially constructed as a shield when a man can take the stand and be

immune from cross-examination impeachment, he is using it for something more than a shield, isn't he?

A I would agree that that was true, in fact if that was the thrust and effect of what happened, Your Honor, but I say this: You are insulating him in a very small degree. You are insulating him from something which the prosecution had no right to in the first instance.

Q Well, of course, some people think that there has been a little over-i sulation.

A I am grateful, Your Honor, that this Court stands as a shield against that view. I would simply say that when that misapprehension is suffered by many, the decisions of this Court have done a great deal to lay to rest that mis-assumption.

MR. CHIEF JUSTICE BURGER: Mr. Duggan?

ARGUMENT OF JAMES J. DUGGAN, ESQ.,

ON BEHALF OF RESPONDENT

MR. DUGGAN: Mr. Chief Justice, and may the Court please. I think I can perhaps be of more service to the Court by beginning rather than with a formal argument by answering some of the questions that the Justices have asked, and perhaps haven't been answered to my full satisfaction.

When Miranda was decided in June of 1966, the prosecutor went over his own statement and he evaluated it in terms of the law by which he was obliged. And we said to one

another forget the statement in the Harris case because we didn't give him that fourth warning, so as a consequence when the time came when in another case we would have served notice on the defendant that we intended to use the statement as evidence against him, we chose at that time not to serve any such notice because it was not then our intention to use this statement against him. So as a consequence there was never any what in New York State has become a Huntley hearing on this matter.

But throughout the entire progress of this trial, everyone knew and everyone accepted that this was a completely voluntary statement in the traditional sense of the world. Its only fault was that by reason of Miranda it was no longer admissible, and so as a consequence when at the time that this statement was sought to be introduced for impeachment purposes, and when I say introduced I don't mean introduced into evidence because it was not -- at the time it was resorted to for impeachment purposes and there was an objection raised, there was no hearing then being sought on the traditional concept of voluntariness.

The thought that was being explored by holding such a hearing at that time was whether or not it was admissible, and the trial judge said certainly. Everybody knows that this statement is not admissible into evidence, because the people opened and closed their case without ever having had any

resort to this. But he said in terms of people against Kulis, which is the law in the state of New York, the inadmissibility of this statement has nothing to do with whether or not it may be used for impeachment purposes, and he said therefore, gentlemen, I am not going to have any hearing to find out something that all of us already know. It is inadmissible.

But granted the point and, as I say, it was granted by all concerned, but it was a voluntary statement. It then certainly became the same thing that everybody had agreed in the traditional sense was perfectly proper, because there was a time at common law when the defendant was under no circumstance allowed to testify in his own defense, and this was thought to be basically so because a defendant had so much to lose by a successful prosecution, and he had so much to gain by a successful thwarting of that prosecution, that he was essentially and by definition unbelievable.

Well, so far as I know, the first break in that common law tradition came in New York State in 1869, and in that state for the first time a defendant was allowed to take the stand and it was there that the concept grew up that no presumption shall be drawn against him if he doesn't.

Q Well, hadn't it come a little bit earlier in England?

A Oh, I don't mean -- I am not going all the way back. I am talking in statutory terms, Your Honor. And the

New York Court of Appeals the following year was called upon to decide a case under the New York law, under this New York statute, and they deliberately painted a defendant as a double entity. In one capacity, he is a defendant on trial, and in that capacity he is under no circumstances to be compelled to get on that stand and give evidence of anything. However, if he chooses to step aside from that position as defendant and become a witness, he then becomes vulnerable and is subject to impeachment as any other witness, and this was accepted, and it was accepted in a great many jurisdictions, even to the point of their saying that even if we adopt as a principle the possibility that this man may be impeached by inadmissible evidence, he invites that by taking the stand.

Q What if this had been a coerced confession, could you impeach him with that?

A If this had been a coerced confession, it is the people'sview and the respondent's view that it couldn't have been used for any purpose, because the entire thrust of the only thing we can tell this Court is that because if it is a voluntary confession, its proof is greatly to be relied upon.

Now, if you conceive of a situation where we can't even rely on the truth of this thing, then we can't use it to impeach him.

Q Well, have you finished?

A Yes, Your Honor.

Q I didn't mean an untrue confession, I meant simply an involuntary confession, could you use that to impeach him?

A No, Mr. Justice Stewart, I don't think we could, for this reason: The point I am trying to make is a voluntary confession, if it is voluntary in the traditional sense, can be relied upon to express the truth, whereas an involuntary confession is subject, to take the obvious example, a man will say anything to keep from being beaten and all we have to do is go to some of the countries behind the Iron Curtain to demonstrate that. There is a point beyond which human endurance can't continue.

Q That is true, but the law is very, very well developed in the decisions of this Court, certainly over the last ten or twelve years, that a confession that is involuntary, even though demonstrably true, is nonetheless wholly inadmissible. And let's assume that you had a coerced or involuntary confession, and let's assume further that it is wholly true. Could you have used that to impeach him?

A I don't think so, Mr. Justice Stewart, because the thought is that we must define a class of confessions which may be used for these purposes, and I think once you define the class as being a true confession rather than a voluntary confession, then you're getting into extraneous matters that perhaps aren't properly explored in the context of this.

Q What you are saying then is that it can't be given any use because it is inherently unreliable as being involuntary?

A As being involuntary, yes, Mr. Chief Justice.

Q When is it determined that it is or is not voluntary?

A You mean as I would choose to use it, without a pretrial?

Q Well, let me give you a hypothetical. You have got a confession and you are the prosecutor, and you notified the defense counsel informally that you don't intend to use it and you don't file your notice that you usually file or anything like that, and it goes on and this is an involuntary confession under three different decisions of this Court, and you try to use it in cross-examination and defense counsel says, oh, wait a minute, you can't use that, I claim it is involuntary. Wouldn't you agree that then you have a hearing outside of the jury?

A Oh, by all means, Mr. Justice.

Q That is what I thought.

A Oh, we wouldn't --

Q Once it is challenged as being involuntary, then you have --

A Oh, by all means, there has to be some judicial determination of that prior to any concept of throwing this in

this man's face. Just simple justice would compel that.

Q Now your brother on the other side has told us that because of the posture in which this question arose in the trial court, we must proceed upon the hypothesis that this was an involuntary confession.

A Mr. Justice Stewart, I think perhaps Mr. Aurnou may have expressed himself somewhat more enthusiastically than was his intention. I don't think you have to make such a presumption because when you read the record and when you see what it was that was sought to be brought into context here, it was not the voluntariness of the confession as to voluntariness alone. The only point that was brought into context was whether it was admissible in terms of Miranda, a question on which all of us agree, there was never any doubt about that. We had come to that conclusion months and months and months before this trial.

Q When the prosecution sought to use it for impeachment purposes, was there any request for hearing on the involuntariness of the confession?

A I would have to get these minutes to refresh my recollection before I could give you an absolutely definitive answer, Mr. Chief Justice. My recollection is that there was a hearing for the purpose of discovering whether -- there was a hearing requested for the purpose of discovering whether or not this was admissible, and we all know it wasn't.

Q It never was offered in evidence, was it?

A Oh, no, Your Honor.

Q He simply cross-examined on the basis of the statements, did he not?

A I can't be entirely honest and give you the answer that I would choose to give you. Mr. Chief Justice, this was offered in evidence but simply to prefer its identity for the appellate court. It was never passed to the jury, it was never read in its totality to the jury, and the only reference to the confession was made in the byplay between the assistant district attorney and the defendant during his cross-examination. Although technically I must concede that it was admitted into evidence.

Q But only for appellate review?

A Only for the purpose of identifying, Mr. Chief Justice.

Now, if we go beyond this area, in Oklahoma, oh, back in about 1898, up to that point a great many jurisdictions, as I have said, went along with the proposition that even an inadmissible statement would be proper impeachment -- would be proper for impeachment purposes. But the Eighth Circuit in Oklahoma at that time -- and I have got the citation -- Harrold vs. Oklahoma, said no, we've got to come to a point of division here, and that point of division has to be whether or not this statement was voluntary, because an involuntary

statement carries with it the stigma of untruth, and it was at that point that the division came, and then from there on a great many jurisdictions, all of whom I have listed, continued to cleave to that rule, a statement even though inadmissible was the proper source of cross-examination for impeachment if it was demonstrated to be voluntary. And that condition existed right up until 1966 when this Court decided Miranda vs. Arizona, and at that point the Court indicated that even an inculpatory statement, if it sought to be used by the prosecution, becomes just for the very purpose that he chooses to offer it to a certain extent inculpatory, and the Court said that even in an exculpatory statement, the Miranda warnings would have to be taken. And a great many courts from the language of the Court in that Miranda case came to the conclusion that even for impeachment purposes simple voluntariness wasn't enough and that was the source of what we think is the misunderstanding that has been created by the diversion among these courts; because, as Mr. Aurnou points out, he has got 16 jurisdictions on his side, and as I point out, I have got 8 jurisdictions on mine. Now, that is the way you win baseball games. It isn't the way you win important determinations of law, because any of my 8 could be as right as any of his 16.

The point that we would make is this: In Miranda vs. Arizona, the Court directed itself to the admissibility of confessions. It starts in the first paragraph, and I can't

quite quote the language. We address ourselves to the admissibility of confession, but the important thing to remember is that in the ordinary effective sense this confession, if confession can be called, was not introduced into evidence, and so as a consequence it can reasonably be concluded, I think, that Miranda did not address itself to confessions, the purpose of which was not to introduce it into evidence.

Now, the point that is important is if you have got an exculpatory statement that was taken with the full Miranda warning, you can introduce that into evidence. Now, suppose he gave another exculpatory statement with the full Miranda warning to another law enforcement officer. That would be equally admissible, and thus perhaps you might be able to impeach his credibility or his reliability or what have you before he ever got on the stand by the purpose of introducing two inconsistent statements that were taken under the authority and with the full approval of Miranda, and we suggest to this Court that this is the thing that the Court sought to prevent, the introduction into evidence on the people's direct case of these inconsistencies.

And I see my time is up. I think I have said all I have to say. Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Miss Landau?

ARGUMENT OF SYBIL H. LANDAU, ESQ.,

ON BEHALF OF RESPONDENT

MISS LANDAU: Mr. Chief Justice and may it please the Court. This statement was not coerced. It has never been suggested that this statement was coerced. The objection that was raised to its use in the trial level was that it violated Miranda, and on that objection the state lost. There was a hearing held after the impeachment in the judge's chambers, at which the judge did give Mr. Facelle, the prosecutor, an opportunity to show that perhaps Miranda was not violated and he tried and he lost. But that was the only objection that there was or could have been to this statement.

This voluntary statement that was given prior to Miranda was used to discredit trial testimony; it was not used to establish Viven Harris' guilt of the substantive crime. But when the petitioner in this case took the witness stand and affirmatively resorted to perjury, the jury was entitled to know that his trial testimony was not the only version of the event that he had ever given. The exclusionary rule should not be extended to bar this limited use of a voluntary statement that was lawfully obtained.

Because the New York rule which allows this impeachment use of the statement safeguards the very vital aspect of the jury's role as a fact-finding body, and that aspect is not one that is endangered by the ordinary exclusionary rule.

Indeed, there is no need even to consider extending the exclusionary rule to this case, because this use of

petitioner's statement did not violate his privilege against self-incrimination. He was not by being impeached compelled to be a witness against himself. The statement was voluntary and it was never introduced for the truth of its content.

In allowing this impeachment, moreover, the trial court was not, and this Court will not, be condoning any police misconduct. There was no police misconduct or prosecutorial misconduct involved in the questioning of Viven Harris.

Q When he was cross-examined by way of impeachment, can you tell us now what his responses were when he was asked did you make that statement?

A Yes. To put it in its context, what his trial testimony was was very, very elaborate as to what had gone on. He gave an elaborate version of what happened on January 4th, all of which was to the point that "I never sold him narcotics," but it involved an undercover police officer begging and pleading with this man, "Please, please give me narcotics," to which Viven Harris, though he wasn't adverse to doing this, said he couldn't do it quite simply because there was a panic on.

With respect to the second sale, the testimony got even more elaborate. He was still reluctant to give in to this pleading and this begging, however he had a friend named Henry Stanley who Bermudez, the undercover detective, guilt by association, put together with him, birds of a feather,

according to Viven Harris, flock together, and Stanley was willing to put on this elaborate scheme of selling the undercover officer baking powder. Well, I don't want to elaborate even more, but this was very detailed and also involved very detailed conversations on December 15th.

He was confronted with the prior inconsistence statement.

Q How as he confronted, verbally?

A Verbally. He was asked do you remember, and this is the evidenciary rule as it exists in New York, is that you don't just surprise a man of a prior inconsistent statement, you give him the opportunity to explain it. You ask him do you remember being asked this question and giving this answer. So he read it, do you remember being asked this question and giving this answer.

Viven Harris' response was I don't remember. It was this response, not the inconsistency, that the prosecutor used so effectively against him in the court. It could not be true that Viven Harris could remember a detailed conversation from December 15, a detailed endlessly detailed conversation from January 4 and January 6, and have a total lapse of memory 24 hours later on January 7. That was the way he was impeached in this case, by being confronted.

Now, if he couldn't have been confronted by this statement and asked if he remembered, he could never have been

impeached by his testimonial claim "I don't remember it." This statement was never used nor was it argued nor was it suggested that it could be used for the truth of its content, or that those content or even the fact that he was a liar proved him guilty.

What the prosecution did with this statement was to say you have heard my witnesses, you have heard Viven Harris, who here is telling the truth? And then he argued that the petitioner was abusing the jury's intelligence by trying to them that all this set of facts are true but that he couldn't remember what happened 24 hours later, that is the sole extent of the impeachment here.

Now, the instruction, not simply the instruction in this case but the instruction in any similar case, to the jury that this statement can be used only as in their assessment of the defendant's credibility is a very readily understood instruction. It is in accordance with common sense. It is in accordance with everyday common sense that a man who is willing to tell different accounts of the same event is not likely or should not be believed as to either account, and because of this it doesn't create a risk that the jury is going to be unable or unwilling to follow the instructions.

Now, we know for a fact that in this case the jury followed the instruction. The prior inconsistent statement, if we can divide it into two parts, January 4 and January 6 --

Q Miss Landau, the instructions there, the charge to the jury is quite lengthy here in the appendix. Can you tell me what page it is on?

A I have to look at my brief to do that.

Q I can't seem to find it at a glance.

A It is in my brief and I talk about the facts, Mr. Justice Stewart. It is page 575 or in the appendix A-95.

Q 96.

A Yes.

Q Thank you.

A He said in the course of the interrogation that the statements purportedly given by the defendant to Mr. Facelle, that this goes to the questions and answers as to the weight and the credibility that you give to a witness' testimony. You may take this into consideration as to whether or not he, the defendant, or any person has made a prior statement, you may take that into consideration in determining how much weight you attach to a witness' testimony, how believable it becomes to you under all the circumstances, but I caution you again -- because this was not the first time the court had so instructed the jury -- I caution you again that this is not to prove the defendant's guilt. This goes to the weight, the believability of the witness' testimony.

Now, we know in this case that the jury did in fact follow that instruction, because they found him -- they did not

aquit him -- excuse me, did not convict him on the first count. The statement is that the first count was a confession, or it was minimizing his role, that is very true, but it was a confession and it was also in conformity to the people's proof.

That second statement, the one which is at the moment before this Court, the one on which he was convicted, was a falsehood. It was untrue. He never -- when he said to the D.A., when he was questioned, was, well, he asked me to get him some narcotics and I went to get it. Now, he just told about going some place, so the D.A. said, some place, you went to the same place? Harris said yes -- no, no, no, when I walked outside the door the man was there and I got it from him. And you got twelve bucks for this? Yes, I got twelve bucks for this. Did you get anything else? Yes, I got a taste of heroin.

That was a lie. Oh, yes, it was true that on January 6, 1966, Viven Harris gave two glassine envelopes in exchange for $12 to Detective George Bermudez, but it never happened in the bar, he never got it from some man standing outside the bar, he went over to him in the bar and said to him, do you want anything today? He said, yes, I will take a couple. Harris said, okay, but I have to go home to get it. This is the truth. I have to go home to get it, he goes outside, he goes back home for it, he is gone twenty minutes, he comes back into the bar and he says, hey, Joe -- that is the name Bermudez is using -- will you step outside with me for a

minute? They go outside, they are seen outside, the partner of the detective sees them outside, sees them in the automobile, sees that double exchange of hands we have all become so familiar with. That second statement was false, but that is irrelevant because it is not introduced for the truth of the contents. Its value lies in the fact that the defendant was willing to tell different stories. This is also the answer to the coerced confession. Not only wasn't this statement coerced, and there has never been a claim of coercion, but under the law in New York we may not use a coerced confession as a prior inconsistent statement. It cannot be. It can be an inconsistency, but to be a prior inconsistent statement by definition, the defendant must have been willing to make the earlier statement. And a statement that has been coerced is not one the defendant has been willing to make.

So the statement is excluded not because it is unreliable, that is irrelevant in a way, because it is not offered for its truth. It is excluded because it is coerced and therefore has no probative value on the issue of its credibility.

It was said by the petitioner here that defendants will not be discouraged from taking the witness stand. The rule in this case, the rule adopted by the New York Court of Appeals will not, has not, and could not discourage defendants from taking the witness stand, because this statement, to the

extent that the hypothesis is made, that a person has a reasonable explanation for why he made an inconsistent statement. Many times people do tell lies to the police, but have reasonable explanations, whether it was fear or bewilderment. Nobody with a reasonable explanation for an inconsistent statement, which is compatible with the truth of this trial testimony, will hesitate to take the stand and give that explanation.

And even beyond this, we know from experience that defendants, where confessions are actually introduced as evidence of guilt, have never hesitated to take the witness stand. It is not the existence in evidence of proof of guilt out of his own mouth which keeps the defendant off the witness stand, and there is no reason to believe that the availability not as proof of guilt but simply if the man affirmatively resorts to perjury that the availability of this statement to impeach him, to expose to the jury that this may not be the truth will deter any defendant from taking the witness stand.

Now, the situation in this case is different than the situation in Bruton. In Bruton the statement is introduced, the co-defendant's statement is introduced, not only for the truth of its content but it is used as direct evidence of guilt against the co-defendant. It is this which the jury has difficulty in following; that is not the situation here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Miss Landau.

Thank you, gentlemen. The case is -- oh, excuse me. You have got two minutes left.

ARGUMENT OF JOEL MARTIN AURNOU, ESQ.,

ON BEHALF OF PETITIONER -- REBUTTAL

MR. AURNOU: Thank you.

MR. CHIEF JUSTICE BURGER: You have got two minutes left.

MR. AURNOU: I would like to say first, Your Honor, that somehow in the argument, and perhaps it is because my brother, Mr. Duggan, was a little too enthusiastic, we lost sight of the material which appears in the appendix at the foot of page 69 and the top of page 70. At that point defense counsel says, "Your Honor, I take strong objection to the procedure herein. This was presented to the jury before any examination, so that the legal voluntariness of this statement" -- and the judge says, "Let the record reflect for you that you are taking an exception to the fact that under the Huntley case, which is voluntariness, it was not offered on the basis of notice required under the Code of Criminal Procedure, and you also have an exception under the fact that it violates Miranda vs. Arizona."

So I say to you that I think the record bears out my statement to Mr. Justice Stewart, in response to his question, that we fairly sought the hearing. Therewas no hearing in chambers, Your Honor. What there was was a discussion during

which Judge Dempsey asked Mr. Facelle, "Did you give this man any warning other than what is in that statement?" and the answer was no.

Q But the statement was not then offered in the sense --

A Offered is where I have my trouble because I stipulated, and I conceded in my brief, it wasn't offered in the sense of being marked as Exhibit A and handed to the jury, no, it was not. Judge Dempsey again -- I can't express my admiration for him enough -- marked it solely as an exhibit to have it exactly before you. But the fact is that it was read visibly by the prosecutor in its entirety, eight pages to read a statement that took six pages.

Q And were all the responses "I do not remember"?

A No, there were some -- one where he said yes, one where he said I don't recall, one where he said I didn't make that statement -- they varied. But the thing that was significant was that he got the entire thing in there and in part of the questioning he says to him, "Well, when you told me that, was it true?" "True," that was the word that Mr. Facelle used. Now, maybe the jury lost the significance of the difference, but while on the one hand Miss Landau says they knew what was going on, on page 15 of her brief she says they must have been confused or they wouldn't have aquitted him on the first count.

Q At the time that he made these responses, did he give any response saying anything to the effect that he was forced to make it or --

A No, he did not. He did not in his statement say it.

I would close this case now, if I may, with the statement that comes from the Harrison case, that the rule for which I contend deprives the government of nothing to which it has any legitimate claim, it does no more than distort the status quo that would have prevailed if the government had obeyed the law. I commend that to you.

MR. CHIEF JUSTICE BURGER: Thank you. The case is submitted.

(Whereupon, at 3:00 o'clock p.m., argument in the above-entitled matter was concluded.)

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