ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DARRYL JAMES, Petitioner V. ILLINOIS

CASE NO: 88-6075

PLACE: WASHINGTON, D.C.

DATE: October 3, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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DARRYL JAMES, :

Petitioner :

v. : No. 88-6075

ILLINOIS :

- - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, October 3, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 p.m.

APPEARANCES:

MARTIN S. CARLSON, ESQ., Chicago, Illinois, on behalf of the Petitioner.

TERENCE M. MADSEN, ESQ., Assistant Attorney General of Illinois, Chicago, Illinois, on behalf of the Respondent.

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P R O C E E D I N G S

(1:50 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-6075, Darryl James v. Illinois.

We'll wait just a moment, Mr. Carlson. Very well, Mr. Carlson, you may proceed.

ORAL ARGUMENT OF MARTIN S. CARLSON

ON BEHALF OF THE PETITIONER

MR. CARLSON: Thank you. Mr. Chief Justice, and may it please the Court:

This case presents the question of whether statements obtained from a Defendant as a result of an arrest made without probable cause may be used substantively as an admission to rebut the testimony of a defense witness.

Mr. James, the Petitioner, was found guilty of murder and attempted murder arising out of a shooting incident in Chicago. And the following day, the day after the shooting, he was arrested by two police officers with -- without a warrant and taken to a squad car where he was questioned concerning the color of his hair.

QUESTION: He was arrested in his mother's beauty salon while he was having his hair dyed and reshaped?

MR. CARLSON: Well, the testimony of the police officer was that he was discovered under a hair dryer. His statement to the police, which the trial court excluded as

having been the fruit of the unlawful arrest, his oral statement was to the effect that he was there to get his hair dyed black and curled.

At trial the state presented five members of the group who were with the deceased and the other shooting victim. They were all friends and they all identified Petitioner as having been the -- the third man in the other group and the one who was the shooter. They also all testified that at the time of the shooting --

QUESTION: Mr. Carlson, could you slow down a little bit? I think some of us are having a little trouble understanding you.

MR. CARLSON: Yes, sir. They also testified that at the time of the shooting Petitioner was wearing what they called a butter-style hair -- hair which is a slicked back hair, reddish-brown in color. That was the substance of the state's case, was the eyewitness testimony.

For the defense, in addition to presenting a police officer who had interviewed some of the eye witnesses and who related certain prior inconsistent statements, Petitioner called a friend of the family named Jewel Henderson, who testified that on the day of the -- shooting she had taken Petitioner to a high school to transfer, to pick up his transcripts and to register at another high school and on that day his hair was, in fact, black and among other things he was

not wearing an earring, also. That was also testified to by the state's other eyewitnesses.

At this point, the prosecution asked the Court, or announced to the Court that it wished to use Petitioner's suppressed statements for the purpose of, as it was erroneously called, impeaching or rebutting Miss Henderson's testimony.

Defense counsel objected on Fourth Amendment grounds, calling, of course, attention to the fact that this Court's decisions had only allowed the use of tainted evidence to impeach the testimony of the Defendant himself.

The trial court rejected that argument but did hold a voluntariness hearing at which the two arresting officers testified, and having found the statements to have been voluntary, the court ruled that they could be used, as he put it, to impeach and rebut Miss Henderson's testimony.

Thereafter, Officer -- Officer Glynn, one of the arresting officers testified and related, in essence that in the squad car he asked the Defendant what his hair color was the day before and Mr. James responded that it was reddish-brown and combed straight back.

Later, approximately two hours, I believe, at the police station, he was interrogated again and at that point, he reiterated that the color was brown and he also was asked what -- what he was doing at the beauty parlor, and according

to the detective Respondent -- or Petitioner stated he was there to get his hair dyed black and curled to change his appearance, and all of those statements were -- were used -- were presented to the jury in rebuttal.

Counsel for Petitioner requested a limiting instruction to the effect that these statements could not be used as evidence of guilt, but only as bearing on the credibility of Miss Henderson.

The trial court refused the written instruction tendered by the defense but did give an oral instruction which in effect said that this testimony was offered to prove that his hair was black -- I'm sorry, was red.

On appeal the Illinois Appellate Court reversed primarily based on --

QUESTION: Do you think -- Mr. Carlson, do you think the trial court's oral instruction was or was not the equivalent of an instruction to use it only for determining credibility?

MR. CARLSON: It definitely was not limiting.

QUESTION: So, it was -- the -- the trial court allowed it, in its instruction, to be used for, in effect, rebuttal, to be considered substantively?

MR. CARLSON: Definitely. I could -- he didn't mention the word "impeaching," but the instruction read, it's "offered for the purpose of impeaching the testimony of Miss

Henderson, who stated to you that the Defendant's hair was black," but then it continued, "This evidence is offered to refute and rebut that testimony, that it was not black, but it was red, at the point the officer said the Defendant told him it was red."

I mean that's just saying, in effect --

QUESTION: Do -- do you agree that if he had made it clear that it could be used only for so-called impeachment --

MR. CARLSON: No, our position is --

QUESTION: -- it would have been all right?

MR. CARLSON: -- that it would be impossible, that even the instruction tendered by defense counsel could not have done the job. This kind of impeachment, if you will, is really rebuttal. It is designed to disprove --

QUESTION: So, there isn't any instruction that you can think of that would have cured this?

MR. CARLSON: That -- that would not -- that would have solved the problem of it being used for its assertive value.

QUESTION: Well, but at -- at least you would have a different question here, if that instruction had been than, in your view, you have now?

MR. CARLSON: Well, no. I believe we would have still been here, because I think the -- the instruction intended by defense counsel was a really totally damage

control, or last resort. His objection was to the admission of the statement, and when the court repeatedly overruled that objection, which was made several times during lengthy hearings, he said well then, at least you've got to give me a limiting instruction.

But I don't believe that, given the -- the logical basis of this kind of impeachment, of -- of contradiction, that you can tell a jury that a witness will be discredited unless you also tell them that they've to believe the truth of the matter asserted in the impeaching or rebutting evidence.

So, our -- our position is that you can no way you can logically, or -- or -- or give an instruction to the jury that would make any sense as a matter of logic, that they could follow and that that could be effective in preventing --

QUESTION: You say that an instruction saying that the Defendant's statements were introduced only to impeach the defense witness' testimony would -- would have, what, made no sense?

MR. CARLSON: Well, I think if you just said impeach, I'm not sure the jury would understand that. I think if --

QUESTION: Well, say to discredit.

MR. CARLSON: To discredit or to -- as it bears on the credibility of the witness, is the general one in

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Illinois. Well the problem with that is that it will bear on the credibility only if they believe the Defendant's statement is true, if they believe it for its substantive value. So, to say that they can consider it only for a purpose that is nonsubstantive, but when it's -- when it's obvious that purpose requires substantive use, like I say, is logically -- it just doesn't make any sense.

As the -- the dissenting opinions in the Illinois Supreme Court -- I think the problem in the Illinois Supreme Court, was their failure to recognize the majority opinion, that what we're talking about here is contradiction, not self-contradiction.

QUESTION: But of course, those aren't constitutional principles themselves, you know, the law of evidence and the circumstances under which you can impeach a witness and what -- what they generally don't have any constitutional basis.

MR. CARLSON: Certainly, but the problem is, what does have constitutional magnitude is whether unlawfully seized evidence is being used to prove a Defendant's guilt -- as substantive evidence of guilt. This Court has never, outside of the good-faith cases, has never allowed at trial evidence obtained unlawfully from -- from a defendant to be used to prove his guilt.

QUESTION: Well, I guess the Illinois Supreme Court

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did conclude that that was error.

MR. CARLSON: No, they did -- did not, Justice O'Connor.

QUESTION: And thought it was harmless?

MR. CARLSON: No, but that was the alternative argument that we had made. What they held was, there is no error in admitting the statements and that any error in the limiting instructions or in the closing argument was harmless. But their -- their -- their basic holding was that there was no error in admitting the statements in the first instance.

QUESTION: But if it was error, it was harmless?

MR. CARLSON: No. No, again, they did not reach the question of whether the admission of the statements was harmless. They only said that, assuming that was proper, any error in limiting instructions or closing argument was harmless.

The Illinois Appellate Court did address that question. They held that it was -- I'll say not harmless there in their opinion, but the Illinois Supreme Court did not address that question.

QUESTION: Well, but the Illinois Supreme Court apparently thought that there would have been error, and real error, if -- unless there was an instruction that the evidence could be used only for impeachment purposes.

MR. CARLSON: Yes, but I think that's, again, it's

our position and I think the position of the dissenting position in the Illinois Supreme Court was that the majority overlooked the fact that there -- this is not like the case you had in Havens or Walder or Harris -- or Harris. That you could not use -- you could not impeach by contradiction and not use it for its assertive value.

QUESTION: Well, why is it any different than Havens? Havens was the T-shirt case.

MR. CARLSON: That's correct.

QUESTION: Where the Defendant has assisted his accomplice by cutting up his T-shirt to make an extra pocket in the -- in the drug courier and then he puts the torn-up T-shirt in his own luggage. How can you possibly say that in -- in that case, it was used only for impeachment, and that in this case, it cannot -- the statement cannot be used only for impeachment? I don't understand the difference in the -- in the case.

MR. CARLSON: It isn't as clear cut in the case of physical evidence as it is in the case of unlawfully obtained statements.

QUESTION: Right. Physical evidence is more -- is more difficult, isn't it? The T-shirt's there for the jury to see. They're staring at it.

MR. CARLSON: But it's not assertive. It's, at most, circumstantial. Furthermore, I think that the real

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impeachment in Havens --

QUESTION: No, but it's accompanied -- it's accompanied by an assertion of the police officer that the T-shirt was found in the luggage.

MR. CARLSON: Right, but that -- that was not a direct proof of the fact that he was involved in the cocaine -- it was a bit of evidence, and yes, it could be used substantively --

QUESTION: What you're telling us that you can't distinguish the two. I'm saying, how could you distinguish the two in Havens.

MR. CARLSON: Well, this Court did, but I -- I think --

QUESTION: So, you're saying Havens is wrong?

MR. CARLSON: No, I'm saying that Havens was predicated on the assumption that the instruction in that case could effectively tell the jury not to use it as evidence of guilt. I mean, the Court held that the evidence was not admissible as substantive evidence of guilt.

QUESTION: Well, none of our cases, though, have ever said that there has to be an element of self-contradiction in order to have evidence that undermines credibility of a witness. That would be a very strange rule and while we've had cases that have involved self-contradiction, I don't think you can find in them any

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statement that that's the only way that credibility of a witness can be undermined, can you?

MR. CARLSON: No, that's true, there -- there have been --

QUESTION: So let's suppose that that's a perfectly legitimate way of undermining the credibility of a witness, to introduce rebuttal evidence of this kind.

MR. CARLSON: Well, I think --

QUESTION: Then the question becomes whether it must be accompanied by an instruction so that it's -- it's limited in its use to that purpose. As to that question, I guess the Illinois court, as I understood it, thought it would be harmless.

MR. CARLSON: Well, the court in this case thought that the instruction given by the trial court -- the oral instruction, in conjunction, if -- and they didn't even acknowledge that it may have been erroneous -- in conjunction with the standard Illinois instruction on impeachment by self-contradiction was adequate, and that -- if -- if -- they said if it wasn't, it was harmless.

But getting back to the issue of physical evidence, I think, again , that -- that -- it -- it's not as clear-cut. I can't deny that. But I don't think -- it will be a rare case, I think, indeed, when you -- when you would be able to impeach a defense witness with physical evidence.

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It's hard to conceive in the abstract of a case where physical evidence could somehow be inconsistent with something that a defense witness said as opposed to what a defendant might have said, because generally it is seized from the defendant, from his premises or whatever, and oftentimes it just won't be there. It just won't be relevant to their testimony.

QUESTION: Mr. Carlson, I suppose it's evident to you that beginning with the Walder case in 1947, the Harris case in 1971, the Havens case sometime in early '80s, the Court has gradually expanded the use that has been permitted of this sort of statement. And what great difference does it make, other than another step of expansion, if we were to say here that so long as the government doesn't use it in its case in chief, it's perfectly permissible to use it substantively?

MR. CARLSON: Well, our position is that the danger, or what's wrong with that is the -- is the deterrent function of the exclusionary rule, that it would add significant incentive to the police to make a lot more arrests.

QUESTION: Do -- do -- do -- do you think fewer Miranda warnings would be given if -- if -- if that rule came from this Court?

MR. CARLSON: Well, this was a Fourth Amendment case.

QUESTION: Well, few -- fewer -- fewer -- less

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attention -- less attention paid to the law regarding searches and seizures?

MR. CARLSON: Well, I -- I -- I think that based on -- as this Court always has, it's based its -- its determinations on applying the exclusionary rule and its assumptions on police conduct, and here we're dealing with the core -- the center of the officer's attention is, his zone of primary interest, the criminal trial.

It seems to me that, as this Court held in Brown and Dunaway in the unlawful arrest statement cases, that there is indeed a need to deter seizures for investigation, seizures on bare suspicion, which I think is what we had here.

QUESTION: But why -- why would it be inadequate deterrence to say that it extends only to the government's case in chief?

MR. CARLSON: Well, our -- our position is, that -- that's what we -- that as the law now stands, the vast majority of authority is that you can only use tainted statements to impeach the Defendant's own testimony. Now, granted -- granted that there will always be the deterrent of the bar in chief, but if -- if the state -- if the officers feel that -- that they would be able to have independent evidence to get past the restricted finding, I think the value to them of -- of, under this new rule of the Illinois Supreme Court would be --

QUESTION: Yes, but they can't -- they can't anticipate that they would -- they can't manufacture the opportunity to use it. The way the Illinois court put it, the -- the evidence you want to contradict would have to be brought out on direct examination of the defense witness.

MR. CARLSON: That -- that's correct, the Illinois Supreme Court --

QUESTION: So, that the officer -- the prosecution isn't permitted to -- to bring this statement out that would justify introducing this illegally seized evidence on cross-examination.

MR. CARLSON: That's true, but --

QUESTION: It's the defense that is offering this statement that is contradicted by illegally seized evidence.

MR. CARLSON: I think, again, if the police are seeking an admission and they've got a broad admission, it would be virtually impossible for the Defendant to put on any kind of a defense without being inconsistent.

I mean, that -- that's -- that's the incentive, and -- and in addition, as we point out in our reply brief, it's not only the use of the evidence that would be of value, it's -- the actual use -- it's the fact that the police would see it as a means of -- of tying the defendant's hands and enhancing the chances of convictions by deterring the defense from putting any -- any evidence on at all, and --

QUESTION: But if -- if the goal of a criminal trial is to try to find the truth, certainly this would enhance that goal.

MR. CARLSON: There's no question about it that any time you apply the exclusionary rule you are not furthering the goal of truth. The question always is, are you furthering the goal of --

QUESTION: Some other value.

MR. CARLSON: Well, the Fourth Amendment interests here.

QUESTION: Well, usually, I wouldn't -- I wouldn't suppose the officers really know when they see something like -- like this that it's -- they don't know how critical it might be to their case. They don't know whether -- many times, if -- if evidence they seize is excluded they haven't got any case left.

MR. CARLSON: That's true, but I think in the case of --

QUESTION: So they're taking a terrific risk.

MR. CARLSON: Well, not in the case of statements. I think, generally speaking, a Defendant's statements are not generally essential to the state's case in chief, certainly.

QUESTION: Well, I know, but we're talking about evidence here -- illegally seized evidence.

MR. CARLSON: Well, I'm talking about legally

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obtained statements. It would also apply to physical evidence, but again, I think that would be a much more unusual situation where that would ever come about.

But in -- in this very case, the police officers knew when they took Mr. James into custody that there were several eye witnesses to the offense and that if they ever -- if they ever found the right person they would probably get identifications and they wouldn't need the statement.

And the first -- the first question they asked him, as a matter of fact, was what was the color of his hair, and I think that was clearly -- they -- they were trying to get statements that would conform to what they knew of the offense already.

The danger is that -- we don't maintain that the police would have to think specifically about what possible specific testimony might be given that it might be useful for. It's just the overall message that if -- if you adopt this rule, that now we can use unlawfully obtained statement or physical evidence, I -- I suppose would apply to Miranda violations as well, whenever the Defendant puts on any kind of inconsistent evidence in his defense.

And again, it's not based on a right to do so, but if the police perceive a value to it I think that's, as this Court has held, you look at the common sense assumptions on their behavior.

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Furthermore, I -- I think one further ramification of this rule is if the Court does approve the -- use -- the substantive use in rebuttal I don't see how that could not apply to the Defendant's own testimony and therefore that under the -- the requirement of Harris and Havens that there be written instructions, I don't think it would any longer really apply.

QUESTION: No, it wouldn't, because you're not using it just for impeachment any longer.

MR. CARLSON: That's right, you're using it for rebuttal for proof of -- of facts in the case. So again, the expansion of the use of unlawfully obtained evidence, both in terms of who it will apply to and also its use, I think is not a small step here, it's a major step and I think is -- is -- is one this Court should -- should not sanction.

I'd like to reserve the rest of my time, unless there are any further questions.

QUESTION: Thank you, Mr. Carlson.

Mr. Madsen?

ORAL ARGUMENT OF TERENCE M. MADSEN

ON BEHALF OF THE RESPONDENT

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

Your Honors, it was nearly 20 years ago, in Harris, this Court said to the extent that there is a deterrent effect

from the exclusionary -- exclusionary rule, sufficient deterrence flows when the evidence becomes unavailable for the state's case in chief.

The Solicitor General, writing as amicus for the state in this case, has suggested that this case is an appropriate vehicle for this Court to draw that as the bright line, and Your Honors, the people of Illinois agree with that position.

Your Honors, there are two steps to draw that line that must be taken. First, it's the step from direct examination of the defendant to direct examination of a witness and then to cross-examination of a witness, and then there's also the related step of -- the step of impeachment to rebuttal evidence, and, Your Honors, in terms of deterrent effect, those steps the state proposes are very, very small steps.

Your Honors, look to a policeman trying to make the decision whether to cross the threshold or not, whether to ask the question or not. He doesn't know what the answer is, and -- but he does know -- he probably doesn't know what the answer is going to be or what he's going to find, but what does he know? He knows that whatever he gets is going to be lost to him for the case in chief if he doesn't take the time to do it right.

QUESTION: Mr. Madsen, does that really make any

difference if -- if the defendant puts in a defense? That would make a big difference, of course, if the Defendant doesn't put on any defense, but if you have any substantive evidence that tends to prove guilt, would it not always be admittable -- admissible on rebuttal if he put on some defense of alibi, or just -- any defense, if you draw the bright line?

MR. MADSEN: Virtually -- virtually any evidence could come in that would rebut --

QUESTION: So that your bright line would just really give effect to the exclusionary rule, only in those cases in which no -- the defendant didn't put on a defense.

MR. MADSEN: As log -- Your Honor, it would be as long as -- as long as we stayed with -- with conflict only and not required the contradiction requirement of the Illinois Supreme Court, which is another consideration.

QUESTION: If you had to make your case without that evidence --

MR. MADSEN: You would have to -- you would have to know -- you would have to know --

QUESTION: You'd have to have a prima facie case without that evidence, right.

QUESTION: You would have to know that you would have to put the case in as -- as the evidence existed and without the protection of the exclusionary rule.

QUESTION: And also, you can't -- on your case in

chief you not only can't use that evidence, but you can't use any of its fruits on your case in chief, right?

MR. MADSEN: Without the protection of the rule.

QUESTION: Those fruits, you might have independently -- might independently come -- come by, if you hadn't committed the illegality. You might have that evidence from some other source.

MR. MADSEN: I'm sorry, Your Honor, perhaps I didn't understand your question.

QUESTION: I guess it wasn't a question; it was a statement. Just say yes, it was -- it as (inaudible), even though --

(Laughter)

QUESTION: May I ask another question? Isn't the -- if we're just looking for a bright line, and maybe it isn't the best bright line, isn't the bright line between impeachment and substantive evidence equally bright? I mean, you -- you could draw the line that the dissenters would have drawn in this case.

MR. MADSEN: Your Honors, I don't -- it -- it is a bright line and it's a line that the state could live with, but I don't think, when it comes to deterrent ends, and we're trying to -- we're drawing the line -- in exclusionary terms and drawing the line for deterrent ends and what it means to the police officer, if we're trying to deter police officers,

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it makes no -- there's no sense to draw the line there.

The -- the incremental difference for discouraging the police officer at that point is -- is too small for the cost of -- to the truth-seeking process.

QUESTION: So, you wouldn't see the necessity for the limitations that the Supreme Court of Illinois put on the use of this evidence -- two of them? Two of them.

MR. MADSEN: Your Honor, I see -- I see -- I do not see the necessity for them. I do see the reasons for those --

QUESTION: You would let -- you would let the -- let the inconsistent evidence come out on cross-examination of the witness and then use the illegal -- illegal evidence in rebuttal?

MR. MADSEN: I would. In the interest of the truth-seeking process, I would. I recognize, however, Your Honor, that there is some function of -- of not -- there is an argument to be made that -- of not allowing the police -- or the prosecutor to do that which the police officer could not do to set up, to bring in the evidence, but we've already more or less resolved that in Havens, and I don't think it's a serious --

QUESTION: What -- what was behind the supreme court's statement that you couldn't use in rebuttal any of the Defendant's prior statements that amounted to a confession?

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MR. MADSEN: Your Honor --

QUESTION: What -- what's --

MR. MADSEN: I don't know what's behind that and I don't think that that's a requirement that -- that's --that in any way would -- in fact, that would be perhaps the biggest assault to the truth-finding process, to not let the -- not let the -- to put on the evidence to conflict with, "I did it."

QUESTION: Well, that would almost rule out most of the statements that are taken in violation of Miranda, I suppose.

MR. MADSEN: It would. It would, Your Honor, and that's -- I think, clearly, that's an exception that Illinois has adopted that I have to live with but you should not make the rest of the country live with if you reach that point.

QUESTION: I -- I must say, what -- what you say about the negligible effect on deterrence is a -- is a lot truer with respect to Fourth Amendment violations than with respect to -- confessions unlawfully obtained.

It seems to me the police officer knows very well that if he -- if he asks the person under arrest, does he -- does he want a lawyer, and tells him you don't have to answer any questions if you have a lawyer, he knows doggone well that as soon as he gets a lawyer the lawyer's going to tell him, don't answer any questions. So he has nothing to lose. Trick

-- trick him out of a confession right away. You wouldn't get a confession if you did it right so why not do it -- do it this way? What -- what's to lose? Isn't that the reality of the thing?

I mean, the Fourth Amendment is -- is something different, but as far as -- as far as confessions go --

MR. MADSEN: It is harder to -- to extend it into a Miranda situation. I agree with that. It's more difficult. Still, the -- the incentive there for the -- the police officer to say, we'll lose the confession and possibly the fruits, would be -- would still be a great risk for him and it's a risk that there's no incentive to take, Your Honors, until the policeman has a convincing case.

When -- when you talk of what the officer knows is -- his evidence is lost for his case in chief.

QUESTION: That's certainly not true in this case. There was something like four or five eyewitnesses, weren't there? Weren't there several eyewitnesses here?

MR. MADSEN: But this evidence --

QUESTION: Yes, and this evidence, he had nothing to lose by asking him everything he could think of, did he?

MR. MADSEN: At the time he asked the questions.

QUESTION: At the time of the particular violation we're talking about here, there's every incentive, it seems to me, that if he can get the defendant in a place where he'll

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talk, to try and talk to him as much as he could.

MR. MADSEN: I think not, Your Honor, because at the take time he asked the question here, he didn't even have enough evidence for probable cause, let alone to take the trial to begin to assert guilt.

QUESTION: I see.

MR. MADSEN: Your Honors, for -- a police officer will take -- will get eventually to take the stand, if a defendant now presents conflicting evidence in his case in chief or conflicting evidence on his cross-examination.

The police officer will get to take the stand and if -- if we extend here to direct -- and I think certainly, Your Honors, what -- what a defense witness -- or, what a defendant does through a witness is clearly attributable to him.

The court cannot allow a defendant to use a witness to say the things that it will not allow him to say itself. And what the police officer knows now is he -- he'll eventually take the stand if the contradiction comes in and he'll say, defendant had the gun, or told me he had the gun, or I found the gun on defendant.

Well, Your Honors, from a police officer's point of view, the people submit, it really makes little difference to them whether at the point of -- after the state's case in chief, after the directed verdict's been passed, after there's sufficient evidence for guilt, whether they get to take the

stand and tell the jury, he had the gun, and the jury was later instructed that this is impeachment, or they get to tell the jury he had the gun, and the jury is later instructed this is a rebuttal.

To that police officer, when he's standing on that threshold making the decision, it's not going to make much difference to him. It's not the kind of analysis he's going to undertake.

QUESTION: No, but isn't it -- you have people who run the police department. Isn't the Chief of Police going to say, in these situations, always get the statement because we might be able to prevent the man from putting on a defense, because we've got a rebuttal.

I mean, you know, you have certain procedures you follow and I would think the standard operating procedure would be, get every statement you can, because that will frustrate any false defenses the man wants to offer. Now, maybe that's good from a truth-seeking point of view, but I don't think it's correct to say it wouldn't be in the prosecutor's interest to have such police procedures established.

MR. MADSEN: See, Your Honor, I think for the bulk, though -- and as the Court recognized in Harris, for the bulk of police work, a policeman's job building a case is to gather evidence, and it's to gather admissible evidence, and to say -

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QUESTION: Yes, but what you're saying is this which has formerly been considered generally inadmissible except for the very narrow exception of impeachment, now will always be admissible if a defendant puts in a case, and that's a pretty broad category of situations and I think it's broad enough so that I would think police departments around the country would modify their procedures.

MR. MADSEN: You're speaking --

QUESTION: I certainly would, if I was running the police department.

MR. MADSEN: You're speaking of extending past the situation here to Miranda.

QUESTION: Extending it -- no. Extending it to -- this is an oral statement case, isn't it?

MR. MADSEN: Yes.

QUESTION: The police have gotten an illegal oral statement and I don't know why the police officer shouldn't do that as standard operating practice if they know they can use it to rebut any defense a defendant was going to put on.

MR. MADSEN: Well, they don't -- they -- they would be able to use it to rebut whatever -- what was -- was inconsistent with it.

QUESTION: Well, anything that tends to prove innocence, that would be rebutted by this -- by the statement.

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MR. MADSEN: But, Your Honor, putting -- giving the officer the -- taking away the evidence from the officer, from the case in chief, and making whatever it is -- whatever the evidence is that he's going to get, it's got to be unimportant enough that he's willing to sacrifice it for the case in chief and --

QUESTION: But if he doesn't do the questioning, he wouldn't have it anyway. You're -- well --

MR. MADSEN: He wouldn't have it -- he wouldn't have it anyway, but the defendant also -- or, if he did eventually have it the defendant wouldn't be able to put on, under the shield of the exclusionary rule, that evidence, and that's what -- that's what the offset here is, and we can't say that where -- where -- to the extent the policemen want to reach that little beyond what they need for their case in chief, or -- there's no incentive.

There's really no incentive, unless you have a very strong case and you're lazy, to go after -- to not do it right, and it's not correct to presume that the police will not do it right.

Your Honors, the people -- the -- the state could live, as it were, with the -- with the extension of this case to direct evidence, and if it is direct evidence we recognize that there -- that assures -- there are safeguards that assures the defendants' using this shield --

QUESTION: Well, I can't help but interrupt with this one thought about what the state can live with. It's of interest to me that two of the three dissenting justices were former state's attorneys of Cook County, if I remember correctly -- Justice Stamos and Justice Ward. So, I guess they thought the state could live with the rule they advocated.

MR. MADSEN: I guess they sought -- well, Your Honor, remember, too, a lot of the dissent, there is this impeachment question and what exactly the nature of this evidence is. But -- but, Your Honors, there is no reason that -- that Petitioner can espouse that this Court should allow a defendant to say to a witness that which he cannot say through himself, at a bare minimum. There is no reason for that.

Your Honors, I would like to address very briefly the question of impeachment and what the nature of this evidence is.

Your Honors, as far as I'm concerned, this is impeachment because the Illinois Supreme Court has said its impeachment.

QUESTION: It's a little difficult for me to view it that way, counsel. It appears to me to be some kind of rebuttal evidence --

MR. MADSEN: I understand that, Your Honor --

QUESTION: -- introduced to undermine the

credibility of the witness.

MR. MADSEN: And through the state's briefs in the courts below, the state at -- at one point interchanged impeachment and rebuttal, but clearly, in the state's reply brief -- and the Illinois Supreme Court made clear -- that they were trying to get the Court to accept the theory of rebuttal evidence in this case. And if this is in fact impeachment, then it does change the -- the entire posture of what we're trying to deal with here. But I believe, Your Honors, that you could recognize --

QUESTION: Well, let's suppose we don't think it is.

MR. MADSEN: I think, as a matter of -- of what the Illinois Supreme Court's done with state law, I don't know how you can call it something else. I think you can say that it's not what you -- I think you can say that it's not what you had in mind in the Walder line of cases, that use, and I think that you can say that you wouldn't call it impeachment and I'm not sure that other jurisdictions would call it impeachment, and I don't know what the Illinois Supreme Court would do with it again under the same circumstances.

QUESTION: There's a great body of evidentiary law that says, you know, if you call a witness to contradict another witness, that that is not impeachment.

You know, if -- if -- if -- if -- you're talking here not about the statement of a defendant but the statement

of another witness and you called that witness to the stand, you -- you would not allow -- you -- you can't impeach a witness on a collateral matter, they say, so that the testimony of the second witness has to be material to the -- to the issues being considered by the jury, which this would qualify as. But I think very few jurisdictions would say that was impeachment.

MR. MADSEN: Your Honor, I -- I agree. I'm not sure there are many jurisdictions -- I'm not sure there's another jurisdiction that would say this is impeachment in this particular -- in this particular instance, but my Court has told me it's impeachment and I suppose that if you say well, to the extent that he said it, it may tend to discredit her, just that he at some earlier point said it.

You wouldn't necessarily have to believe him. Now, if -- if you didn't believe him, impeachment would fail. But you wouldn't necessarily have to believe him to call into question her credibility.

But that's -- that's the only approach we've been able to see to even begin to support this as impeachment, but I don't see how this Court can interfere with what the -- the State of Illinois has -- has called -- but the label makes no difference.

QUESTION: Have you found any other case in any other state that says this is impeachment?

MR. MADSEN: We've not.

QUESTION: This is all by itself?

MR. MADSEN: It is. To my knowledge -- to my recollection, Your Honor.

QUESTION: Isn't the question whether it's impeachment within the meaning of the exception or the exclusionary rule really a federal question rather than --MR. MADSEN: I think, Your Honor, that's the point. What the Illinois Supreme Court has labeled this for purposes of Illinois evidentiary law is a different question from what -- what you need to face, and I think that's an easy way to address that question, and I think, Your Honors, that if you take that approach to this question, then that will give you the solution and avoid the business of, there's -- if you look at this as impeachment and try and address it from that, there's a waiver of the first instruction, there's two harmless error analyses in this opinion, and the much easier course to take would be that course.

Your Honors, Illinois asks you to accept --

QUESTION: If you take out impeachment, what other reason would you have to put it in?

MR. MADSEN: Rebuttal.

QUESTION: Rebuttal?

MR. MADSEN: Rebuttal.

QUESTION: And that's automatic. You can put in

anything on rebuttal. Is that statement just as damaging --

MR. MADSEN: To the extent that it's proper for rebuttal.

QUESTION: Is that statement just as damaging to the defendant whether it's on direct testimony or rebuttal testimony?

MR. MADSEN: It's just -- it's just as damaging either way, and it's just as damaging whether it comes from the mouth of the defendant or from the mouth of one of his witnesses, and I submit either on cross or direct, but certainly on direct.

QUESTION: So that any defendant who takes the stand or puts on a defense loses Miranda?

MR. MADSEN: Not -- he -- he loses -- not -- Your Honor -- he loses it -- he does not lose it any -- you've already made that determination, Your Honors, in Walder and Harris. I guess -- I guess if we say he does, that the determination has already been made, and in balancing the exclusionary rule the -- you've already decided that the deterrent ends of that aren't well met by -- by allowing that to happen.

QUESTION: I did?

(Laughter)

MR. MADSEN: No, I'm afraid you were in dissent, Your Honor. I'm afraid -- I'm sorry, I'm speaking of you

collectively.

QUESTION: Doesn't rebuttal itself have some limitations in most states? That is, it has to be a -- a response to something adduced by the defense. The case -- the state can't just sandbag its case in chief and decide to suddenly complement that at rebuttal.

MR. MADSEN: That's true, Your Honor. You can't -- you can't put on a second case in chief. It has to be related to what the defendant puts on. But all we do is, we have protection of this evidence and we move -- all we're doing is shifting -- making the person whose -- whose court it is in, as -- as we say, responsible for the use of -- for how that evidence comes in or not.

QUESTION: But at least when you're dealing with a confession, that is always going to relate to whatever the defendant puts on, because whatever he puts on, it -- it will go to establish the point that he did not commit the crime, and if you have a confession that will always be able to come in, as far as relevance is concerned, isn't that right? As far as being properly in response to what was in the case in chief? Wouldn't a confession always come in?

MR. MADSEN: It will, but if the confession were properly admitted -- it were legally taken, there -- the confession would be there. It's not a question of voluntary --

QUESTION: No, I understand; it -- it -- it doesn't blow your case away, but just in response to the Chief Justice's question -- in Fourth Amendment violations I can understand how very often you wouldn't be able to get something in unless he had specifically said that the -- the T-shirt wasn't in the luggage and you show it was in the luggage, or something like that. But as far as a confession is concerned, it seems to me that if the -- if the defendant puts on any kind of a defense, you're going to be able to respond by introducing his confession.

MR. MADSEN: Your Honor, could I ask -- if you're talking in terms of "I did it" --

QUESTION: Yes.

MR. MADSEN: Then that's different also from a statement like the one in this case -- I had brown hair.

QUESTION: Okay. You're right. I -- I'm talking about the "I did it" confession.

MR. MADSEN: And that would be -- while that is the one thing that would make it difficult for him to put on evidence against, that also is the highest price we pay for the exclusionary rule, because that's "I did it," and then allowing the evidence to put in -- the defendant to put in evidence that thwarts the truth-seeking process that "I did it" and that's the highest price -- price we pay, and -- and it's too high on the speculation that police are not going to

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take the time to do it right to get -- to get the statement that's admissible in the first place.

QUESTION: We don't have a confession in this case, anyway.

MR. MADSEN: No, we don't, Your Honor. It's not a confession case.

QUESTION: But you do have a statement -- a very relevant statement that the prosecution wants to use to prove its case.

QUESTION: A statement "I dyed my hair the day after the incident" is pretty close. That's fairly incriminating, I think.

MR. MADSEN: It is incriminating that he dyed his hair the day after the incident and it's certainly important to the case.

QUESTION: Well, presumably the state isn't going to be interested in any statements that aren't incriminating.

(Laughter)

MR. MADSEN: Well that's -- thank you, Your Honor. Thank you, Your Honor.

Your Honors --

QUESTION: Well, in fact here there was the additional statement that he went to the beauty parlor in order to change his hair color. Was it necessary to introduce that?

MR. MADSEN: I'm not sure that it was necessary to do it, but it added nothing to the statement. Obviously, if he was there and he said he had --

QUESTION: Well, it showed a guilty mind.

MR. MADSEN: But he had had his hair changed there, that he went there to get his hair changed. It shows that he said he had.

QUESTION: It showed it was voluntary. Nobody threw him into the chair and started changing his hair color, right?

MR. MADSEN: At least -- at least that.

Your Honor, as far as the policeman is concerned, the evidence is lost if he loses it, unless the defendant does something to allow it to come back in, and a policeman is not in a position to try to work out the legalities that the seven judges below, or the seven -- ten judges below, and you, and Judge Pincham in the trial court, are trying to make when they're trying to decide whether to cross the threshold or whether to ask the question, and Your Honors, I submit that an order from the chief is going to be, gather admissible evidence, and that's the point that this Court should work from.

Your Honors, it's for all these reasons that the people ask this Court to affirm the Supreme Court of Illinois.

QUESTION: Thank you, Mr. Madsen.

Mr. Carlson, you have ten minutes remaining.

REBUTTAL ARGUMENT OF MARTIN S. CARLSON

ON BEHALF OF THE PETITIONER

MR. CARLSON: I don't know if I misunderstood Justice Scalia's comments on -- on -- he saw the danger more in terms of Miranda than in terms of the Fourth Amendment, but I want to emphasize that this is really a derivative Miranda.

This was an unlawful arrest for the purposes of interrogation, so that it was getting him -- it was -- the arrest was the vehicle by which the police could then obtain the statement that they would lose without -- without the -- having done the illegality.

So, I think in the case of physical evidence perhaps that's correct, but certainly in the case of Dunaway-type violations, where it's an investigative arrest for the purpose of interrogation, I think that the incentive is definitely there.

QUESTION: Well, of course, they could have -- the police I suppose could have found out what color his hair had been.

MR. MADSEN: Well, as a matter of fact, that may have aided their probable cause argument, but that's the point. They didn't do that, among other things. The evidence is not set out, but the arrest was based on -- two boys on the street came by and said, we heard rumors that Romeo, who the police said was the Petitioner's nickname, may have done this.

And based on that, they went and picked him up.

I think it's pretty clear, as the trial court found, that there was no probable cause here and the police couldn't have believed that they had probable cause. So this -- I think this rule would both encourage carelessness, but I think it would also encourage deliberate violations of Fourth Amendment rights.

As -- as far as, again, whether a police officer has to sit down and think this through, I mean that's true. I think the message will be that the restrictions on the use of this kind of evidence have been greatly relaxed. It's -- it'll be valuable to us to get it, so if you can't get it another way, and especially, as in this case, if the prospect of having independent evidence is very high, where you know you have several eyewitnesses, then I think that the -- the deterrent, or the incentive, is there and I think I'll close with that, unless the Court has any other questions.

QUESTION: I have two very quick questions, if I may. Did you say that Judge Pincham tried this case?

MR. CARLSON: That's correct.

QUESTION: The other question I had is how -- is this a typical period of time from trial in 1983 to now, on direct review? Does it take that long in Illinois?

MR. CARLSON: Well, I think the -- the trial itself was not that --

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QUESTION: You know it was pending in the court of -- the appellate court for about three years?

MR. CARLSON: It was delayed in the appellate court -- it took the appellate court, I believe over a year, or a year and a half, to decide the case after oral argument and for them to explain it.

QUESTION: Are things that -- I'm just wondering if things are that bad. This is an awful long time to get a case here on direct review.

MR. CARLSON: They're not that bad. They're bad, but not that bad. This was unusual.

QUESTION: Thank you, Mr. Carlson. The case is submitted.

(Whereupon, at 2:38 p.m., the case in the above-entitled matter was submitted.)

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BY Lona M. May

(REPORTER)