In the

Supreme Court of the United States

DON RICHARD LEGO,

Petitioner,

v.

JOHN TWOMEY, Warden,

Respondent.

No. 70-5037

Washington, D. C.
November 11, 1971

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Thursday, November 11, 1971.

The above-entitled matter came on for argument at 10:33 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

NATHAN LEWIN, ESQ., 1320 Nineteenth Street, N.W., Suite 500, Washington, D. C. 20036, for the Petitioner.

JAMES B. ZAGEL, ESQ., Assistant Attorney General, 188 West Randolph Street, Suite 2200, Chicago, Illinois 60601, for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 5037, Lego against Twomey.

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

ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on certiorari to the Court of Appeals for the Seventh Circuit which, in a short per curiam opinion, affirmed the District Court's denial of petitioner's application for a writ of habeas corpus.

Petitioner is in the Illinois State Penitentiary, serving a 25-to-50-year term for armed robbery. Under this Court's limited grant of certiorari, two questions are presented, both interrelated and both relating to the procedure used under Illinois law by the Illinois trial court in admitting a confession made by the petitioner into evidence, and allowing it to be considered by the jury.

Q Now, just to be sure I have it in focus. This case presents the issue left open in Jackson v. Denno?

MR. LEWIN: It's an issue that the late Mr. Justice Black adverted to in Jackson v. Denno in his dissenting opinion. It was left open. It's one of a range, really, of issues, Mr. Chief Justice, that are left open under Jackson v. Denno.

What it presents is the question of the standard of proof that a trial judge must apply when, under a State procedure, he and he alone determines the voluntariness of a confession.

Q Well, does this case also present the question, or not, whether, after he's determined voluntariness, whether that issue is again submitted to the jury?

MR. LEWIN: Yes, Mr. Justice Brennan. If, in fact, the first question were decided against the petitioner, we submit, and our contention is that the two are interrelated. That if, in fact, this Court were to sustain a standard less than proof beyond a reasonable doubt for a trial judge making such a finding, he should constitutionally require that at the very least the jury get a second look at that issue.

Q But then, on that, if that were to be so, I take it, the jury, as in all other issues, would make their determination by reason of "beyond a reasonable doubt" standard?

MR. LEWIN: That's right. We think that's what would be constitutionally required.

Q Well, do I understand you to say in effect, on that point, that the confession, in this context, is like any other piece of evidence: once it's submitted to the jury, it's submitted to the jury to be evaluated along with all the other evidence and by the same standard? That's your second point.

MR. LEWIN: Well, I think our second point is slightly different from that, because I think it is -- Your Honor has stated the position, I think it does reflect a position similar to that of the State in this case; what the State is arguing is that once submitted, a confession may only be considered in the context of all the evidence in the case.

Our contention is that the confession, if admitted, must still be singled out to the jury and it must then be asked to decide the question of voluntariness vel non, as a preliminary fact-finding.

Q I didn't mean to include that -- or exclude that in my hypothetical. You mean that this would be a special instruction in addition to the general credibility instruction?

MR. LEWIN: Yes, sir.

We think that would be constitutionally required if a judge were permitted to apply some standard less than proof beyond a reasonable doubt to his determination.

Q Would it be sufficient for these purposes if, hypothetically, the instruction was that: when you come to consider the confession which had been admitted in evidence, you will bear in mind that, as with other elements, you must find this voluntary beyond a reasonable doubt?

MR. LEWIN: Yes. That --

Q That would be enough?

MR. LEWIN: That instruction, we think, would be

constitutionally sufficient. Of course it was not given in this case, and in fact that issue of voluntariness is not in any way singled out for the jury under the Illinois procedure.

Q Well, that is an issue that was not left open in Jackson v. Denno, I take it?

MR. LEWIN: No. No, that was not adverted to --

Q Now, wait a minute, wait a minute. What you're in a sense saying, or what you are saying is that the issue of voluntariness must be presented to the jury --

MR. LEWIN: Well --

Q -- even though the jude has passed on it in advance in a proper manner?

MR. LEWIN: I'm saying that only, Mr. Justice White, if he is permitted to pass on it by some seandard less than beyond a reasonable doubt.

In other words, the contention I'm making is that either -- that constitutionally someone in this process must pass upon voluntariness beyond a reasonable doubt. Either it may be the judge, and if that's true the petitioner is satisfied if he alone makes that decision.

Q Well, on that basis, --

MR. LEWIN: Or the jury.

Q So you would be quite satisfied if the judge just said: I think the voluntariness is -- I find it to be voluntary, it's admissible. And then he says to the jury: You

must find the confession admissible beyond a reasonable doubt, as a preliminary matter to using it.

MR. LEWIN: You must find it voluntary beyond a reasonable doubt.

Q Yes. Yes.

MR. LEWIN: Yes. Yes.

Q You think that would be enough?

MR. LEWIN: Oh, I think, for the petitioner's position, yes, --

Q Well, if that would be enough --

MR. LEWIN: -- I think that's right.

Q If that would be enough, why wouldn't it be enough for the judge to say: There's enough evidence in the case to find it voluntary; I don't have to pass on it, but I will give it to the jury and single it out and say: You must find this voluntary beyond a reasonable doubt?

MR. LEWIN: That is what Jackson v. Denno foreclosed, you see.

Q I would think it would foreclose --

MR. LEWIN: Right.

Q -- what you're --

MR. LEWIN: We don't have --

Q If -- If the confession must be found voluntary beyond a reasonable doubt.

MR. LEWIN: Well, Mr. Justice White, our position --

the petitioner's position in this case is that the court need not go to -- need not reach, if it decides not to, the question whether the judge must necessarily find the confession voluntary beyond a reasonable doubt. It would be sufficient if someone in the process found it voluntary beyond a reasonable doubt.

And the vice of the Illinois procedure is that there is no one in the entire process who ever passes on voluntariness beyond a reasonable doubt. Essentially the State's argument is that a confession is like any other evidence -- the finding of voluntariness vel non is to a confession, is like a preliminary fact-finding as to whether a statement is, for example, a spontaneous utterance so as to be an exception of the hearsay rule, or whether a certain document is the best evidence under the best-evidence rule. And that therefore the judge and the judge alone may make that finding. He makes the finding on the basis of a preponderance of the evidence, and he then submits that evidence to the jury for it to be considered along with all other evidence in the case, instructing them only as the Winship case now requires, that they must find the defendant guilty beyond a reasonable doubt on all the evidence in the case.

Petitioner's contention is, of course, that that analogy of confession to any other evidence is plainly unsound. The fact that this Court even discussed the question, much less that it decided it as it did in Jackson v. Denno, is

a plain indication that the question of voluntariness of a confession, because it involves a possible infringement upon Fifth Amendment rights, various constitutional dangers lurking in the background, requires special procedural handling as a constitutional matter. Surely it would not have presented a constitutional issue, and this Court would not have considered it if a State, say New York, simply said: Well, that's a spontaneous declaration; we don't allow a judge to make that preliminary finding, we just have the jury make the preliminary factual finding. Or as to any other exception of the hearsay rule.

If a State had done so, that would present no constitutional problem. Since New York did so with regard to confessions, it did present the problem considered by this Court in Jackson, and the ruling of this Court in Jackson that there must be a reliable clearcut finding on the issue of voluntariness vel non.

Now, we submit that it follows from the Jackson decision, as well as subsequent decisions in related areas by this Court, that there must be a finding on the issue of voluntariness at a trial that a confession is voluntary beyond a reasonable doubt.

Now, of course, the broadest range of that argument is to say that the judge must make that finding when he makes that initial determination required under Jackson v. Denno, he

must make it beyond a reasonable doubt.

That issue need not, we submit, be reached in this case, because in this case, and under the Illinois procedure, there is no one, no one in the entire process against the defendant, who ever makes that finding beyond a reasonable doubt.

Consequently, we think that the Illinois practice is invalid, even under the opinion of the Chief Justice as Circuit Judge in the D. C. Court of Appeals, which are cited -- the opinions of which are cited in our brief.

In the Clifton case, the Chief Justice, as Circuit Judge, did say -- and we've reprinted that as an Appendix to our brief, it appears on page 6d -- that it is one thing to call for the high standard of proof beyond a reasonable doubt from the ultimate fact-finders, and quite another to ask that the issue be resolved preliminarily by the judge beyond a reasonable doubt, contrary to all the law governing admissibility of evidence.

Q Mr. Lewin, suppose the evidence -- let's avoid the word "confession" for the moment; but suppose a piece of evidence was offered by the prosecution in the form of a letter written by the defendant to some third person, which contained the essence of a confession. Would you say that must be -- fall under this same rule?

MR. LEWIN: Only to the extent, Mr. Chief Justice,

that there is some constitutional danger. If the letter had been seized, in violation of either Fourth or possibly Fifth Amendment standards --

Q No, just assuming that the recipient turned it over to the prosecution.

MR. LEWIN: No. Where there is no constitutional problem, where we're referring simply to the preliminary questions, or any -- not even preliminary questions, just any ordinary questions -- question on which -- factual issue on which admissibility depends, then of course it's standard procedure, and we don't contend that the Constitution requires otherwise, that the judge make that factual finding. He alone may make it in the absence of the jury, then permit the evidence to go in, and not comment any further on it to the jury, and not raise those underlying factual issues to the jury at all.

Q And the jury can accept it or reject it, as they see fit?

MR. LEWIN: As they see fit, in the context of all the other evidence.

But where the evidence that's sought to be introduced may infringe on constitutional rights, may in some way have been unconstitutionally obtained, in those circumstances we think that the finding must be made beyond a reasonable doubt.

Now, as to confessions, both under this Court's Miranda decision and we think in Malloy, even prior to Miranda,

it was clear that confessions, admissions made out of court by a defendant in custody, as was the admission in this case, are ipso facto, in and of themselves, declarations obtained or made by a waiver of a constitutional privilege. Essentially any defendant who makes a statement, after he's arrested and the Court was clear on this in Miranda, and even the dissenting opinion in Miranda suggested that that was not an impermissible reading of old cases or even a permissible extension.

That a defendant who makes a statement in custody is, in substance, waiving his Fifth Amendment right not to --

Q I don't understand that.

MR. LEWIN: Well, --

Q The Fifth Amendment right is the right of his compulsory self-incrimination.

MR. LEWIN: And a defendant in custody, at least under -- certainly under Miranda, and there I think the Court went into substantial --

Q In what part of Miranda?

MR. LEWIN: Well, I think, in Miranda of course the Court relied on Bram and prior cases. I think Mr. Justice Harlan as well adverted to the fact that saying that the Fifth Amendment applies to custodial interrogation may be a permissible extension, although he disagreed with it in Starbering, but a permissible extension of the Fifth Amendment.

And I think the government in the -- at least the

Federal Government and the Solicitor General, in his brief in the Westover case, admitted that the Fifth Amendment might apply to in-custody interrogations.

Q Well, that's what Miranda --

MR. LEWIN: Right.

Q -- and other cases held, that compelled confessions come under the language of the Fifth Amendment, but only compelled confessions.

MR. LEWIN: Right. But a defendant in custody -- when a defendant is being held in custody and he then makes a statement, the question of whether it's compelled or not is really a question of whether he -- and it's very close to the border, I think, of whether he has waived some Fifth Amendment right. He's being held in custody. Take this petitioner, arrested on the scene, taken down to the station house, within hours. He claims being beaten in the car, being beaten at the police station.

The real question is, assuming he had some constitutional privilege or certainly a legal privilege to remain silent, did he waive that privilege in making the statement he did?

Now, we think that issue, the question of whether that confession should be considered, is very analogous to the issue of the waiver of a constitutional right. And this Court has held, as far back as Johnson vs. Zerbst that courts indulge

-- as the Court said -- every reasonable presumption against assuming that there's been a waiver of a constitutional right.

Q So you think in a Miranda situation before an in-custody statement would be admissible, there must be a finding beyond a reasonable doubt that the warnings have been given, et cetera, and beyond a reasonable doubt that there was a waiver?

MR. LEWIN: That -- I don't think that question has to be reached, Mr. Justice White, in the square coerced confession claim.

Q Well, I know it doesn't need to be reached, but wouldn't a holding here on your side determine that issue?

Q It follows --

MR. LEWIN: I think a holding on our side would not.

Q It follows somewhat from what you've just told us.

MR. LEWIN: Well, I think --

Q It follows.

MR. LEWIN: Well, let me just say, I think the fact that there is -- this is one of several factors, which I think bear upon this case. I'm not contending that that, in and of itself, necessarily determines the issue in the case. I'm saying that the question of voluntariness vel non has to be considered against the background of this being very likely an issue of whether there's a waiver of a constitutional right.

As to which the Court did say in Miranda, and as to which it has said in other constitutional rights, it would require very substantial evidence.

Now, I don't think the Court has to go that far to decide the coerced confession claim. In other words, one can say, because coerced confessions --

Q Well, sure, we could say it. That's true. We could just say it, I suppose. But --

MR. LEWIN: No --

Q -- what about the suppression area in a Fourth Amendment case? Do you have to make those findings beyond a reasonable doubt?

MR. LEWIN: Our initial argument is that one would have to make those findings, whenever there's a constitutional issue.

Q Yes.

MR. LEWIN: But, alternatively, and I think it plainly would cover this case, we contend that one need only make one -- the court need only hold in this case that one must make those findings as to a confession case. Because confessions are particularly devastating in the context of a criminal prosecution.

Q This arose on a suppression -- on a motion to suppress?

MR. LEWIN: On a motion to suppress a confession.

Q And, generally speaking, the moving party has the burden of proof, doesn't he?

MR. LEWIN: The moving party has the burden of proving initial illegality on a motion to suppress. That, we think, is just not true when you're talking about a defendant who's in custody, and whose statement has been taken from him when he's in custody. We think that's part of the government's total package of proof. It's not like trying to prove that the government has in some way illegally searched, where there's a presumption that a search is legal, or that the government has conducted unlawful eavesdropping, or that kind of thing; where there's no -- there's no factual background from which one can just conclude that the government is engaged in anything questionable.

Here the government, indeed -- and here, and I think that's a principal reason why the burden is on the State, is that here there is a constitutional right involved. I mean, whether one says it has to be proved beyond a reasonable doubt, whether Miranda --

Q There's no constitutional -- the constitutional protection is against involuntary confessions. If a person confesses voluntarily, then there is no waiver of anything, there's no constitutional issue involved.

MR. LEWIN: There -- I think there are two answers to that, Mr. Justice Stewart. One is that Miranda held to the

contrary.

Q Well, this is a pre-Miranda case, isn't it?

MR. LEWIN: Yes.

But, nonetheless, Miranda did hold --

Q So that is not subject to Miranda --

MR. LEWIN: But Miranda did hold, and we're not claiming here that the absence to provide warnings, or all the new procedural rights that Miranda put into effect --

Q Right.

MR. LEWIN: -- we're just saying that if, in fact, there is a Fifth Amendment right, then we're dealing here with a waiver of the Fifth Amendment rights.

Q Well, the waiver would come in if the man said, Yes, this was an involuntary confession, but I now waive my right to be excluded from the evidence. That's -- that would be a waiver. It's quite different from this.

MR. LEWIN: A man who, in custody, does make a statement is at least waiving the right, although not the constitutional right, to be silent. He has a legal right not to answer questions, --

Q Well, that was said --

MR. LEWIN: -- and he's waiving that right.

Q -- in Miranda for, I think, the first time.

MR. LEWIN: Well, I think that was the legal right not to answer questions that has pre-existed Miranda. But --

Q Do you know of any case that said so, before Miranda?

MR. LEWIN: That there was a right not to --

Q Yes.

MR. LEWIN: -- simply not to respond?

Q Yes.

MR. LEWIN: Well, I know that there are Circuit cases that --

Q I never saw any.

MR. LEWIN: -- have. I think that the --

Q Could you state a few?

MR. LEWIN: I believe that the -- Bufalino, the Appalachian case in the Second Circuit so held, that those arrested on the scene had a legal right to remain silent and not to answer questions.

Q In the Second Circuit?

MR. LEWIN: In the Second Circuit. I don't --

Q Mr. Lewin, my problem is that you agree with the general proposition that when you file a motion, the burden is on you, the filer of the motion. Too, you file a motion and say that this confession should be suppressed, which confession on its face had the usual language that he sas given no promises, no threats or anything, and it's perfectly valid on its face. I can see where clearly at that stage somebody has got to move. But how do you put -- where do you shift the burden there?

MR. LEWIN: I don't think, Mr. Justice Marshall, that there's a single jurisdiction that's held that the burden of showing that a confession that the prosecution wants to put in, a statement of the defendant, of the accused, that the prosecution wants to put in, that the burden of showing that to be illegal is on the defendant.

If the prosecution wants to put it in, it has some burden to come forward and show that that statement has been --

Q Well, why do we call it a motion to suppress?

MR. LEWIN: Well, I submit it could simply be a motion to exclude at the trial, except that many States have provided procedures under which these matters are taken care of prior to trial.

Q Well, what you're saying is that the motion to suppress, or the motion excludes; all it says is that we don't think the government has the right to put this in, so the government must show us why it's in.

MR. LEWIN: The government is putting it in.

Q Well, that's your basis. That's why you need the Fifth Amendment, I see now.

MR. LEWIN: The government is putting it in, it's putting in the accused's own words --

Q That's what I mean.

MR. LEWIN: -- and it has to lay the foundation for being able to use that evidence. It's like a piece of physical

evidence that it obtains and that is presumed, in the absence of any showing to the contrary, to be lawfully obtained.

Q Well, I don't want to be captious at all, but I don't agree that they have a burden to show it. They only have a burden to show it if the defendant raises the question.

MR. LEWIN: Of course. If the issue is not raised, the issue of voluntariness isn't raised, then the defendant is, certainly at trial, waiving any objection on the ground of non-voluntariness.

Q Well, certainly as a matter of evidence, it's admissible. It's a well-recognized exception to the hearsay rule.

MR. LEWIN: Yes.

Q The government has no burden at all. It just offers it and it's up to the defendant to show why it should be excluded. Because, as I just said, as a matter of evidence, it's perfectly admissible.

MR. LEWIN: And the defendant, we think, under all the rules -- I think that all jurisdictions apply -- shifts the burden back to the government by showing that he was then in custody, and by simply saying this was obtained involuntarily.

Q After Miranda that may be true; this is a pre-Miranda case.

MR. LEWIN: Well, I submit, even pre-Miranda --

Q It's the defendant's duty to show that for some

reason or another it's inadmissible. And the reason is that it was coerced or involuntary. Otherwise it's, as a matter of the law of evidence, it's clearly admissible. It's a well-recognized exception to the hearsay rule.

MR. LEWIN: Right. The defendant then makes some showing, and even if a court were to put the burden of going forward on the defendant, and I think that's certainly legitimately true, the defendant must at least either assert, move, in some way personally say, "I was coerced."

Q Yes. And then --

MR. LEWIN: And state some facts.

Q -- show it.

MR. LEWIN: And state some facts. That just puts the burden of going forward, though, on the defendant; it's not the ultimate burden of proof. We think all jurisdictions at least put the burden of proof, by a preponderance of the evidence, on the government. In a criminal case, where -- and this has been the conclusion not merely of commentators, such as Lord Devlin, who is quoted in our brief, but in State Supreme Courts, both in New Jersey Supreme Court and the Wisconsin Supreme Court, in the Yough and Keiser cases which we cite in our brief, talk about the devastating effect of confessions in a criminal trial. When one's dealing with those --

Q Mr. Lewin, would you single out any other kinds of evidence that are devastating, as you put it? What about

eleven eye-witnesses? Is that devastating on the defendant?

MR. LEWIN: But a constitutional rule, we submit, can't be made for an eleven-eye-witness case, nor do we think there's any similar or analogous constitutional rule that would be appropriate.

On the other hand, in Jackson --

Q But you do have rules about eye-witnesses. You have Wade.

MR. LEWIN: Yes.

Q You do have a constitutional rule about eye-witnesses.

MR. LEWIN: About line-ups, yes.

Q Yes. Well, that's what eye-witnesses are.

MR. LEWIN: Right. But not -- well, to some extent -- I withdraw that "right". To some extent that goes to the reliability of an eye-witness.

Q Right.

MR. LEWIN: But Jackson indicated --

Q Isn't that the same as the reliability of the confession?

MR. LEWIN: Well, we think the reliability -- this Court, in Jackson, certainly recognized that the reliability of a confession is a much more important question and involves constitutional -- in fact, there's a question of constitutional dimensions, the procedure surrounding the

admissibility of the confession; whereas it has never made that kind of suggestion or ruling with regard to various other kinds of evidence that may be very damaging. Because, as the Court recognized in Jackson, there is a whole complex of values underlying the rules against coerced confession. And --

Q Let me test one of your points with a hypothetical. You put the emphasis, of course, on in-custody statements. Suppose you have a situation where a man has robbed a supermarket, and he's caught right almost on the scene, and the officers have him in custody, he's got the loot in his hands, and while they're waiting for the car to come and take him away, some one of the citizens standing by says, "Why did you do this?" And his answer is, "I needed the money."

Now, certainly, in that context, that admission would be rather devastating, wouldn't it? Would you apply all these standards that you list to that case?

MR. LEWIN: Yes. I think a constitutional rule, applicable to post-arrest confessions, would be applicable to that case as well. And the only rule we're seeking is a rule as to standard of proof. And, again, a rule as to standard of proof applicable any place in the trial, the vice of the Illinois procedure is that no one in the entire trial, neither the judge nor the jury ever decides whether this confession has been voluntary beyond a reasonable doubt.

So that means that there is a man in this petitioner's

position, for example, who is convicted on evidence where a judge may simply have decided, by a preponderance of the evidence, that the confession is voluntary, then submit it to the jury with all the other evidence in the case --

Q Well, you're just assuming all your answers there.

MR. LEWIN: Well, isn't that -- that's exactly what's possible under the Illinois procedure.

That a judge simply says, by a preponderance of the evidence --

Q No doubt about it. Now you're just saying that happens, and it's wrong --

MR. LEWIN: Yes.

Q -- and so what?

MR. LEWIN: Well, if -- if, one, there is a constitutional right, and we submit that Miranda indicates that there is; if, two, every necessary fact has to be proved beyond a reasonable doubt, and that's what Winship says; if, three, as this Court said in Chapman, where there's a constitutional claim, it's important that the conviction rests beyond the reasonable doubt on no constitutional error. All those factors, we submit, add up to mean that in a trial, in a criminal trial, there should at least be someone, someone along that entire procedure, who says -- or was required to focus on the question, says, beyond a reasonable doubt this confession was not

obtained by coercion.

Q The issue is on guilt or innocence, which is what reasonable doubt applies to, so far, is whether he committed the crime or not.

MR. LEWIN: Well, I think --

Q Now, wait a minute, Mr. Lewin --

MR. LEWIN: Sorry.

Q It's whether he committed the crime or not. And the question about voluntariness hasn't got anything to do with whether he committed the crime. The jury is going to hear some evidence, including his confession perhaps, and they're going to decide whether that proves that he committed the crime beyond a reasonable doubt.

Now, you necessarily say that because it's involuntary, that it's untrue?

MR. LEWIN: No.

Q Well --

MR. LEWIN: It may be, though.

Q It may be.

MR. LEWIN: It may be untrue.

Q And so if a man -- a voluntary confession may well be untrue.

MR. LEWIN: Yes, sir.

Q Now, what has voluntariness got to do with finding guilt beyond a reasonable doubt?

MR. LEWIN: If every element of the offense, or every necessary fact, as this Court stated in Winship, has to be found beyond a reasonable doubt, not --

Q Every necessary fact to determine whether he committed the crime.

MR. LEWIN: Right.

Q Not whether he confessed voluntarily.

MR. LEWIN: When a piece of evidence is as important to the question of guilt or innocence as a confession, we --

Q You really aren't arguing whether it really related to -- you really aren't arguing that, with respect to the standard of proof as to guilt or innocence, that the standard of proof that might help protect the constitutional right.

MR. LEWIN: That's right. Which is what this Court, although it didn't talk in terms of standard of proof, but what this Court did in Jackson. It says --

Q Well, I can't say that --

MR. LEWIN: There's nothing in Jackson -- there's nothing in the due process clause that talks about whether a judge or a jury must make the finding. Nonetheless, this Court found, concluded that in order to be sure that there's a reliable determination, it has to be the judge who makes it. We think that that very same hedge or protection against the possibility of a conviction on the basis of an involuntary

statement --

Q All right.

MR. LEWIN: -- applies as well as to --

Q I got it. I got your point.

Q Now, you put an emphasis, Mr. Lewin, on simply -- that this is simply, I think you said in effect, what the standard is, what standard is to be used by the trial judge in evaluating the admissibility. Well, aren't there some other collateral consequences that are involved when you come to review on appeal? Is it not much easier for an appellate court to pass on the judge's determination of voluntariness beyond a reasonable doubt than to have the judge make a determination merely that a jury could reasonably find that the confession was voluntary.

MR. LEWIN: I think that's true, and to that extent it would support saying that the rules should be --

Q Doesn't that --

MR. LEWIN: -- the kind that --

Q -- do considerable, as Mr. Justice Black suggested in his separate opinion, to take the fact-finding function away from the jury?

MR. LEWIN: I think not, Your Honor. Because it simply says to the judge: you make factual determinations on this issue, as you make it on a host of preliminary or underlying factual issues relating to the admission of evidence.

But as to this particular issue, you do it beyond a reasonable doubt.

In other words, it just simply applies another standard, a different standard, to this particular question because of the importance of the constitutional right. It doesn't, in any way, change the judge-and-jury function, it simply says to the judge: do it by standard X rather than by standard Y.

Q Well, the collateral consequence I speak of is that an appellate court, looking at that after the event, never having seen any of the witnesses, can very easily say the trial judge could not have reasonably found this beyond a reasonable doubt to be a voluntary confession, even though a jury of 12 people have found it to be voluntary beyond a reasonable doubt.

MR. LEWIN: Right. And --

Q That's rather an odd circumstance, isn't it?

MR. LEWIN: No more odd than --

Q To be if we believe in the jury system.

MR. LEWIN: Right. But no more odd than is true in appeal from any criminal conviction, and ultimate sentence -- an ultimate finding of guilty, where a jury may find a defendant guilty, and this happens more than just occasionally, and a Court of Appeals, reviewing the evidence, applying "could a reasonable man find this defendant guilty beyond a reasonab le

doubt", a Court of Appeals reviewing that evidence says: We think that a judgment of acquittal should have been entered, because a reasonable man could not find the defendant guilty beyond a reasonable doubt.

So all that such a rule would do is it would apply the very same standard as applied to guilt or innocence in the Court of Appeals, to the question of voluntariness of a confession.

MR. CHIEF JUSTICE BURGER: Time. Thank you, Mr. Lewin.

Mr. Zagel.

ORAL ARGUMENT OF JAMES B. ZAGEL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ZAGEL: Mr. Chief Justice, and if it please the Court:

I think I first ought to clarify to some extent the Illinois procedure with respect to confessions, partly because the record in this case is somewhat atypical. Under Illinois law, the initial determination of voluntariness is made by the trial court, by statute the burden of proof on voluntariness is placed on the prosecution, the statute does not declare what that burden of proof is, it simply states that the prosecution shall prove voluntariness.

Q Was that true --

MR. ZAGEL: That was that --

Q The issue you're describing for us, is that -- was that true at the time this case was decided?

MR. ZAGEL: Yes. That has always been true.

Q And it is still --

MR. ZAGEL: And it's still true.

Q -- the same thing today as it was then?

MR. ZAGEL: Yes.

So, of course, the issue as to whether it is permissible to place the burden on the defendant is not really before the Court.

Secondly, ordinarily in a criminal case the issue --

Q May I just ask one other question?

MR. ZAGEL: Yes.

Q Under your procedure, is the evidence taken on the question of voluntariness in the presence or outside the presence?

MR. ZAGEL: Outside the presence.

Q Outside.

MR. ZAGEL: And that has always been the procedure in Illinois.

Illinois follows, in effect, the orthodox rule, and has done so --

Q Was that in fact so in this case?

MR. ZAGEL: Yes.

Q Because it didn't come through clearly to me in

the record.

MR. ZAGEL: No, that is true. There was a pretrial motion to suppress, outside the presence of the jury. In fact, before the empaneling of the jury.

These issues are usually decided long before --

Q Before they empanel the jury?

MR. ZAGEL: Before the jury's empaneled. They usually decide it well in advance of trial.

Q And was that -- that was also true at the time this case was tried?

MR. ZAGEL: Yes. Yes.

However, at the trial itself, on confessions, and the jury's consideration -- the jury is specifically directed to the consideration of the confession. There is a special confession instruction. It was not given in this case because it was not requested. But the standard procedure under Illinois is for the jury to receive an instruction telling them that they have to adjudge the weight of the confession in light of the circumstances of its making, and with some detail.

Now, it is true that that is not a consideration of voluntariness. The jury is not told, You must consider whether the confession is voluntary; they --

Q It does go to truth or falsity?

MR. ZAGEL: It does go to truth or falsity.

Q And to whether or not there might be a factor

determining whether there was a finding of guilty beyond a reasonable doubt?

MR. ZAGEL: Yes. Yes.

That is the standard Illinois practice. The petitioner, in attacking that practice, takes basically two separate positions. The first is that in any case where the constitutional acquisition or constitutional legality of the acquisition of evidence is a question, it is the burden of the prosecution to prove that it constitutionally acquired the evidence, and it is the burden that they must sustain by proof beyond a reasonable doubt.

Now, I would point out, and it has been alluded to, that there's a considerable amount of precedent generally against that rule. In search-and-seizure cases, the federal rule does not place the burden on the prosecution; in cases where there is a warrant, in many States it places the burden on the defense, in all cases where illegality in search-and-seizure is challenged. That is true in Illinois, incidentally, by statute, the statute that immediately follows the one on confessions, deals with motions to suppress evidence illegally seized.

I might also point out that in a few cases in which this Court has spoken on the subject of burden, and those have been Bumper vs. North Carolina, on the burden of proof, to establish consent search; and Miranda vs. Arizona, on the

burden of proof to establish waiver; and in United States vs. Wade, on the burden of proof to establish an independent basis of identification when there's a primary illegality.

In none of those cases has this Court adopted a reasonable-doubt standard. The standard is simply burden of proof in consent cases; in Miranda the language was "heavy burden"; in United States vs. Wade the language was"clear and convincing evidence".

Essentially it's petitioner's first point that the constitutional nature of -- the constitutional issues involved make these questions special. I would point out that only if you take a very limited tactful view of a criminal trial are they made particularly special. Questions of the admissibility of hearsay are usually of extreme importance in a criminal trial.

I point out that for example it is not the burden of the prosecution to prove a conspiracy exists and to prove it exists beyond a reasonable doubt before the declarations of the co-conspirator can be admitted into evidence.

On the question of accomplices, which is a vital question in most criminal trials, where there is accomplice evidence, it is the burden of the defendant to prove that a witness is an accomplice, and that's a particularly vital burden since that very often is the difference between a directed verdict of acquittal and a conviction on the other hand.

Furthermore, I think that there's a confusion and it runs through all the arguments of the petitioner, between the purpose served by the reasonable-doubt rule and the purpose served by the exclusionary rule.

It is clear to me, at least, that the purposes of the exclusionary rule are entirely separate and apart from the determination of guilt or innocence. Indeed, with some of the exclusionary rules, mostly search-and-seizure, their existence cannot be squared with policies promoting the accuracy of fact-finding.

Furthermore, the reasonable-doubt rule, in all of its manifestations, every single one, is the rule that is concerned solely with the weight of the evidence in a criminal trial, and not with the admissibility of evidence. And Chapman, upon which petitioner relies very heavily, does not change this.

First of all, Chapman is a case that applies only when the existence of a constitutional error has been established and it says nothing about the burden of proof to establish the existence of that error.

Second of all, Chapman is essentially an application of a reasonable-doubt standard in a case where you are dealing, although it is an appellate court that deals with the question, with questions of weight of the evidence. Because in an harmless-error context, what the Court is concerned with is the relative weight of the bad evidence or tainted evidence in the context

of the whole evidence to determine whether it harmed the petitioner. It is essentially a question again of weight of evidence. There is no precedent, and I submit no policy, consistent with the existing reasonable-doubt rule to require --

Q Although the constitutional error might be something other than the wrongful admission of evidence in the case?

MR. ZAGEL: Yes, that is true.

Q You are not necessarily, in the Chapman area, dealing with the weight of evidence.

MR. ZAGEL: Well, I think --

Q It might be the manner or method of trial, or it might be a comment by the prosecutor on the defendant's failure to testify. It might be any other, it might be --

MR. ZAGEL: Well, I would --

Q -- an entirely different constitutional error. You're not dealing only --

MR. ZAGEL: Yes, that is true. That is --

Q -- with wrongfully admitted evidence in the Chapman area.

MR. ZAGEL: That is true. Except I would suggest that in particular, that Griffin vs. California problem dealt with in Chapman is, at base, the weight of the evidence problem. Because the prosecution is using silence as an evidentiary factor, he is saying this silence helps to establish our case.

Although I conceive that -- I admit that it is conceivable that there would be cases where harmless error was applied, that you could say that the error in question dealt specifically with evidence.

But still it's essential in the resolution of that problem, usually to weigh the evidence as a whole, which is what Harrington vs. California made very clear.

The petitioner does not dwell extensively on its first proposition that all questions of constitutional acquisition of evidence must be decided by proof beyond a reasonable doubt. He does take as his second position that there is something in the special nature of confession that requires proof beyond a reasonable doubt.

I would point out initially that the analysis that he makes is essentially incorrect. I don't think one can say that a violation of the Fifth Amendment is essentially more or less important than a violation of the Fourth or the Sixth Amendment. I think that the values protected by the Fourth and the Sixth are fully as important as those protected by the Fifth.

There was a time, I suppose, when petitioner might say, with some justice, that since the determination of voluntariness of a confession is closely tied to its reliability, that it presented a different issue. I don't think that contention is open today. I don't think it's been open since Rogers

vs. Richmond, which has specifically excluded such considerations from voluntariness.

There is some language in older cases which sought to rest the exclusion of involuntary confession on fears as to their reliability. But that language is no longer good law.

Q But Rogers v. Richmond also said that your instruction about probable truth or falsity is gone, too.

MR. ZAGEL: I think that Rogers v. Richmond dealt with a determination of voluntariness. I don't think that probable truth and falsity is banned when you say to the jury, You ought to consider the probable truth or falsity of a confession, in light -- or the weight, in effect, the weight of the confession.

Q You say that this probable truth or falsity wasn't in Rogers v. Richmond?

MR. ZAGEL: I'm saying that --

Q Please don't say it, because I'm looking at it.

MR. ZAGEL: No. I'm saying that probable truth and falsity is excluded from determinations of voluntariness.

Q Well, does your instruction say that you decide truth and falsity?

MR. ZAGEL: On -- on -- the jury is not instructed on the issue of voluntariness in Illinois at all. At all. So the --

Q I thought you said there was a specific confession --

MR. ZAGEL: Yes, but that is -- only goes to its weight. The weight of the confession.

Q Well, that's truth and falsity, isn't it?

MR. ZAGEL: Yes. But it's only as to the weight of the confession. It has nothing to do with voluntariness.

Q And Rogers v. Richmond says that's not enough, and that's not enough.

MR. ZAGEL: I would respectfully disagree. I do not think that Rogers v. Richmond invalidated instructions to the jury as to whether -- as to weight of the confession.

Q Well, it did not validate the instruction of the jury in Illinois, because it's a Connecticut case; so I agree with you.

MR. ZAGEL: I might add that it is my understanding that instructions similar to those given in Illinois are given in federal criminal trials, with respect to weight of a confession.

I point out, in addition to, I think, petitioner's erroneous analysis of perhaps attaching excessive value to the interests protected by the Fifth Amendment as opposed to those protected by the Fourth, that his tactical assertion that somehow a confession is more significant, is really unjustified.

I point it out, and I think it's fairly clear that in any given case a confession may be of relatively minor significance; the case of eleven eye-witnesses comes to mind,

the case in which a legal wiretap is discovered, is recorded evidence of the crime itself, certain seized evidence, a large quantity of heroin; in all of these cases -- and sometimes fingerprints -- confession pale into insignificance, and particularly the nature of confessions, and to some extent even the confession in this case.

Confessions have a tendency to be filled with self-serving statements. Usually a man does not, unlike the eye-witness who will give a full and often devastating picture of the crime, the confession is always filled with -- or often filled with statements, "Well, I did this but I didn't mean to"; "I didn't want to hurt the victim". And in that respect it is difficult to say, and certainly you could not say as a matter of law that confession is always of overwhelming importance.

It is of some significance, to me at least, that the principal case relied on by petitioner in his first argument, United States vs. Schipani, an opinion of a single-judge District Court, in which the court said that there ought to be proof beyond a reasonable doubt. The court specifically rejected the suggestion that a difference could be made between confessions and other forms of evidence.

And it is particularly significant because it is difficult, at least it was difficult for me and I started out as an appellate lawyer before I started to try criminal cases, it's difficult when one sees records of convictions and nothing

but records of conviction, to make assessments as to what evidence really ties the knot with a particular defendant. And it is significant that the only trial court opinion that petitioner cites, specifically rejects any distinction between confessions and other points of evidence.

Q That's the Schipani opinion of Judge Weinstein?

MR. ZAGEL: That's Schipani. Yes.

Q Who was -- have you analyzed the analysis of the mathematical laws of probability contained in that opinion?

MR. ZAGEL: Yes. At least I was familiar with that before I read the opinion. That is a general statistical analysis, assuming, as is often done, that preponderance of the evidence equals 50-plus and reasonable doubt equals 95-plus. I don't know that I would accept those figures, but the basic mathematical operation is correct.

Q Then 50 times 95 comes out to 50-minus.

MR. ZAGEL: Comes out to the 50-minus; would come out to 50-minus.

Q Do you think that's a valid analysis of this problem?

MR. ZAGEL: I think not, because that kind of shock attitude that one gets toward basing a criminal judgment on a 50-minus probability is essentially a shock resulting from your abhorrence of convicting an innocent man. But you don't get that factor. If all you're considering is convicting an

innocent man, you don't multiply that 50-plus in, you're still left with the original 95-plus.

Q Judge Weinstein, as Mr. Lewin points out in his brief, was formerly a Professor of Evidence at the Columbia --

MR. ZAGEL: That is correct.

Q -- Law School.

MR. ZAGEL: And I might say that his opinion follows very closely analysis of similar problems by two Columbia professors, Jerome Michael and Professor Wexler.

Essentially the Schipani opinion is a judicial adoption of a couple of Law Review articles.

Q Yes.

MR. ZAGEL: And it has not been much adopted in this country.

Finally, in this --

Q Doesn't that reflect on the value of those two Law Reviews?

MR. ZAGEL: Well, I've written a couple myself --

Q Or on the judges.

MR. ZAGEL: -- and I would generally read the opinions first and the Law Review articles second.

The third point made by the -- it's a relatively minor one. The third point made by the petitioner I think I ought to touch on, is that the defendant in this case is in a much worse position than Jackson was in Jackson vs. Denno.

I have two essential problems with that. The first is that I think that's a terrible constitutional standard, that tactical position determines whether a rule is constitutionally required; or to put it another way, I think that petitioner would have to contend that Jackson v. Denno decided that whatever makes it more difficult for the prosecution to present a confession is the constitutional requirement.

My second difficulty is that he, the petitioner here, is not in a worse position than Jackson. The plain truth of the matter is, accepting the premise of the Jackson opinion, the petitioner Jackson never had a hearing, an adequate hearing, of voluntariness. And the petitioner here did have such a hearing.

The other point in this regard made by the petitioner is that if the judge makes a determination that a confession is voluntary by a preponderance of the evidence, then when it comes to the time of trial the confession is introduced and the petitioner has to determine whether to get up on the stand and suffer all of the risks connected with his appearance on the stand; and he just do this without proof of voluntariness beyond a reasonable doubt.

I think that argument cannot be sustained in light of McGautha vs. California, nor can it be sustained in light of the guilty-plea cases, the trilogy of cases beginning with McMann vs. Richardson. And in fact the decision whether to

testify is made by a defendant without any determination, in most cases, of important issues beyond a reasonable doubt. Defendant, in effect, can take a prosecution case which is barely able to survive a motion for a directed verdict, testify on the stand, and sink himself.

And in that position, a far worse one than the petitioner faced in this case. He has no right to a determination that the prosecution's proof establishes guilt beyond a reasonable doubt.

The final point made by petitioner is that he ought to have been given a jury trial, in effect, on the issue of voluntariness. I point out that it seems to me that the essence of Jackson v. Denno was that a jury does not really, in fact it's constitutional incapable of giving a hearing on the issue of voluntariness, that the jury will just not separate the issues, that the jury will consider weight, probable truth and falsity, and will not determine voluntariness in the pure classic sense.

I point out also that the jury determination of issues of admissibility is not a traditional function of the jury, and would not be binding upon the States under Duncan vs. Louisiana. And at least in the few precedents that have dealt with the issue, it seems to be rarely contended that there's a constitutional requirement.

The existing precedent, such as it is, is against that

contention.

Frankly, the only way to satisfy petitioner's claim in this regard would be to empanel separate juries on the motion to suppress, because it would be only then, purely apart from the issue of guilt or innocence, that the jury could give a determination of voluntariness.

It's our opinion and our contention that a jury ought not to be constitutionally required to decide a question that this Court recognizes it is incapable of deciding.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Zagel.

Mr. Lewin, you acted at the request of the Court and by appointment of the Court in this case?

MR. LEWIN: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: On behalf of the Court I want to express our appreciation for your assistance to the Court and of course for your assistance to your client.

MR. LEWIN: Thank you, Your Honor; it's a privilege.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 11:35 a.m., the case was submitted.]