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In the

Supreme Court of the United States

RICHARD BROWN,

Petitioner

v.

ILLINOIS

No. 73-6650

Washington, D. C.
March 18, 1975

Pages 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

RICHARD BROWN, Petitioner	:	
v.	:	No. 73-6650
ILLINOIS	:	

Washington, D. C.

Tuesday, March 18, 1975

The above-entitled matter came on for argument at 10:46 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT P. ISAACSON, ESQ., Assistant Public Defender, 407 Civic Center, Chicago, Illinois 60602
For Petitioner

MISS JAYNE A. CARR, Assistant Attorney General of Illinois, 188 West Randolph Street, Chicago, Illinois 60601
For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 73-6650, Brown against Illinois.

Mr. Isaacson, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT P. ISAACSON, ESQ.,

ON BEHALF OF PETITIONER

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

The issue is whether two statements, procured after flagrant and abusive, unconstitutional arrest and during oppressive, unconstitutional detention, should be suppressed under Wong Sun versus the United States.

Acting pursuant to official Chicago police department orders, two Chicago police officers, Nolan and Lenz, proceeded to Petitioner's apartment.

They were investigating the homicide of one Roger Corpus. They arrived at Petitioner Brown's apartment at approximately 4:30 in the afternoon.

Finding noone home, they broke into his apartment. The officers then searched the apartment and laid in wait for nearly three hours for Petitioner Brown's return home.

Now, these officers had absolutely no evidence, no evidence to link Petitioner Brown to the homicide of Roger Corpus.

At approximately 7:45 that evening, your Honors, when Petitioner Brown returned to his own home, he was greeted by a drawn gun of Officer Lenz. Officer Lenz jumped out at him.

Petitioner backtracked a few steps and Officer Nolan greeted him with a revolver in his back and asked the Petitioner to come on inside the apartment.

At this initial encounter, Petitioner Brown did not know that these two plainclothes policemen were Chicago police officers. They then handcuffed his hands behind his back, threw him up against a wall and searched his person.

They hustled him off to a police station interrogation room where --

QUESTION: From your point of view, Mr. Isaacson, I suppose it would make no difference if they had met him outside on the sidewalk and the same events had thereafter taken place?

MR. ISAACSON: Your Honor, I believe that the flagrant and abusive nature in which this unconstitutional arrest was effected is an important factor in this case.

QUESTION: But would it make any difference to your case, if it had occurred out on the sidewalk?

MR. ISAACSON: The Wong Sun rule would still apply, your Honor. This just makes it a stronger case, much stronger than Wong Sun itself.

As I mentioned, the Petitioner was then handcuffed, his hands behind his back and searched, hustled off to a police station interrogation room where the same two police officers who had originally arrested him, the same two officers, Nolan and Lenz, began an incommunicado interrogation.

The interrogation, this initial interrogation, did not end until a statement was procured from Petitioner.

Even after the first statement, the police did not bring Petitioner before a neutral magistrate. They continued to unconstitutionally detain him.

They continued to detain him until a second statement was procured from his mouth later, approximately six, seven hours later.

Not until 14 hours after his unconstitutional arrest was Petitioner taken before a magistrate. He was continuously, uninterruptedly, unconstitutionally detained by the Chicago police officers.

Based upon these facts, the Supreme Court of Illinois held that the mere recitation of Miranda warnings and nothing more, aborts the primary taint of the abusive, unconstitutional arrest and the ongoing, continuous, unconstitutional detention.

Your Honors, this is not a case where a good faith effort was made by the police to conform their conduct

with this Constitution, with the United States Constitution.

They acted deliberately to violate the constitutional rights of the Petitioner. They acted premeditatively. They laid in wait in his apartment for three hours. They had no case against him.

They set out to obtain statements from Petitioner's-

QUESTION: I am sure you are familiar with the memorandum filed by the United States as Amicus Curiae in this case which says that the primary thrust of the arguments in the state courts, where they went to the voluntariness of the confession and that the circumstances surrounding the arrest were rather -- not at all thoroughly canvassed and while the state court found that it was improper and invalid, an unconstitutional arrest, there really was very little evidence one way or the other.

And here you are telling us that it is very, very clear that there was absolutely no cause whatsoever to arrest him. I wondered if that indicates that you wholeheartedly disagree with the Government's submission?

Is that it?

MR. ISAACSON: We do, your Honor. The record is replete with references to the actions of the police officers.

QUESTION: Well, this Mrs. DeLoach, for example, who said that she saw the -- your client entering the deceased's apartment before the unfortunate murder of the deceased and

there is no indication in the record of whether she did or whether she didn't communicate that information to the police.

Is that correct?

MR. ISAACSON: The only information in the record, your Honor, that was conveyed to the police was a list of three names, including the name of Petitioner, given to the police by the deceased's brother, Arthur Corpus.

Now, that list was not a list of three people whom Arthur Corpus believed to be involved in this. He did not have any idea. He merely gave a list of three individuals who were acquaintances.

QUESTION: Whom the deceased knew, right. Whom the deceased knew.

MR. ISAACSON: Right.

QUESTION: And then how about this poolroom incident? What connection, if any, does that have with this murder -- or, it doesn't have any, I suppose.

MR. ISAACSON: It has no connection with this murder. It was -- it just was put in the brief and we are arguing that it is just further evidence of the Chicago police --

QUESTION: Of the overbearing action of the police because they said, you say, erroneously -- because they dishonestly said that the bullet in the ceiling of the

poolroom matched your client's gun. Is that it?

MR. ISAACSON: Precisely.

QUESTION: Even though that wasn't true and they knew it wasn't true.

MR. ISAACSON: That is correct.

Actually, the police officers testified that they merely told Petitioner that the bullets were sent to the Chicago Crime Laboratory. Petitioner testified that they told him that the bullets matched.

Just taking the police officer's testimony, which stands on the record, this just indicates, along with this continuous, ongoing, unconstitutional activity which stemmed from the unconstitutional arrest -- we are referring now to the unconstitutional intention -- this just indicates, not police officers who were bent towards attentuating the taint of their unconstitutional activity, but to the contrary, officers who were attempting to exploit the ongoing continuing unconstitutional activity.

A better case for exclusion of Petitioner's statements can scarcely be imagined from the deterrence point of view.

Again, these officers acted premeditatively and deliberately. They set out to get a statement, to procure a statement from Petitioner's own mouth and they did not stop and --

QUESTION: Would you make the same argument if -- wouldn't you make the same argument if the officers never said a word to him, but they nevertheless arrested him unconstitutionally, as you say, and he simply volunteered anything that happened, that he told them.

They didn't ask him a single question.

MR. ISAACSON: If the arrest was merely unconstitutional, the case would not be as strong. The same argument would be made under Wong Sun.

The oppressive nature --

QUESTION: It would at least be a product of the unconstitutional arrest -- or would it?

MR. ISAACSON: Well, it would be if it flows from the unconstitutional --

QUESTION: Well, what are you arguing? Are you arguing that the illegal arrest produced it or that the officers' conduct thereafter --

MR. ISAACSON: The unconstitutional arrest and the continuing and ongoing unconstitutional detention of Petitioner.

QUESTION: Well, now, the arrest had violated the Fourth and 14th Amendments. It has been so held.

Was the officers' conduct thereafter -- how was that unconstitutional? What did it violate, if anything?

MR. ISAACSON: They were continuing to hold

Petitioner in detention, continuing --

QUESTION: And that is also a Fourth --

MR. ISAACSON: That is also a Fourth Amendment violation. I would like to point out --

QUESTION: And you say that the Miranda warnings, socalled, are directed to nip in the bud any possibility of Fifth and 14th Amendment violations and they are basically irrelevant to a Fourth Amendment violation. Is that it?

MR. ISAACSON: The Wong Sun exclusion rule, your Honor, involves protection of both the Fourth and Fifth Amendments through the 14th Amendment.

In view of the strong nature of the police conduct, in view of the fact that the unconstitutional taint grew increasingly more exploitive with each additional minute of unconstitutional detention.

Petitioner's -- both the Petitioner's statements should be suppressed.

QUESTION: Because of the exclusionary rule, Mapp against Ohio, having to do with the Fourth and 14th Amendments. Is that it?

MR. ISAACSON: No, because of Wong Sun versus the United States, which --

QUESTION: Yes, that is a case, but it is a case that construed the Constitution of the United States.

MR. ISAACSON: Right.

QUESTION: So what is it in the Constitution? It is the exclusionary rule applicable to violations of the Fourth and 14th Amendment, isn't it?

MR. ISAACSON: That is correct.

QUESTION: Or does it have something to do with the Fifth and 14th Amendment? That is my question. I just want to be sure I understand your theory.

MR. ISAACSON: The Fifth Amendment is also involved, your Honor, almost by definition. There were statements procured from Petitioner's mouth.

QUESTION: After. But he had been given Miranda warnings.

MR. ISAACSON: Well, we do not even believe that the Miranda warnings were adequate. The more narrow issue, the narrower issue is before this Court and that is the adequacy of Miranda warnings.

But in view of the continuing ongoing unconstitutional taint, were these Miranda warnings, as given, sufficient to cut off the taint? I would like to sell your Honors --

QUESTION: The taint was because of an invalid arrest and seizure. Correct?

MR. ISAACSON: That's correct.

QUESTION: Which has nothing to do with the Fifth Amendment, as such.

MR. ISAACSON: That's correct.

QUESTION: Mr. Isaacson, what if, contrary to the situation that apparently is involved here, there had been an unconstitutional arrest and your client had simply been put in detention and nobody was with him at all. He had been given Miranda warnings. He then decided he wanted to see a lawyer, conferred with a lawyer and after talking to the lawyer, said,"I want to spill it."

Would that be suppressible because the original arrest was illegal?

MR. ISAACSON: If Petitioner had conferred with an attorney, that would be sufficient. Or if Petitioner was taken before a neutral magistrate to be informed of his right to an attorney by an independent party in order to place a neutral individual between the Petitioner and these officers, the arresting, interrogating officers, that would have been sufficient.

QUESTION: You don't contend for a "but for" rule, then? "But for" the arrest, he never would have made the statement.

MR. ISAACSON: We do not contend that.

QUESTION: Well, just awhile ago you were contending it. I said, what if he simply volunteers anything that was said, he volunteered after illegal arrest, the officers didn't say a word. I thought you said you would

make the same argument?

MR. ISAACSON: To say volunteered, your Honor, any notion of Petitioner volunteering a statement in this case is totally negated by the facts of the case.

The police set out originally to get a statement from him and they were successful.

QUESTION: Well, I don't know. If the arrest hadn't been illegal, but legal and there had been no Miranda warning, the statement would be excludable.

But with Miranda warnings, any possibility of involuntariness is apparently squelched.

MR. ISAACSON: But, your Honor, the case of this Court, the companion case to Miranda versus Arizona, Westover versus the United States, held that the other circumstances surrounding the statement can negate the protection normally afforded by the Miranda warnings.

The facts in Westover were such that Westover was detained by the Kansas City Police who questioned him for 14 hours.

QUESTION: You are going to get into an argument about Miranda and the reach of the Fifth Amendment now, rather than a Fourth Amendment case.

I think the question still is whether or not -- it sounds as though there is a substantial question here as to whether the police conduct after the arrest is what is at

issue here.

MR. ISAACSON: We suggest that an analogy can be drawn between the protection afforded by Wong Sun of Fourth and Fifth Amendment rights and the protection afforded by Miranda of Fifth and Sixth Amendment rights.

In Miranda, the right to counsel under the Sixth Amendment was deemed to be protection, a necessary ingredient of one's Fifth Amendment right for privilege against self-incrimination.

Similarly, the case in Wong Sun, that is, that one's Fourth Amendment rights, the right against unreasonable searches and seizures, are thought necessary to protect one's Fifth Amendment rights.

And Westover fairly holds -- to get back to the facts -- after 14 hours of detention by the Kansas City Police, Westover was turned over to the FBI who immediately gave Miranda warnings. Westover then made a statement.

QUESTION: It was more than Miranda warnings.

MR. ISAACSON: It was more than Miranda warnings. Westover made a statement. This Court viewed the detention as one continuous 14-hour detention. This Court did not merely focus on the giving of the Miranda warnings in a vacuum, as the Supreme Court of Illinois did and as Respondents advocate here.

What they did was look at the continuing

attendant circumstances and this Court held in Westover that the more oppressive the prior and attendant circumstances surrounding the taking of custodial statements, the less weight to which the warnings were constitutionally entitled.

In this case, your Honors, we submit that those warnings were entitled to little if any weight.

In view of the ongoing -- in summary, in view of the ongoing, continuous, unconstitutional activity by the Chicago police officers, both the Petitioner's custodial statements during his unconstitutional detention should be suppressed.

I'd like to reserve my remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

QUESTION: May I ask, whatever happened to Jimmy Cleggett?

MR. ISAACSON: He was not prosecuted, your Honor.

QUESTION: What effective sanctions, in your estimation, are there against police conduct of the kind that occurred here? Just the exclusionary rule?

MR. ISAACSON: The only effective sanction, your Honor.

Thank you.

QUESTION: What about Bivens? The Bivens case?

MR. ISAACSON: Individuals have expressed

reservations about the Fourth Amendment exclusionary rule but even those individuals -- referring now to Professor and Dellin Oaks and others, do not deny its applicability to cases where confessions are involved, where statements are involved and in addition, the exclusionary rule, whatever place it has, in a good faith attempt by police to comply their activities to the Constitution, the case cannot be stronger for its application in the present case where they set out to achieve something, they set out to get statements, and /they did it in a flagrantly unconstitutional manner.

QUESTION: Did Justice Schaeffer sit on the case in the Illinois Court?

MR. ISAACSON: Yes, he did, your Honor.

QUESTION: Did he join the majority?

MR. ISAACSON: Yes, he did.

MR. CHIEF JUSTICE BURGER: Miss Carr.

ORAL ARGUMENT OF MISS JAYNE A. CARR

ON BEHALF OF RESPONDENTS

MISS CARR: Mr. Chief Justice and may it please the Court:

The issue presented by this case is whether, following an arrest without probable cause, the subsequent giving of Miranda warnings to a suspect in custody prior to police custodial interrogation will obviate or attenuate any taint arising from the initial unconstitutional arrest.

This, in effect, was the holding of the Supreme Court of Illinois in this case, that the giving of Miranda warnings per se would obviate the taint from what they found to be an arrest without probable cause.

Prior to beginning my argument, I would like to make certain corrections as to factual misconceptions in this case.

QUESTION: Miss Carr, might I interrupt you for a moment? You said a minute ago that the Supreme Court of Illinois held that the giving of Miranda warnings per se was an attenuation. Do you think they meant that it would invariably be or that it had had that effect in this particular case?

MISS CARR: I believe, Mr. Justice Rehnquist, that they held that under the circumstances of this particular case, the giving of Miranda warnings was sufficient to obviate any taint from the initial unconstitutional arrest.

One of the factors that was extremely relevant to the Court's position on that point was the fact that initially there had been a hearing prior to trial on the admissibility of these two statements, both the initial statement given to the police officer and the second later statement given to the assistant state's attorney.

The Amicus brief filed on behalf of the United States by the Solicitor General attempts to make the point

that this case is akin to the situation in Morales versus New York in which a proper disposition would be to remand the case after vacating the judgment for a further hearing to determine whether or not there are facts which would constitute probable cause.

I think that the Solicitor General misreads Illinois practice in this respect.

Illinois provides for a pretrial motion to suppress filed by a defendant in which the defendant files a motion in writing alleging specific grounds in support of suppression. Defendant in this case, in fact, filed such a motion alleging as one of the grounds that the arrest was without probable cause.

After the motion is filed the state then has the burden of going forward with the evidence and the burden of proof by a preponderance to show that the confession is, in fact, admissible.

There was a hearing in this case at which the state did go forward with proof but offered no proof as to the existence of probable cause.

The trial court denied the motion to suppress on a finding that the confession was voluntary and the Supreme Court of Illinois proceeded in this case on the assumption that the confession was voluntary and had been given after full compliance with Miranda warnings but that the initial

arrest was, in fact, without probable cause.

In making his opening statement, counsel on behalf of the Petitioner indicates that at the time of the arrest, the Petitioner was not aware that Officers Nolan and Lenz were, in fact, police officers.

This is refuted by the record on the motion to suppress in that both officers testified that immediately upon contacting the Petitioner as he approached his apartment that each officer told him he was under arrest and after he was placed under arrest and a brief search was conducted for weapons he was, in fact, told that he was under arrest either for questioning or for investigation of a murder.

He was, at that point, taken immediately to the police station, which took approximately 10 to 15 minutes. He was taken directly to an interrogation room at the police station which contained a window, a table and several chairs.

At that point, the officers left the room for five to 10 minutes to obtain their file, came back into the room and proceeded to give the defendant, prior to speaking with him, four Miranda warnings as required by this Court's decision in Miranda versus Arizona.

There is the point made in passing by the Petitioner's counsel, both here and in its brief, that these Miranda warnings were inadequate in that the officer did not advise the defendant that he was entitled to the services of

an appointed counsel if he could not afford retained counsel.

This is, in fact, refuted by the record on the motion to suppress. Officer Lenz, on direct examination, did omit the particular reference to the ability to have appointed counsel which -- that may be found at page 7 of the abstract.

However, on cross-examination by defense counsel, the officer was again asked to go through what specific warnings he gave to the defendant at the time of the arrest and he did, in fact, at that time, relate four Miranda warnings. Those warnings may be found at page 19 of the abstract.

The other officer who was present at the time the warnings were given, Officer Nolan, testified consistently that the warnings were, in fact, complete as required by Miranda versus Arizona. His testimony may be found on direct examination at page 37 of the abstract and on cross-examination at pages 45 and 46.

It should be emphasized that the first statement given by this defendant after he was taken into custody was given within 45 minutes of his arrest and -- I'm sorry, within an hour of his arrest and within 45 minutes of his arrival at the police station.

The sequence of events as related by the testimony indicates that he was arrested, was taken immediately to

the police station, was given Miranda warnings and questioning began, at which point, the defendant indicated that he chose the course of telling the truth, giving the officers the information that was taken down in a half-hour statement which was admitted at trial through the testimony of Officer Nolan.

Following this discussion, the defendant then chose to go with the police officers to locate Jimmy Cleggett. The officers and the defendant were out on the street for a period of three to four hours, during which time the petitioner and the officers were in and out of the squad car looking into various business establishments in an effort to locate Cleggett.

They were successful in that effort, returned to the police station around midnight or 12:30. An assistant state's attorney was called and while defendant was waiting for the assistant to arrive, he was not questioned.

When the assistant state's attorney did arrive, the assistant gave him four Miranda warnings once again, asked him if he wished to speak with the assistant, the defendant said yes, he did, that he wished to make a statement.

There was a brief conversation with the assistant in private and following the arrival of a court reporter, there was a formal written statement taken, again, after the defendant had been further advised of his Miranda rights.

This statement the Petitioner declined to sign after it was transcribed but it was admitted into evidence at trial.

There was also a reference in both the Solicitor's brief and Petitioner's brief to the fact that the police officers told the Defendant that the bullets which had been removed from the ceiling of the poolroom in fact matched the bullets taken from the body of Roger Corpus.

This is not supported by the record. There was a stipulation entered by the state on trial and there was a stipulation offered on the motion to suppress that the bullets, in fact, were not able to be compared and therefore it is not clear whether or not they would have matched had there been a comparison made.

The testimony of the two police officers on the motion to suppress indicates that all they told the defendant during the course of questioning prior to his first statement was that the police were aware of the poolroom incident, had secured the bullets and had transported them to the crime lab for comparison with the bullets taken from the body of the victim.

There was nowhere in the record, except for the testimony of the Petitioner on the motion to suppress, any reference to the officers telling the Defendant that his fingerprints had been found in the apartment of Roger Corpus,

the victim.

The trial judge in this case, in denying the motion to suppress, it could be fairly described, rejected the testimony of the Defendant in respect of the particular point that the Petitioner's counsel here raises as to deceit or trickery on behalf of the police officers.

The basis of the decision below was, in fact, that the concession in this case, both the first statement to the police officers and the second statement made to the assistant state's attorney were voluntary statements given after full compliance with Miranda.

The issue, then, presented to this Court for a decision is whether, following the decision in Wong Sun, the giving of Miranda warnings will, in and of themselves, obviate the taint from any initial unconstitutionality in the arrest procedures without more.

The Respondent wishes to make the point that this is a narrow issue. Its basis primarily is in the fact that atatement in this case is in all other respects voluntary and was given after full compliance with Miranda warnings, a knowing, intelligent and voluntary waiver of those rights.

QUESTION: Can I put a little footnote as to how voluntary his confession was?

Now, are you talking about the one he refused to sign?

MISS CARR: I am talking about both statements, Mr. Justice Marshall.

QUESTION: Well, you say that the one he refused to sign is obviously voluntary?

MISS CARR: In the sense that the trial judge, prior to the trial, heard evidence on the specific issue of voluntariness and found in denying the motion that the statements, both statements, were voluntary and admitted the statements at trial.

QUESTION: There is a difference in saying the court found it. You were saying it as a fact.

MISS CARR: The trial judge --

QUESTION: Well, I, for one, don't think that the statement was voluntary if somebody refused to sign it. I have great problems with that.

Why don't you sign something that is voluntary?

MISS CARR: Well, perhaps the Defendant had second thoughts about whether or not he wished to make a statement but --

QUESTION: To volunteer.

MISS CARR: -- but that does not affect the fact that at the time of the statement it was made after full intimation to the Defendant as to his rights to make or not to make a statement and also to have an attorney present.

QUESTION: Was he also advised of his rights not

to be illegally arrested?

MISS CARR: I'm sorry, I did not hear the question.

QUESTION: Was he also advised of his rights not to be illegally and unconstitutionally arrested?

MISS CARR: No, Judge, he was not.

But the fact that the initial arrest here was made without probable cause does not affect the fact that subsequent to that arrest, the police officers took the Defendant directly to the police station, gave him full Miranda warnings and at that point in time, he voluntarily and intelligently and knowingly chose to waive his rights to speak or not to speak, to secure the presence of an attorney or not, and chose to make a statement to the police officers which after -- in full evidentiary hearing, was found to be voluntary.

In this situation, the fact that the initial arrest was made without probable cause does not in and of itself render the subsequent statement inadmissible into evidence.

This Court, in Wong Sun versus the United States, indicated that it would not follow a per se exclusionary rule in this type of situation and did apply a test other than the "but for" test.

In other words, the test was not the "But for the illegal arrest the statement would not have been brought about."

The test is whether or not the police officers, following an unconstitutional arrest, exploit that initial illegality in securing the statement.

In the factual context of this case, where the statement is in all other respects voluntary, it can hardly be said that the police officers exploited the initial illegality of the unconstitutional arrest when they made particular efforts to give this Defendant full Miranda warnings and allow him --

QUESTION: It sounds, then, as though you are plugging for a rule that the Miranda warnings are automatically in per se, sufficient to obviate the taint.

MISS CARR: That is correct, Mr. Justice White, where the statement given after Miranda warnings is in all other respects voluntary. To a --

QUESTION: And that the circumstances otherwise are just irrelevant, as long as it is voluntary?

MISS CARR: Well, we make the point in our brief that in particular situations where the initial circumstances attendant to the arrest are particularly aggravated, those circumstances are initially taken into consideration in the determination of voluntariness of the statements but once a statement has been found to be voluntary, the giving of Miranda warnings and a voluntary and intelligent waiver thereof should, without more, render that statement admissible in

evidence.

This is quite unlike the situation that the Court was faced with in Wong Sun.

QUESTION: So you are saying that as long as you give the Miranda warnings, the statement should be admissible any time that it would have been admissible, had the arrest been legal?

MISS CARR: That is correct.

QUESTION: All the others -- the fact of the illegal arrest and -- just washes out once you give Miranda warnings. Then you are just as though the arrest were legal.

MISS CARR: Insofar as the statement has been admissible.

QUESTION: Miss Carr, what is -- there has been a wrongful arrest here and immediate Miranda warnings and then they search the man at the station and find the murder weapon on him. Would the Miranda warnings make that admissible, in spite of the illegal arrest?

MISS CARR: We make the point in our brief that given the current state of the interpretation of the Fourth Amendment exclusionary rule, that situation would present a more substantial question than the situation we have here.

One of the points that we make in the brief is that there should be substantial consideration given by this Court since the Petitioner premises his position here on the

Fourth and 14th Amendments to a reconsideration of the exclusionary rule and its extension to situations like that.

I think it is a little more questionable in that situation whether or not the Miranda warnings would, in that situation, obviate the taint because of the fact that the Defendant is being confronted with a physical item of evidence which probably would be suppressible.

QUESTION: There is nothing voluntary about his submission to the search, I presume.

MISS CARR: That is correct. The reason why -- one of the reasons that we point out the fact that this case is more properly a Fifth Amendment rather than a Fourth Amendment case is that unlike the situation in Wong Sun, which is a case decided by this Court prior to Miranda versus Arizona, there is now a substantial difference between verbal and physical evidence.

A defendant who is subjected to an unconstitutional arrest and a search incident thereto really has no choice as to whether or not that search will or will not be made. That situation is substantially different where you have a situation like the present case, where the defendant was initially arrested without the probable cause, taken to the police station, given four Miranda warnings and then at that point has the freedom to make the choice of whether or not he will speak -- and here this is exactly what happened.

The Defendant had the opportunity to make this choice. He made the choice to speak.

It is not recognized that a defendant in a criminal prosecution is not required to make these types of choices but that he must, prior to making these choices, be fully informed of what his constitutional alternatives are.

This, in fact, occurred in this case and after he had been fully advised of his rights and chose to waive those rights, the statement is in all other respects, in terms of traditional concepts of voluntariness, admissible in evidence and should be admissible after the giving of Miranda warnings despite the fact that there is an initial arrest without probable cause.

This Court, in Wong Sun did ground its position on the Fourth Amendment but that case, as I noted, was prior to Miranda versus Arizona and there is a recognition in that opinion for the fact that at that point in time this Court saw that perhaps there was very little difference between physical and verbal evidence because of the fact that most people, as is noted in Footnote 12 of the opinion, did not realize that they had the right to talk or not to talk when being questioned by a police officer.

The decision in Miranda versus Arizona, in fact, supplied that information to an in-custody defendant, whether or not he is in custody with or without probable cause and

once he is fully informed of his rights under the Fifth Amendment and chooses to speak, that statement, despite the fact of the initial illegality, can hardly be said to be tainted by that illegality, that it could have come about by exploitation of the police officer's initial arrest without probable cause.

There is another alternative argument which we make in our brief in support of the fact that there really is no sound basis for deciding this case on Fourth Amendment terms and that is, the inefficacy of the Fourth Amendment exclusionary rule itself.

We are forced to make this argument in this case because the Petitioner does, in fact, ground his position in this case on strictly Fourth and 14th Amendment grounds, as Mr. Justice Stewart was asking before.

There are alternative remedies under the Fourth Amendment for the exclusionary rule, as I believe Justice Blackmun, in his reference to Bivens --

QUESTION: Let me make sure I understand this. Suppose there had been no Miranda warnings given here. Everything else happened just like it happened, except no Miranda warnings, questions, answers, statements.

Would you suggest that the exclusionary rule, modified as you think it should be, apparently, should be so modified as not to exclude these statements, had there

been no Miranda warnings?

MISS CARR: In that situation, I would still view this case as primarily a Fifth Amendment case in the absence of Miranda warnings where they in and of itself affect the admissibility of the statement.

That is precisely the reason why we suggest that the Fifth Amendment is much more effective in its dealing with this type of situation where there is verbal evidence than the Fourth Amendment because the procedural safeguards which have been clearly enunciated by this Court under the Fifth Amendment do, in fact, work.

QUESTION: Well, you are just saying then, that we just ought to forget about verbal statements being a product of a -- being the result of an unconstitutional arrest?

MISS CARR: There may be situations, as I was referencing, Mr. Justice Rehnquist.

QUESTION: Well, in regard to this situation, it is because they are involuntary and they violate the Fifth Amendment.

MISS CARR: There may be also the situation, as we noted in our brief and as I was indicating in my response to Mr. Justice Rehnquist's question, where the circumstances of the arrest and the confrontation -- for example, if a defendant is taken into custody without probable cause, even

given his Miranda warnings and not questioned, but placed in a line-up and identified by a complaining witness, told he was identified and then gave a statement, the situation under the traditional and current concepts, the exclusionary rule -- the Fourth Amendment is a little bit different because in tht situation, it is much more akin to a seizure of physical evidence than it is of verbal evidence.

QUESTION: Well, suppose I just put it to you -- let's suppose that the question in this case is whether or not the exclusionary rule should make these statements inadmissible, assuming there were no Miranda warnings here.

Let's just assume that the statements will be considered products of an unconstitutional arrest. Then the question is, should they be excludable under a rational exclusionary rule? Would you say --

MISS CARR: Under a rational exclusionary rule --

QUESTION: Would you think that the conduct of the police in this case was such that it ought to be deterred by having the evidence excluded?

MISS CARR: The problem with applying the Fourth Amendment exclusionary rule to that type of statement is that there is absolutely no empirical evidence that, no matter how flagrant or how technical the police officers' error is, that the exclusion of that evidence entirely is not going to deter that type of conduct and in that situation,

the proper concern should not be for whether there is a violation, either technical or flagrant, but whether or not the evidence that was given by the suspect was, in fact, reliable and voluntarily given by him and I think the consideration in that situation is much more proper and much more consistent with the integrity of the criminal process to seek the truth.

In that situation, then, to apply a per se rule of exclusion because of some initial illegality where the officers' actions may be either the product of a misconception of the law, a misconception by a magistrate if there is a warrant involved or --

QUESTION: Well, apparently, though, you would give the same answer if the officers knew they were -- absolutely knew and were deliberately violating the Fifth and Fourth Amendment rights.

MISS CARR: Let me make it quite clear I do not condone that type of action on behalf of a police officer.

QUESTION: Yes, but you nevertheless would have the same result.

MISS CARR: It should not have -- what motivates the officers' conduct should not have -- except on the determination as to whether or not the particular item of evidence should be admissible. There should be other viable

remedies to alter or deter that type of illegal police conduct where there is a knowing and flagrant violation but to totally disregard the integrity of the evidence and the truthfulness and propriety of admissibility of that evidence absent the initial illegality is to do great injustice, really, to the essence of the criminal justice system in this country which is, in fact, to find the truth.

QUESTION: What you are really -- unless I misunderstand you and you tell me if I do -- I am -- in expressing this understanding of the argument, I am not being critical of it, but as I understand it, what you are really saying is that now that Miranda has been decided, we ought to forget about and overrule Wong Sun.

Is that about it?

MISS CARR: I think that since Miranda has been decided, there are certain factual premises on which Wong Sun has been -- and legal premises on which Wong Sun is grounded which are no longer true and the most evident and the most important of those is the Court's assumption in Wong Sun that there was no difference between verbal and physical evidence.

I think with the decision in Miranda that is no longer true, Mr. Justice Stewart.

QUESTION: And now that we have those safeguards and so long as they are there to protect the Fifth Amendment

right against compulsory self-incrimination verbally, there is no need to pay any attention any more to Wong Sun, except with respect to material evidence, such as in a case like Davis against Mississippi.

MISS CARR: Well, I think --

QUESTION: Isn't that about what your argument comes down to? Or am I mistaken?

MISS CARR: Not necessarily as to the statements of Blackie Toy in Wong Sun because I think no matter which test you are applying in that particular situation, you are probably going to reach the same results.

QUESTION: Because we would have reached that result had Miranda been decided before Wong Sun, we would have reached the same result in Wong Sun because of the absence of the Miranda warnings.

MISS CARR: As to Blackie Toy but also, the point that I am trying to make is where you, under the test that the Respondent is suggesting here where you consider any aggravated circumstances of the initial arrest in determining voluntariness, that situation is taken care of in the sense of the Blackie Toy situation where the circumstances of the initial arrest are particularly aggravated and a court would probably have found that that statement was not admissible as being involuntary under the Fifth Amendment which, it is our poisition, is the more proper rule to apply to verbal

statements.

As to the statement made by Wong Sun in the Wong Sun decision, it is interesting to know that this Court, in finding that the taint was attenuated as to his statement, considered as one of the factors in attenuation the fact that he had been arraigned before a magistrate and thus informed of his constitutional rights, very similar to the situation we have here where the defendants were given Miranda warnings both by the police officers and by the assistant state's attorney before each of the statements.

QUESTION: Because all of those magistrates' warnings, just as all of the Miranda warnings in this case, could not undo the wrongful arrest.

MISS CARR: That is correct and this Court specifically rejected the "but for" test in the Wong Sun decision, as most courts, since Wong Sun, have.

There are very few courts, there are only one or two exceptions to the rule and they are noted in our brief, but most courts in this country follow the rule that an illegal arrest does not render per se any subsequent statement -- any inadmissible per se, any subsequent statement.

QUESTION: Well, would the rule you are contending for, Miss Carr, lead you to say that if the officers not merely arrested this man but, say, ransacked his house at

the time they arrested him, went through his drawers and his desk and so forth and ultimately came up with incriminating evidence, that that should be admissible without regard that the legality that the arrest or the search --?

MISS CARR: As to the physical evidence of evidence?

QUESTION: Yes.

MISS CARR: That issue is really not directly presented by this case in the posture that we put the exclusionary rule in; in terms of its lack of effectiveness, that is correct.

The fact that the initial illegality technically taints the evidence does not affect its inherent reliability or credibility. Of course, depending on the nature of the evidence.

But one of the basic criticisms of the Fourth Amendment exclusionary rule is the fact that it excludes evidence of unquestioned reliability because of a basically, in most cases, technical violation and in some cases a flagrant violation of Fourth Amendment rights and it does substantial resulting harm to society and very little benefit in terms of any deterrent effect at all.

Quite often, a police officer, when that determination of initial illegality is made, is totally unaware of the disposition of the case because quite often

it occurs on appeal.

QUESTION: It at least vindicates this particular defendant's Fourth Amendment rights, the invocation of the exclusionary rule.

MISS CARR: Not really, because once his rights have been violated, there really is no way to repair the initial violation.

QUESTION: Well, I presume the argument is that one way to try to at least rehabilitate him or to rehabilitate his right is to say that what you get as a result of the violation ought not to be used against him.

MISS CARR: That is one of the premises of the exclusionary rule. We argue that that premise is, in effect, outweighed by the fact that the initial reason for the adoption of the exclusionary rules and its applicability to the states was to deter that type of police misconduct. In practice, it has been shown quite clearly that it does not have that effect.

QUESTION: You are saying, I gather, that if the issue were here, you would also suggest that we scrap Mapp.

MISS CARR: That is correct.

QUESTION: Yes.

QUESTION: If I understood your friend correctly, and he will perhaps explain it if I didn't, he responded to Mr. Justice White that if, after he had got to the police

station and had the Miranda warning -- which he said was not enough to cure this problem -- he then had his counsel come and advise him and then made all these statements, that he would say that that washed out the problem.

Now, are you equating the Miranda warning with advice of counsel, in effect?

MISS CARR: In effect, the situation in those two circumstances is really no different because in that situation all the defendant has done is chosen an alternative action to the one exercised by the defendant in this case.

In that situation, after full compliance with Miranda, he chose not to speak but to confer with his attorney, which is his right.

QUESTION: Well, then --

MISS CARR: It is also his right to waive his right to the presence of counsel and his right to remain silent and to make a statement, as the Petitioner did here.

QUESTION: Then what you are saying, in effect, if I understand your argument, is that once a Miranda warning is given at the station or, alternatively, the man has advice of counsel -- which your friend said would satisfy him -- would in either of those cases, how he got to the police station is irrelevant to the issue.

Is that right?

MISS CARR: In terms of whether or not the arrest

was --

QUESTION: Voluntariness.

MISS CARR: And whether or not the statement is voluntary.

It is our position that if the statement is voluntary, and the product of -- although, the initial custody resulted from an arrest without probable cause, if the statement was preceded by complete Miranda warnings and voluntary waiver thereof, that the statement should be admissible in evidence despite the fact that the initial custody was unconstitutional.

QUESTION: What is the name of that case, a good many years ago, long before I was here, from the Sixth Circuit involving the claim that because the extradition had been wrong, the trial could not take place? What is the name of that case?

MISS CARR: Kichevald?

QUESTION: What?

MISS CARR: Kichevald?

QUESTION: Frisby.

QUESTION: Frisby. Frisby against Collins. That would be an analogy to your argument, wouldn't it?

Do you know that case?

MISS CARR: I think it would and that is an example -- that situation is an example of the alternatives

available to obviate police misconduct. If the situation you are referring to, Mr. Justice Stewart, is the fact that the Court held that there was no -- that how --

QUESTION: How he got into the court didn't make any difference, as long as he had a fair trial.

MISS CARR: Right. But where alternative sanctions in terms of criminal sanctions available for that type of misconduct for a police officer and that could be one of the underlying bases for the opinion.

QUESTION: Right.

MISS CARR: The Respondents would respectfully request that the decision of the Supreme Court of Illinois be affirmed.

MR. CHIEF JUSTICE BURGER: Mr. Isaacson, do you have anything further?

To avoid interrupting you, let me put a question to you along the lines I had just suggested.

What is it about the advice of counsel that, in your view, apparently breaks the chain that distinguishes it from the Miranda warning?

I take it you indicated there was a great difference. I wonder if you would pinpoint that a little more fully.

REBUTTAL ARGUMENT OF ROBERT P. ISAACSON, ESQ.

MR. ISAACSON: I was talking and referring before,

your Honor, to the advice of counsel before any statement was given.

The difference between that situation and the case before this Court is that a party on behalf of Petitioner -- party is present with the Petitioner.

It cuts off the continuing, ongoing taint of the unconstitutional activities by the police department.

Now, these same officers who arrested Petitioner, your Honor, were the same who interrogated him and I submit to this Court that Petitioner had not meaningful choice to view this case merely as a voluntary case, is incorrect.

It totally ignores Wong Sun. Wong Sun involves the protection of both rights.

When Petitioner was arrested in this flagrant and oppressive manner, what chance did he have with these officers? What chance did he have when they laid in wait in his apartment for two or three hours and surprised him with drawn guns?

They were not acting under a color of constitutional law. They were acting with total disrespect and disregard of the Fourth Amendment of the United States Constitution.

They were after the confession, the statement. They stated in their own words it was an arrest for investigation or interrogation and they procured that

statement before they took him before a neutral magistrate.

They procured that statement because that is what they set out to do and what meaningful choice did Petitioner have when they proceeded to give Miranda warnings and we even contest the adequacy of the waiver, when these officers were violating the constitutional rights from the very minute, the very minute he saw them. They were --

QUESTION: Does not a Miranda warning, by its very nature, constitute something that should be given before any appearance before the magistrate?

Once a man has appeared before the magistrate, he doesn't need a Miranda warning, does he?

MR. ISAACSON: Miranda warnings should be given prior to any interrogation, your Honor. The point in this case is that Miranda warnings -- whatever effect Miranda warnings have -- and I would sell your Honors the New Haven study in the Yale Law Journal, 76 Yale Law Journal 1519, where the only indepth study of the Miranda warnings were undertaken.

There the study held -- the study made findings that whatever effect Miranda warnings had, the effect was very small. The accused generally did not believe that the police would be giving him these warnings if, in fact, they didn't have something on him.

But these warnings -- the Miranda case itself only

speaks to the generally oppressive atmosphere of in-custodial interrogation.

It does not speak to the additional coercive atmosphere of these arresting, interrogating officers.

These officers, who deliberately and designedly intended to violate the constitutional rights of the Petitioner.

These were the same two that hustled him off into an interrogation room.

QUESTION: Would your argument be different if they were a different set of officers?

MR. ISAACSON: The case would not be as strong but Wong Sun would still apply. The point is here, what meaningful legal choice the Petitioner had when these same two officers who had flagrantly violated his constitutional rights tell him that he has other constitutional rights and merely recite Miranda warnings to him?

They continued to illegally and unconstitutionally exploit not only the unlawful arrest, but the continuing unlawful detention.

I would cite your Honors to the recent case of Gerstein versus Pugh by this Court which came down in late February and this Court held that the Fourth Amendment includes -- provides protection to a defendant who is unconstitutionally detained.

This is unconstitutional detention going directly from an unconstitutional arrest at gunpoint.

They assaulted Petitioner in his own apartment. They kidnapped him to the police station. They put him in a small interrogation room and they continued to incommunicado interrogate him.

The Miranda warnings were not meant to go after this situation.

QUESTION: What would the situation be, in your view, if he had been taken immediately to a magistrate and the magistrate had done the usual things and then he came back to the police station in custody and was interrogated and made the same statements?

Would you say that the intervention of the magistrate would have the same consequence as the intervention of his lawyer?

MR. ISAACSON: The intervention of the magistrate, your Honor, would attenuate the taint, based on the case that you gave me.

The difference is, we are not asking for a "but for" exclusionary rule. We are merely asking, when the police act unconstitutionally, premeditatively and deliberately and when they are out after statements and when they get those statements -- to be sure, when they procure those statements, before bringing Petitioner before a neutral

magistrate -- in other words, they continually, ongoingly exploit the unconstitutional arrest and detention, those statements must be suppressed because to not suppress those statements is to sanction the police conduct that occurred in the present case.

It is to sanction the investigative arrest.

There was no color of authority by these police officers. They knew they were violating the Fourth Amendment and they did so in an intimidating and frightening manner.

Petitioner had no choice. He had no meaningful legal choice. He had to speak. And his statements should be suppressed, just as physical evidence should be suppressed, pursuant to unconstitutional arrests.

If I might add here that physical evidence is probative, your HOnor. There is no -- when a gun is seized during an unconstitutional -- or after an unconstitutional arrest, there is no doubt but that the Petitioner or that the accused possessed that weapon. It is not as probative as a statement and for that reason, the exclusionary rule should be applied more amply to physical evidence.

But I might add that in Wong Sun this Court held and this Court stated that in view of deterrence and the imperative of judicial integrity, the two underlying rationales behind the exclusionary rule, there should be no

difference -- no difference between the verbal statements and physical evidence.

We do not here have a case where the statements procured from Defendant were unintended or an unintended by-product. The police knew what they were after and they got it. Those statements should be suppressed under Wong Sun versus the United States.

QUESTION: Mr. Isaacson, you said that you are not contending for a "butfor" exclusionary rule?

I understood that -- you did say that, did you not?

MR. ISAACSON: Correct.

QUESTION: Then do I understand that what you are contending for is for an exclusionary rule which will operate to exclude oral or verbal statements depending upon -- i.e., depending upon what, the gravity, the flagrancy or the deliberate nature of the Fourth Amendment violation or the combination of the three. Is that it?

MR. ISAACSON: Because all those circumstances exist in the present case, your HOnor, yes. The case for exclusion is the greatest in this particular case.

QUESTION: Right. But if it is not a "but for" exclusionary rule, then it is a case-by-case exclusionary rule, depending upon how flagrant, how grave and/or how deliberate was the violation of the Fourth and 14th

Amendments? Is that what you are contending, sir?

MR. ISAACSON: That is correct, your Honor.

This position is supported by the --

QUESTION: I just wanted, before you get --

MR. ISAACSON: Yes.

QUESTION: -- to the support for it, I wanted to be sure I understood what your position is.

MR. ISAACSON: that is the position.

QUESTION: And not depending at all on the -- on what happened afterwards, after the initial seizure?

MR. ISAACSON: No.

QUESTION: Or does that take on some of the coloration, too?

MR. ISAACSON: The act of bringing Petitioner before a neutral magistrate --

QUESTION: Yes.

MR. ISAACSON: -- before statements were rendered, before incommunicado interrogation began, would be an act of attenuation.

Nothing like that was done in the present case.

The AOI would have us point, and the model penal code would suggest a rule of exclusion based upon the good faith efforts of police officers.

They would have a rule of exclusion after an unconstitutional right of suppressing statements rendered.

That rule would be subject to a determination of the good faith on the part of the police, the degree and type of their activity, and that case -- excuse me, the proposal by the AOI would clearly apply to exclusion in this case and we urge that your Honors --

QUESTION: So this would be a case-by-case examination, in your submission?

MR. ISAACSON: Precisely.

QUESTION: As to how grave, how deliberate, how flagrant, how shocking was the Fourth and 14th Amendment violation.

MR. ISAACSON: We are not asking --

QUESTION: And what happened afterwards.

You have mentioned the intervention of the magistrate, but suppose the defendant were released on bail and two weeks later he had given this confession?

MR. ISAACSON: In that case, your Honor, clearly attenuated and that is what happened to Wong Sun and Wong Sun -

QUESTION: Right, and this would be regardless of the extent to which the police had flagrantly violated rights initially.

MR. ISAACSON: In that case, the connection between the unconstitutional arrest and the statement would be so attenuated.

If Petitioner was brought before a magistrate and

later returned. But that is not the case at bar.

The case at bar was exploitation by the police and they got the very product which they set out to get. As such, the case for exclusion is the strongest and this Court should not sanction the investigative arrest.

If there are no further questions -- thank you.

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

Thank you, Miss Carr.

The case is submitted.

Mr. Isaacson, you appeared by appointment of the Court, I believe and on behalf of the Court, I wish to thank you for your assistance to the Court and, of course, your assistance to your client.

[Whereupon, at 11:45 o'clock a.m., the case was submitted.]