OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5238

TITLE MAJOR CRANE, Petitioner V. KENTUCKY

PLACE Washington, D. C.

DATE April 23, 1986

PAGES 1 thru 43

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IN THE SUPREME COURT OF THE UNITED STATES

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MAJOR CRANE, :

Petitioner, :

V. : No. 85-5238

KENTUCKY :

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Washington, D.C.

Wednesday, April 23, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:01 o'clock p.m.

APPEARANCES:

FRANK W. HEFT, JR, ESQ., Louisville, Kentucky, on behalf of the petitioner.

JOHN S. GILLIG, ESQ., Assistant Attorney General of Kentucky, Frankfort, Kentucky; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Crane against Kentucky.

Mr. Heft, you may proceed when you are ready.

ORAL ARGUMENT OF FRANK W. HEFT, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. HEFT: Mr. Chief Justice, and may it please the Court, in this case the Kentucky Supreme Court drew an artificial distinction between evidence between confessions' voluntariness and evidence of its credibility. That distinction is premised on the fundamental misunderstanding of confessions' constitutional voluntariness and its factual reliability, and it resulted of a violation of the petitioner's right of cross examination and his right to present a defense.

Reduced to its simplest form, the issue in this case is whether a defendant can be constitutionally prohibited from introducing evidence about the circumstances under which his confession was obtained for the purpose of showing its or challenging its credibility simply because the trial judge has determined a confession to be voluntary and therefore admissible.

At the onset, defense counsel in this case -

indicated in our opening statement that the theory of defense was the circumstances under which this confession was obtained were so -- demonstrated the confession's lack of credibility, and that that lack of credibility created doubt as to the petitioner's guilt.

The prosecution in turn, perceiving defense counsel's challenge as an attack on the trial court's determination of the confession's constitutional voluntariness, moved the defense be procluded or prohibited from introducing any evidence about the circumstances under which the confession was obtained.

The trial judge then ruled that the defense could show evidence about factual inaccuracies in the statements contained within the body of the confession, but would be precluded from introducing any evidence about the circumstances relating to the confession's voluntariness. Consequently, the defense was prohibited from introducing any evidence about the size of the interrogation room, the number of police officers conducting the interrogation --

QUESTION: What issue would that have borne on, Mr. Heft?

MR. HEFT: That bears on the credibility of the confession, the length of the interogation and detention, the number of police officers present, and

the size of the room.

QUESTION: You say that even though it were determined that the confession was voluntarily given, those factors would perhaps induce the jury to believe what?

MR. HEFT: That the confession also lacks credibility. That evidence is --

QUESTION: Why?

MR. HEFT: Well, the evidence obviously is germane to voluntariness. It is also germane to credibility, because here the petitioner's statement of confession is just riddled with factual mistakes and inaccuracies.

QUESTION: But didn't the trial court say you could produce evidence as to inaccuracies?

MR. HEFT: Yes, and indeed defense counsel did introduce that evidence. We introduced evidence about the misstatement of the gun and the fact that an alarm -- the petitioner said an alarm sounded, and there was no alarm, the fact that the petitioner said he stole money --

QUESTION: But they were simply mistakes in the confession.

MR. HEFT: But there is a reason for those mistakes, Your Honor, and the jury was precluded from

hearing any evidence as to why the petitioners made those statements, and the facts surrounding the procurement of the confession are germane to a determination of why the petitioner made those statements.

The petitioner here was interrogated for a period of time, approximately an hour and 40 minutes, and indeed the jury was not informed of the fact that the petitioner was questioned and talked about this particular liquor store robbery for some nearly 45 minutes before he gave the written waiver of his constitutional rights, and before the statement was actually taped.

Surely those circumstances are germane to the issue of credibility, because what happened in that interrogation room does have a bearing on why the petitioner --

QUESTION: I thought the only two facts that you wanted to get in that you couldn't get in was the size of the room and the number of officers in it.

MR. HEFT: That's true. We wanted to get those facts in.

QUESTION: Those are the only two facts that you wanted to get before the jury that you didn't get before the jury.

MR. HEFT: Well, when the confession was --

QUESTION: Is that true or not?

MR. HEFT: Yes, that -- and the length of time of the interrogation.

QUESTION: Yes, well, but you say even if those are the only facts, they were still very relevant to reliability.

MR. HEFT: That's correct. The Kentucky Supreme Court in ruling --

QUESTION: Now, Mr Heft, do you suppose that even if there was an error here, that it could be harmlessw, and that harmless error analysis would be appropriate to apply?

MR. HEFT: No, Your Honor, we don't feel that this error is harmless. We believe that this error is such as to create doubt about the outcome of the trial and to raise doubt about the reliability of the jury's verdict.

QUESTION: Well, do you agree that it is subject to harmless error analysis?

MR. HEFT: Well, I think that based on the Court's most recent pronouncement in Delaware versus Van Arsdale, the fact that restriction on plaintiff's right of cross examination, that certainly is subject to the harmless error analysis.

The Kentucky Supreme Court in determining -- in ruling on this issue relied on this Court's decisions in Jackson v. Denno and Lego v. Twomey, concluded that the petitioner or the defense could introduce evidence about the credibility, the reliability, and the weight of the confession, but the defense was precluded from introducing any eveidence about the circumstances under which the confession was obtained.

We would submit that that is based on an artificial distinction that the courts sought to draw from evidence of credibility and evidence of voluntariness. Evidence about the circumstances under which the confession was obtained necessarily overlaps with the issue of voluntariness and the issue of credibility.

Moreover, the Kentucky court ruled that the trial court's findings on the issue of the constitutional voluntariness of this confession were preclusive, and the preclusive to the extent of preventing the defendant from introducing any evidence about the circumstances under which the confession was given simply because the trial judge had viewed the light on those facts in determining the confession's constitutional voluntariness.

QUESTION: You don't insist that the issue of

constitutional voluntariness has to be submitted to the jury, do you?

MR. HEFT: No, Your Honor. The Kentucky Supreme Court's decision reflects a fundamental misunderstanding about the effect of the trial judge's ruling or his determination that the confession was constitutionally voluntary, and it further fails to recognize the very different purposes served by suppression hearings and a trial.

In a suppression hearing, of course, the judge's function is to determine the evidence about the circumstances under which the confession was obtained and determine whether or not the confession was constitutionally voluntary based on prevailing constitutional standards. The trial judge doesn't determine the confession's truth, its falsity, its credibility, or its reliability.

The jury, on the other hand is charged with -- during the course of the trial is charged with precisely that responsbility. It has to determine the confession's truth, its falsity, its credibility, and it weight in order to make its ultimate determination on the issue of guilt or innocence. The jury simply cannot fulfill that function where, as here, they are precluded from hearing evidence about the circumstances under

which the confession was obtained.

The Kentucky Supreme Court's ruling violates the petitioner's right to present a defense and his right to cross examination because here defense counsel is prevented from introducing evidence that supports his theory of the defense and the confession is so lacking in credibility that it does not have to be believed by the jury and the jury doesn't have to give it any weight.

I think it is probably easy to summarize this by saying that although the jury could hear about the factual inaccuracies of the confession, the jury simply doesn't understand or was not given any evidence to determine why the petitioner made those statements. Why did he misstate such pertinent facts about the circumstances surrounding this crime?

QUESTION: Your client didn't offer to testify. He didn't take the stand.

MR. HEFT: He didn't testify at trial, Your Honor.

QUESTION: Yes, so it is not a question of his having been prevented from testifying about something that he wanted to testify to.

MR. HEFT: No, this is not a Fifth Amendment situation, Your Honor. It is the right to cross

examination. Consequently, we would submit that the effect of the Kentucky court's ruling is to deny the petitioner an opportunity to answer and defend against the state's charge. The petitioner has been prevented from introducing evidence about the circumstances under which his confession was obtained, and the jury cannot therefore make a reliable assessment of the confession's credibility and its weight, because the jury cannot examine the effect of those circumstances under which his confession was obtained for determining its credibility and its weight.

Ostensibly the state interest that was sought to be protected in this situation was to prevent new litigation of the issue of a confession's constitutional voluntariness, but that issue simply can't be advanced or protected by a blanket rule that prevents the defendant from introducing circumstances under which his confession is given, especially where the rule, as here, is premised on some artifical distinction between a confession's voluntariness and evidence of its credibility.

The effect of such rule is to undermine confidence in the outcome, and it substantially diminishes the accuracy of the truthfinding process, because the jury never hears evidence as to the ultimate

question of why the confession was made by the petitioner, why did he make those misstatements of fact, why are those inaccuracies contained within the substance of his statement.

Thus, the jury is unable to assess the effect of those circumstances on the confession's credibility or its weight, and surely that creates doubt and uncertainty as to the reliability and the accuracy of the jury's findings on this issue.

QUESTION: Mr. Heft?

MR. HEFT: Yes, Your Honor.

QUESTION: Suppose this is one thing happened, that you asked the question, what size was the room that my client was questioned in, and the judge -- the other side objects on the grounds that it is immaterial, and the judge sustains the objection without more. Would you be here?

MR. HEFT: I think he would have to make a specific objection saying that the size of the room relates to the issue of the confession's credibility.

QUESTION: And then the judge says, I still think it is immaterial. You would still be here?

MR. HEFT: Yes, Your Honor.

QUESTION: Is this room any larger or smaller than other interrogation rooms?

MR. HEFT: This room here, Your Honor? Substantially larger than the interrogation room which --

QUESTION: Hm?

MR. HEFT: It is substantially larger than the interrogation room --

QUESTION: You mean the courtroom? Is that what you are talking about?

QUESTION: No, I am talking about where he was interrogated.

MR. HEFT: Oh, I am sorry.

QUESTION: How large is the usual interrogation room?

MR. HEFT: I would say -- well, the only one that I have ever --

QUESTION: You don't know, do you?

MR. HEFT: The only ones I have seen are --

QUESTION: You don't know, do you?

MR. HEFT: No, sir, I can't give you --

QUESTION: How can you object to the size?

MR. HEFT: Because the size of this room is small. It was ten by ten or ten by twelve at best.

QUESTION: You don't insist on a room this size, do you?

MR. HEFT: No, Your Honor, but I think that is a factor that the jury can use to determine the

credibility. When the circumstances are viewed, the petitioner being a 16-year-old boy operating at the level ofa third or fourth grade child, is put in this small room with several police officers, that bears on the reliability of what the defendant or petitioner states to those police officers in the course of that interrogation. And that why the room is -- I think the size of the room is so significant.

The Kentucky Supreme Court based its decision on several jusifications, one of which included perceived difficulty in separating evidence of the confession's voluntariness and evidence of its credibility. The Kentucky court reasoned that the separation function is better vested in the trial judge than in the hands of the jury.

That conclusion, however, is based on a misperception of this Court's ruling in both Jackson and Lego. This Court acknowledged in those cases that there is in fact difficulty in separating evidence of a confession's voluntariness from evidence of its credibility, but neither case expressed any doubt that the jury was fully capable of properly using evidence for the purpose of determining a confession's credibility and weight simply because evidence about the circumstances under which the confession was obtained is

introduced.

Neither did the Court express any doubt that the jury could not properly discharge its factfinding function merely because of the difficulty in separating the evidence of a confession's voluntariness and evidence of its guilt.

Indeed, the confidence that the jury can properly use evidence is, I think, a matter of common experience, and it is perhaps best reflected in the multiple admissibility rules, which when applied to this case would hold that evidence of a confession's credibility is not inadmissible simply because it is also evidence of a confession's voluntariness.

As we indicated in the appendices to our brief, every jurisdiction with the exception of Kentucky that has ruled on this matter allows a jury to determine and hear evidence about the circumstances under which the confession is obtained for the purpose of determining either the confession's credibility, its voluntariness, or both.

The second justification offered by the Kentucky Supreme Court for its rule was that the defendant offers very selective evidence when he doesn't testify in cases in which his confession is admitted as evidence against him. The court was concerned that the

jury would not be made aware of the defendant's prior experience with the law, his familiarity with interrogating procedures, and his familiarity with his Miranda rights.

Consequently, the Kentucky court reasoned that exclusion of such evidence would allow the defense to paint an unfair picture for the jury. That perceived danger, however, is unlikely to exist in any case because if the defendant were able to raise improper inferences from the evidence or raise or submit improper evidence. The prosecution surely could object and refute that evidence by making specific objections, asking for admonitions, or even introducing rebuttal evidence.

The justifications for which the Kentucky Supreme Court based its ruling herein do not justify the abridgment of the constitutional rights of the petitioner in this instance. Moreover, I think it is important to note that the state here was allowed to do precisely what the defendant was not allowed to do, and that is to introduce evidence about the circumstances under which the confession was procured. The state introduced evidence that on two occasions prior to giving a statement petitioner was fully advised of his Miranda rights. He was explained those rights in detail

and understood those rights.

Moreover, the state was allowed to introduce evidence that during the course of the interrogation procedure the petitioner was supplied with soft drinks and refreshments by the police officers. Now, obviously, the purpose in introducing such evidence is to demonstrate that petitioner was well treated during the course of the confession, and thus the confession is credible, reliable, and trustworthy.

Surely if the prosecution can introduce evidence about the circumstances under which a confession is given to demonstrate its credibility, the same opportunity cannot be denied the defense where, as here, his Sixth and Fourteenth Amendment rights at stake.

The determination of the Kentucky Supreme Court in its ruling here undermines the historical and the constitutional role of the jury to assess and determine the credibility and reliability of evidence in deciding the ultimate question of guilt and innocence. The findings here of the trial judge were deemed conclusive, and the jury could not consider any evidence about the circumstances surrounding procurement of the confession, because he had already used that evidence in determining the confession's constitutional

voluntariness.

It is important here to realize that the confession's constitutional voluntariness is made without regard to its truth or its falsity, and therefore it is imperative that the jury be advised in full detail about all the evidence under which the circumstances of the confession were procured because they must -- the judge doesn't decide the issue of credibility. The issue must therefore be decided by the jury.

Since involuntary confessions can, of course, be untrue, it follows that as part of the right to present a defense, defendant must be able to fully and effectively cross examine and confront the police officers who participated in the course of the interrogation in order that the jury can assess the effect of the circumstances on the voluntariness of the confession.

We would submit here that the Kentucky Supreme Court violated the petitioner's right to present a defense and his right to cross examination, and that the rule created by Kentucky is not only an artifical distinction it sought to draw, but it is premised on a fundamental misunderstanding of the effect of the role that the trial judge plays in the suppression hearing.

Consequently, the rule enacted by Kentucky results in an impermissible interference in the petitioner's right to present a defense, and we would urge the Court to reverse the decision and remand the case for a new trial. Thank you.

CHIEF JUSTICE BURGER: Very well. Mr. Gillig.

ORAL ARGUMENT OF JOHN S. GILLIG, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GILLIG: Mr. Chief Justice Burger, and may it please the Court, before proceeding with our analysis of the issue in this case, we would like to correct, first of all, what is perhaps a mistake or a different emphasis in the facts, and that is that Major Crane was operating at a somehow diminished level or diminished capacity.

It was true, and it was stated that he was operating at a low academic level in the third or fourth grade, but he was evaluated as a sophisticated delinguent, and in its findings of fact and conclusions of law the trial court stated that he had had numerous experiences with the law, and was street wise, and knew very well what he was doing, and so we simply want to point that out to the Court.

QUESTION: How does that bear on these

curious, almost fantasy responses?

MR. GILLIG: Well, I think it bears on that simply because it is not the basis for these responses. I wouldn't be able to speculate why he said exactly what he said.

QUESTION: Hypothetically, it may be that he had committed so many of these offenses that he got them confused in the record.

MR. GILLIG: Absolutely, Your Honor.

QUESTION: Even assuming that is true, why aren't the circumstances admissible evidence under the Lego case?

MR. GILLIG: Well, our contention is that the rule of the Kentucky Supreme Court in Crane is unexceptional in that it merely states that evidence to be admissible must be relevant, and the Kentucky Supreme Court said that in this case this evidence was simply irrelevant.

Now, Lego said that the states have been as free since Jackson v. Denno as they were before to formulate their own rules of procedure so long as adequate safeguards are provided, and we believe that the Kentucky Supreme Court has done just that. It is not anything unusual or exceptional to say that evidence should be relevant, and the trial court merely made a

ruling that the evidence was relevant, and that was upheld by the Kentucky Supreme Court.

So, we don't believe that Lego approves the procedure which was used by Kentucky in this case, but it doesn't really address the issue that is presented here, if indeed there is an issue presented.

QUESTION: Well, is your submission that any evidence that went into the voluntariness finding by the judge should -- is wholly irrelevant to the reliability of the confession?

MR. GILLIG: No, Your Honor, not at all. In fact, if I could read just briefly from the holding of the Kentucky Supreme Court, it said once a hearing has been conducted pursuant to the rule, and the trial court has made its ruling, then that ruling or finding that the confession was voluntary is conclusive, as this Court permitted in Jackson versus Denno.

The trial court may exclude evidence relating to voluntariness from consideration by the jury when that evidence has little or no relationship to any other issue. This shall not preclude the defendant from introduction of any competent evidence relating to authenticity, reliability, or credibility. So we are simply saying that all this rule does is say, or reaffirm, really, the basic --

QUESTION: Well, then, this case just boils down to you would think there would be some evidence that if the trial judge excluded, it would be error. Some evidence that was introduced at the voluntariness hearing you would think should be admissible.

MR. GILLIG: I would say it could be argued that if that evidence had been used in the voluntariness hearing, then you could present the argument to the trial court that that issue had already been taken care of.

QUESTION: I know, but can you think of any evidence that should be admissible with respect to reliability that was used at the voluntariness hearing?

MR. GILLIG: Well, I think that would depend quite a bit on the case.

QUESTION: So you can't even imagine any?

MR. GILLIG: No, sir. I would say as a matter of fact we could say that assuming the petitioner in this case, if he were claustrophobic, perhaps, then you could lay a foundation that that might be relevant --

QUESTION: So really the Supreme Court's reservation really doesn't mean very much. What you are saying is that they said that, but you can't imagine any evidence that the Constitution would require be admitted.

MR. GILLIG: Well, if the issue of voluntariness is a settled issue --

QUESTION: It is settled. It is held to be voluntary.

MR. GILLIG: Yes, sir. And then in that case there may be other cases in which the evidence which is presented at the suppression hearing is relevant to credibility, or there may not.

QUESTION: Why doesn't the evidence as to the size of the room here which the defendant wanted to get at by cross examination, why doesn't that bear on reliability in the sense used by the Supreme Court of Kentucky?

MR. GILLIG: Well, I beliee that -- well, of course --

QUESTION: The fellow was in a fairly small room, you know, a hot -- you know, let's assume a hot sweatbox, four or five officers there. You know, maybe he wasn't thinking too clearly.

MR. GILLIG: Well, of course, that brings up another point. His contention was that he made up a story to please the police, so I don't think if he were in a sweatbox type situation that that would necessarily relate to his propensity to make up a story to please the police, just as I might, say, make up a story to

please a teacher, or some other authority.

QUESTION: I thought that often defendants under interrogation felt a compulsion to say something, tell something to satisfy the police and get them off his back.

MR. GILLIG: Well, if that is the case, if that is the basis for him saying that, then we would argue that it would be a case of coercion, and then the confession would be involuntary in any event, but we are not saying that it is impossible for another court to disagree with the findings of the Kentucky Supreme Court that this evidence in fact was not relevant to this case. Another court may so find, but that still doesn't go back to the basic premise presented by the case, which is simply, once the voluntariness issue was decided, that some evidence which is presented in the voluntariness hearing may then be properly excluded by the trial court at the regular trial.

If we could point out, in the petitioner's petition for cert to this Court, in some language that was dropped in a later brief, he said that in this case the fact that a petitioner was given his Miranda warnings wouldn't have made any difference to this case. The Miranda warnings, the fact that he was given his Miranda warnings might well and would indeed bear on

the voluntariness of his confession, but it really isn't relevant, as petitioner has stated before, to determining whether or not he made up a story to please the police.

If the Court disagrees with that finding of relevance, then that would be another factor to this case, but it doesn't go back to the basic premise that evidence, to be admissible, must be relevant, and that is all this opinion says from the Kentucky Supreme Court.

QUESTION: Mr. Gillig, may I interrupt? I think one can read -- the Kentucky Supreme Court opinion is a little bit ambiguous, I have to agree, but having read the dissent, and the dissent seems to have read the majority as saying that voluntariness and credibility are sort of mutually exclusive categories, and that if it relates to voluntarines, then it is almost presumptively not relevant on credibility, it seems to me one can read the Kentucky Supreme Court opinion that way, as saying they are two quite separate issues, and you are not defending that interpretation of the opinion, if I understand you. You are saying we should read the opinion differently.

MR. GILLIG: Yes, I would -- I am not defending the sense interpretation of this opinion. In

the opinion it says that the evidence in this case related solely to voluntariness, but it also said, having little or no relationship to any other issue, and if evidence has little relationship to any other issue, it may have some relationship, so I think there is a bit of ambiguity there that would enable a finder of fact or a trial court to conclude that, yes, there can be some, there can be evidence which is relevant to the voluntariness that is not relevant to credibility.

Of course, it works the opposite way as well. The trial court in making that determination in the suppression hearing is not permitted to examine the reliability of the confession in determining whether or not the confession is voluntary. So, to that extent, the decisions of this Court have indeed, I think, recognized a distinction.

QUESTION: Well, if -- go ahead.

If we thought the dissent, however, was correct in interpreting the majority opinion below, I take it that you would agree we should reverse?

MR. GILLIG: You are saying if we read --

QUESTION: If we read the majority opinion like the dissent did, do you agree we should reverse?

MR. GILLIG: You are saying if you would read the opinion to say that all circumstances relating to

voluntariness are automatically excluded from the --

QUESTION: Yes. Is that what the dissent thought the majority said?

MR. GILLIG: Apparently -- I believe so, but I --

QUESTION: Suppose we agree that that is the way we read the opinion, too.

MR. GILLIG: Well, I wouldn't believe that that would be proper, but if it is, if you do read it that way, I wouldn't think it would be reversible error, because I believe that you could go ahead and -- if there is a distinction to be made, then it may be the important factors which are to be weighed might justify making that distinction in all cases and saying, well, if it is raised in the voluntariness hearing, and if it relates solely to voluntariness, then it can't be -- I am getting very confused.

QUESTION: That is all right. Join the crowd.

MR. GILLIG: The purpose of the suppression hearing is to determine the voluntariness, and credibility is excluded. When you determine credibility, we would argue simply that the court's opinion says some evidence may be excluded --

QUESTION: Right.

MR. GILLIG: -- and some may not.

QUESTION: Right.

QUESTION: Yes, but you say that we affirm this on the basis of what a dissenting opinion said it means.

MR. GILLIG: I think we should affirm -- I think this case -- it should be affirmed on the basis of what the majority said, not on the basis of what the dissent said.

QUESTION: I know it is -- maybe I am ignorant, but what is avowal testimony?

MR. GILLIG: Well, in that case, what they simply did was, they took the police officers aside.

QUESTION: How does avowal testimony differ from other testimony?

MR. GILLIG: Well, they testified without the presence of the jury, so that we would have a record of what they would have said if they had been allowed to testify as they wished.

QUESTION: And their tesimony was outside of the jury.

MR. GILLIG: Yes, Your Honor.

QUESTION: May I ask this question? Was this 16-year-old given any opportunity to call his parents?

MR. GILLIG: Yes, Your Honor. According to

the testimony of the police officers, he was able to do practically anything he wanted to. If he had requested a call, they certainly would have done that. He requested several things, to go to the restroom, and he requested a coke, and a bag of chips, and that kind of --

QUESTION: Was he specifically given the opportunity to call his parents?

MR. GILLIG: I don't know if they specifically said, you may call your parents if you want. They made numerous efforts to contact his mother and his grandmother, and I believe the record reflects ten attempts in a period of about two hours.

QUESTION: Was that before or after the interrogation?

MR. GILLIG: I believe this was beginning before and continuing all the way through. He was only actually interrogated for about 45 minutes, as we document in our brief. He was, of course, in custody for a longer period of time, but the actual interrogation was very short.

QUESTION: What was the IQ of the defendant?

MR. GILLIG: I don't believe that is reflected in the record.

QUESTION: There is some testimony, I think, to the effect that he was in the fourth grade or had

ability at that level.

MR. GILLIG: Yes, Your Honor. He had been evaluated six months prior to this by a social worker. He was in a program for juvenile delinquents essentially on another crime, and had been evaluated as operating at an academic third or fourth grade level. The trial court heard Major Crane testify at the suppression hearing, and at the conclusion of that time the trial court simply said that this court recognizes that there are many people who have graduated from high school every day which are operating at the third or fourth grade level. The trial court -- and the social worker had evaluated him as a sophisticated delinquent who knew how to manipulate people to get what he wanted, and the trial court again found him to be street wise.

QUESTION: Do high schools in Kentucky graduate people who are third and fourth grade?

MR. GILLIG: I think that happens in Kentucky. I think it happens everywhere. The fact that one has a high school diploma doesn't necessarily mean that one can read, unfortunately, but he certainly didn't have a high school diploma in this case. I don't believe that is in evidence. But we do believe that his prior experiences with the law are the kinds of factors which are relevant to a suppresseion hearing and which

are brought out fully before the trier of fact but which never -- would never make it to the jury, if that is -- if the issue of voluntariness is then presented to the jury.

So, we think that that is an important factor. I would point out that in the Kentucky Supreme Court's decision they never attempted to define voluntariness and credibility. Perhaps some of the issues that the Court seems to be concerned about are really what is going to happen in the next case when a confession comes down regarding another factor, whether the Kentucky Supreme Court would find that relevant or irrelevant, but the holding in this case, we believe, is very limited. It simply says that the evidence has to be relevant, and it says because the voluntariness hearing has been conclusively decided, that forecloses some items of evidence, and then it lists two of those items.

QUESTION: That is per se.

MR. GILLIG: No, sir, I don't believe that that --

QUESTION: If it is in the credibility, it is out at the trial.

MR. GILLIG: No, sir, I don't believe so. I think what they are saying is that the trial court in

each case at the conclusion of a suppression hearing, assuming the situation would reoccur, would then evaluate what the defendant was seeking to present. I don't believe that it is enough for a defendant to stand up and say, okay, we argued voluntariness, we argued that we were held in a small, windowless room, and that was voluntariness. Now it is the trial, and we don't want to argue voluntariness any more, we want to argue credibility.

QUESTION: I have listened to that, but I can't find it in the opinion any place.

MR. GILLIG: Whether that --

QUESTION: The opinion that is before us is just the opposite to what you say. It said if it is in the credibility, then it is out.

MR. GILLIG: No, sir, I believe it says that -- in this case what it said was that because these issues had been presented to a voluntariness hearing -- it is not really because it is presented to the voluntariness hearing. It is whether it relates to voluntariness. These issues might never have been even raised in the voluntariness hearing, but when the petitioner comes back and says, what we want to do is show that I was held in a small, windowless room, it doesn't matter whether that issue was faced in the

suppression hearing. The trial court can say, but that is a voluntariness issue. You are arguing voluntariness, and that has already been decided, and so that evidence is simply irrelevant. We don't need to present it to the jury, and there are going to be significant disadvantages to the state if we do present it.

QUESTION: Take an old case from Mississippi where they took Hank Ellington and put a rope around his neck and pulled him over a rafter and said they would let him down as soon as he confessed, and assume that was brought out in the admissibility hearing, and it was held to be admissible. Would you be prevented from bringing that out? Would that be immaterial?

MR. GILLIG: I believe that the situation there is not presented in this case, because that is --

QUESTION: I agree. I agree.

MR. GILLIG: That is a fact. It is a disputed fact, in other words, whereas the facts which were sought to be admitted here were facts about which there was really no dispute.

QUESTION: There was no dispute on my Mississippi facts.

MR. GILLIG: Oh, I see. You are saying that the police officers didn't say that that didn't happen.

They accepted, they said, yes --

QUESTION: They bragged about it.

MR. GILLIG: Well, in that case, then of course the confession would be involuntary, and it would never be admitted.

QUESTION: But suppose it had been admitted as voluntary. And the defense counsel sought to bring out tgat the man was hung. Would you think that was immaterial?

MR. GILLIG: Your Honor, I believe that -- I believe that it probably would be immaterial. That is not what the Supreme Court has said, so I can't really say what the Kentucky Supreme Court would do.

QUESTION: Well, the Supreme Court said it would be immaterial because it was in the suppression hearing.

MR. GILLIG: No, Your Honor, I don't believe the Supreme Court has made the ruling that strict. I don't believe they said simply --

QUESTION: Okay, it doesn't apply to hanging.

MR. GILLIG: But I believe, on the other hand, that you would be talking about the necessity, perhaps, for having a second layer of defense, and that has not been constitutionally required by this Court. We would have to rest, I believe, on this case on the fact that

the suppression hearing is there to make an initial determination of voluntariness.

QUESTION: You have used the word, in fact, we all use the word voluntariness. Do you think voluntariness is kind of an either/or proposition, or do you think there are possibly degrees of voluntariness, and some confessions are a good deal more volunteer than others?

MR. GILLIG: Well, certainly there are degrees of voluntariness.

QUESTION: And here the finding in the suppression hearing is that it crosses at least a minimum threshold sufficient to make it admissible, but could it not be possible that it would still be relevant -- the whole area of how voluntary it was would nevertheless be relevant on the question of credibility in almost every case?

MR. GILLIG: Well, I believe --

QUESTION: He walks in himself without any pre-warning and says, I want to confess to a crime I committed last Thursday at 8:00 o'clock. You get one picture there of somebody who sits in a small room with four police officers for an hour and a half and ends up by confession. Maybe that is not quite as voluntary as the first example --

MR. GILLIG: Yes, Your Honor.

QUESTION: -- even though it would be admissible.

MR. GILLIG: And so I think that in each individual case then it would depend on what the defendant was arguing when he got to trial and said I want to argue credibility now, so that you wouldn't just say just because the defendant lost the voluntariness hearing, therefore all circumstances of the confession are always admissible, which is exactly what petitioner wants. Petitioner wants that to say there is no distinction, therefore all the facts are admissible, and so we would disagree with that. It would be an evaluative thing by the trial court in the first instance --

QUESTION: What would be wrong with a rule that said this opens the gates and let everything in to tell the full story of the circumstances surrounding the confession and the extent to which it was voluntary, how tired he was and all that? What would be wrong with a rule that said all of that evidence would just come in, and not worry about whether you call it voluntary or credibility? What would be wrong with such a rule?

MR. GILLIG: Well, of course, that is essetially the Massachusetts rule. What we argue is

wrong with the Massachusetts rule, two things. First of all, the trial judge who is making the initial voluntariness determination, if he knows that all that evidence is going to be presented to the jury again, then he has a reason to just sort of take a brief look at that confession and maybe not give the voluntariness hearing, the initial suppression hearing the emphasis that it deserves as a binding, as a final, as a determination of that defendant's rights, whether they have been violated --

QUESTION: So it is only final to the extent that it governs admissibility before the jury. It is not final in any other sense.

MR. GILLIG: Yes, under the Massachusetts rule, but he may tend to just pass that along pro forma, and then you go back to what the result this Court disapproved of in Stein versus New York, which was also a case where the trial court would simply look at the confession, see if there was a reasonable issue, and then send it to the jury, and the problem this Court found with that, and the problem that is still, we believe, in the Massachusetts rule is that once the jury gets the confession, makes the decision, there is no real way to say, well, did they rely on the confession and convict because of the confession, or did they not

rely on the confession and convict him anyway, and that can cause problems later on for appellate review.

QUESTION: You are really arguing that the rule that you favor is better for the defendant. That is what you are really arguing.

MR. GILLIG: Yes, sir, we believe so.

We would simply say again that there are some sound policy reasons for this rule that have been enumerated by the Kentucky Supreme Court. The Kentucky Supreme Court pointed out first that there was a difficulty in separating the factors relating to voluntariness and credibility, and felt that this determination, because there is some difficulty, is best left to the trial judge, not in the minds of the jurors.

The Kentucky Supreme Court pointed out that voluntariness is a settled issue, so that to the extent that evidence would relate to voluntariness, then it is not really necessary to retry that issue, and finally, if the evidence of voluntariness is retried to the jury, then there is the possibility of confusing the jury, there is the possibility that the defendant's previous experiences with the law would not get in, there is the possibility that his familiarity with Miranda rights and other things that would be relevant to the voluntariness hearing simply wouldn't be introduced, and the

petitioner here has made the argument that if the prosecution could rebut, if the defendant got up and because he didn't take the stand created the impression that he was somehow misled by the police or coerced by the police essentially and arguing the voluntariness all over again.

The problem is that under Kentucky he would not be able to rebut, even if the petitioner takes the stand under Kentucky law the most you can do is ask if he has ever been convicted of a felony, and then when he says, yes, I have, then that is the end of it. You can't say, well, how many times have you been arrested, how many times have you been interrogated. A defendant can't say, well, I have been interrogated ten or twenty times just this year. It is simply not possible to effectively rebut a presumption, assuming such a presumption would be created.

One final point that the petitioner brought out. He says that Kentucky stands alone on this issue. I don't believe if the Court examines the cases which are presented in the appendix to his brief that you will find that Kentucky does stand alone. We are not saying that other states stand with us. We are not saying that we stand alone. The problem is, it is very difficult to sort out exactly where the states would come down on

this issue, because it has not really been presented.

In many of the citations in his brief, for example, citations to rules, State Rules of Evidence, Number 104, those are all patterned on the Federal Rule of Evidence 104, and all that says is that no evidence relating to the weight or credibility of the confession shall be excluded, and that is exactly what Crane versus Commonwealth says.

So, simply because a state court cites to their own rule of evidence which is patterned on Federal Rule of Evidence 104, it doesn't mean that they have looked at this issue or they have decided this issue. As we point out in our brief, we believe that the impetus for the Kentucky court's ruling or the Kentucky court's holding in Crane is simply that it is recognized the degree to which this Court has adjusted what may come into a voluntariness confession and simply recognizes that they don't need to retry that issue before the jury.

And so for these reasons we believe that the rule of the Kentucky Supreme Court in Crane is a valid rule. It doesn't break any new ground, really, and for that reason it should be affirmed.

If there are no other questions.

CHIEF JUSTICE BURGER: Very well. Do you have

anything further, Mr. Heft?

ORAL ARGUMENT OF FRANK W. HEFT, JR., ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. HEFT: May it please the Court, I have just got a couple of points to make on rebuttal.

First of all, to answer just a couple of the factual questions that were raised during questioning by the Court, in regard to Justice Powell's question about the petitioner being able to call his parents, he did state at Page 19 of the joint appendix that he requested to call his parents and he was not permitted to do so by the police. Of course, the police did testify in the suppression hearing that they made efforts to contact his family.

I would also like to point out that it seems to me that the questions relative to how the dissent in this case interpreted the majority's view of the rule is a point well taken because here on Page 29 of the respondent's brief the respondent argues that if the trial court rules the confession voluntary it admits into evidence none, emphasis by the respondent, none of the circumstances surrounding procurement are relevant towards credibility. The dissent correctly analyzed the Kentucky Supreme Court rule here.

Moreover, if, as has been indicated in our

brief, this is not the kind of situation, I believe, in which the Court can approach the issue or resolve the issue by a bright line approach, because evidence of credibility necessarily overlaps with evidence of voluntariness. What the responding is arguing is, in effect, if we can somehow -- is that the trial -- first of all, defense counsel is going to have to make some kind of a determination pretrial what is evidence of voluntariness and what is evidence of credibility. Secondly, the trial judge is going to -- every trial judge in the country is going to have to make that determination, and then every appellate court in the country is going to have to review that decision. We think that would create an administrative and judicial nightmare.

QUESTION: Is it possible that this is, assuming error, that it is harmless error?

MR. HEFT: No, Your Honor, I don't believe this is harmless. As I indicated earlier, I believe that the error here affected the outcome and raised doubts as to the reliability of the jury's verdict. Here the evidence --

QUESTION: Well, because it raised doubts about the reliability of his confession?

MR. HEFT: Primarily because the confession

was the principal piece of evidence in this case. We pointed out in our brief the evidence of guilt was not overwhelming, because there was no physical evidence to link the petitioner to the crime. The statement made by -- the inculpatory statement made by the co-defendant, we pointed out, was motivated in order to minimize his culpability here. The statement that the petitioner was alleged to have made to his mother is likewise subject to scrutiny, and it seems to me to demonstrate a lack of credibility, because here we have a young man who has demonstrated a propensity to confess to crimes he has not committed.

We would urge for those reasons that this ruling -- the error cannot be harmless. Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:45 p.m., the case in the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)