ORIGINAL

In the

Supreme Court of the United States

UNITED STATES,

PETITIONER,

V.

J. LEE HAVENS,

RESPONDENT.

No. 79-305

Washington, D. C.
March 19, 1980

Pages 1 thru 57

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 79-305
J. LEE HAVENS, Respondent.	:	

Washington, D. C.

Wednesday, March 19, 1980

The above-entitled matter came on for oral argument at 11:03 o'clock, a.m.

BEFORE:

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

APPEARANCES:

ANDREW L. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner

WILLIAM C. LEE, ESQ., 803 South Calhoun Street, Calhoun Building, Fort Wayne, Indiana 46802; on behalf of Respondent

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in United States v. J. Lee Havens.

Mr. Frey, I think you may proceed when you are ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit reversing Respondent's convictions for possession and importation of cocaine on the ground that Respondent's trial testimony was improperly impeached by the use of illegally seized evidence.

On October 2, 1977 Respondent's co-conspirator McLeroth, a fellow attorney from Fort Wayne, Indiana was apprehended by Customs at the Miami Airport in possession of approximately 3-1/2 pounds of cocaine which was hidden in pockets sewn into a T-shirt. Upon being questioned, McLeroth implicated Respondent who had arrived in Miami with him on the same flight from Peru and had already cleared Customs.

Respondent was located by the agents and arrested and his luggage was seized and searched. It contained a T-shirt from which material was missing that corresponded to the material

used in making the pockets in McLeroth's shirt in which the cocaine was secreted.

On Respondent's pre-trial motion the District Court suppressed the T-shirt as the fruit of an illegal warrantless search of Respondent's luggage.

Now, McLeroth testified as the principal prosecution witness at trial, he recounted several trips Respondent had made to Peru for the purpose of procuring cocaine and he described Respondent's role in preparing the pocketed T-shirt for use in the smuggling venture.

With regard to the ill-fated trip that culminated in their arrest he described Respondent's actions in procuring the cocaine in Peru and secreting it in the shirt.

Respondent testified in his own defense and he denied any involvement in the cocaine smuggling. In the course of his direct testimony the following colloquy occurred which appears at page 34 of the appendix:

"Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?

"A. Yes, I did.

"Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima,

Peru?

"A. I did not."

On cross-examination, the prosecutor asked the following question which appears on page 35 of the appendix:

"Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?

"A. I don't -- I said I had nothing to do with any wrapping or anything, yes. I had nothing to do with anything with Mr. McLeroth this cocaine matter."

And further down toward the bottom of the page he was asked:

"Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?

"A. Absolutely not."

Now, when it became clear that the prosecutor intended to pursue the subject of the shirt found in Respondent's luggage a bench conference was held. The Court concluded that it would permit questioning about the shirt for impeachment purposes. If Respondent admitted that the shirt was in his luggage, that would be the end of the matter. But if he denied it, impeachment of his denial would be permitted.

Respondent did in fact deny any knowledge that the

shirt had been in his luggage.

QUESTION: Well, what if he had answered: "Yes, the shirt was in my luggage."?

MR. FREY: That would have been it. I think he could have --

QUESTION: What would have been the instruction, if any, about that answer? Any?

MR. FREY: I don't think there would have been any instruction about that answer.

QUESTION: Well, you said there was a bench conference about whether you were going to pursue this for impeachment purposes.

MR. FREY: Well, there was a bench conference about whether this questioning would be allowed as cross-examination and whether if he answered in response to the cross-examination in a manner inconsistent with --

QUESTION: Was the question ruled? The question must have been ruled proper cross-examination.

MR. FREY: It definitely was.

QUESTION: Is that what the argument was at the bench?

MR. FREY: The argument at the bench was about whether the Government could cross-examine on this subject.

QUESTION: If it wasn't proper cross-examination in the first place, surely it was not -- nothing that happened

thereafter was proper?

MR. FREY: Well, it is our contention that the cross-examination was proper.

QUESTION: You can't go outside the scope of proper cross-examination and ask some question that you know you can impeach him on.

MR. FREY: That is correct. It is not our contention that you could ask something that is outside the proper scope of direct. But when you are dealing with a --

QUESTION: Well, was that what the argument was at the bench, was this a proper question for --

MR. FREY: No, I think the argument involved the Walter Harris issue about whether it would be permissible --

QUESTION: There was never any objection as to whether this initial question was proper, namely: Did you have a shirt like this in your bag?

MR. FREY: Well, I am sorry that I can't specifically recollect whether that point was made. The thrust of the discussion was that the prosecution had a right to ask the question. If the question was answered in a manner inconsistent with illegally seized evidence, impeachment of that answer by rebuttal testimony would be allowed and by introduction of the shirt.

QUESTION: If he answered "yes" to the question would that be inconsistent with anything he said on direct?

MR. FREY: If he answered "yes," yes it would be inconsistent. He would have some explaining to do. It would be inconsistent both with his testimony that he had absolutely nothing to do with cocaine smuggling.

QUESTION: Why?

MR. FREY: Well, if he had nothing to do with it, if he just --

QUESTION: You just fine a shirt with holes --

MR. FREY: Well, a shirt with holes is a shirt that evidently was used in the preparation of the shirt that McLeroth wore. It is certainly a strongly suspicious circumstance that if he had no involvement whatsoever, if he didn't know as he testified that McLeroth was obtaining cocaine --

QUESTION: Even if it weren't flatly inconsistent, it is very relevant to his direct examination.

MR. FREY: Yes, it is our contention that this is unquestionably proper cross-examination except for the fact that the evidence was illegally seized.

QUESTION: Mr. Frey, you have to take the position that it was proper cross-examination, don't you? Otherwise, aren't you right in the net of Agnello?

MR. FREY: Well, how much the net of Agnello picks up today, I am not sure. But Agnello itself is somewhat unclear as to exactly what the full ramifications of its rationale are. Our view of Agnello is that its principal rationale was that

you simply cannot use illegally seized evidence in court at all.

QUESTION: Rather than improper cross-examination.

MR. FREY: I don't think that was the focus of it.

QUESTION: But if his answering, "Yes, I had a shirt like that in my bag" was inconsistent with something he had said on direct, then you are within -- that is impeachment itself. Even if you are using some illegally obtained information it is used to -- it is used to contradict something said on direct examination consistently with our cases already decided.

MR. FREY: Clearly the purpose of the cross-examination in this case was to try to give the lie to his testimony that he had no involvement in the cocaine smuggling and he had no involvement in preparing McLeroth's shirt and so on on the last trip by calling him to account for evidence that existed, the tendency of which is inconsistent with his testimony. That seems to be perfectly normal.

QUESTION: It is perfectly -- a rule would be perfectly rational under both Agnello and Walter that said that Government cannot use the illegally seized evidence in its case in chief and that defendant could move to dismiss or to close the case in chief under Agnello if the cocaine had been introduced at the Government's case in chief. And still if the defendant chooses to take the stand or if the Government -- and the Government chooses to cross-examine, then a different rule might

apply.

MR. FREY: Well, I don't think -- I wish it were that easy but I am afraid it wouldn't be perfectly consistent with Agenello, because in Agnello the evidence was initially suppressed. He then took the stand and testified and the evidence was introduced to impeach his answers on cross-examination. In that respect Agnello was structured in a manner parallel to the present case.

So that while I think the Court, as I will get to, as it has matured in its thinking on this problem in the more contemporary cases the Court has clearly come to the view that the distinction that you suggest is the proper one the Court said in Harris, unequivocally, and it said it again in Oregon v. Hass, unequivocally, that the deterrent purposes of the exclusionary rule are adequately served by excluding the evidence from the prosecution's case in chief, making it put on a case sufficient to go to the jury without any reliance upon the illegally obtained evidence.

QUESTION: Is it your position, Mr. Frey, that anything within the area of the case itself which tends to reflect negatively on the credibility of the defendant on the stand is admissible; how far do you carry it?

MR. FREY: Well, I think that we -- well, we have two arguments in this case.

The first argument is -- which is on the broad issue

is that the distinction of the Court of Appeals' attempts to draw between impeachment of answers given on direct examination and impeachment of answers given on cross-examination is not a valid distinction.

The way we would look at the case is to ask the question whether cross-examination on this point was proper. If cross-examination on the point was proper, it is our view that the Government is entitled to conduct that cross-examination and the defendant is obliged to submit to it and that that is well settled by the decisions of this Court. And if he then lies in response to the cross-examination, then the Government is entitled to impeach.

Now, as I said before to Mr. Justice White, I think there is absolutely no question in this case that if this T-shirt had been found in a warranted search or had been found at the time Havens was going through Customs and therefore there was no question of the legality of the seizure, nobody would question for a moment that the T-shirt could be used in exactly the manner it was used in this case and --

QUESTION: Couldn't it be used in the case in chief?

MR. FREY: It could have been used in the case in chief. But if the prosecution for some reason had not used it in the case in chief, it could have been used in connection with the cross-examination and for impeachment or rebuttal of responses given on cross-examination.

QUESTION: Rebuttal and impeachment are two quite different things, are they not? Rebuttal is the Government's going forward with its own case on the second round so to speak, where the impeachment is an effort to show that the defendant's case is not to be believed.

MR. FREY: I understand that they are two conceptually different things. There are times when impeachment and rebuttal tend to merge in the tendency of the particular evidence.

I mean a case like Walter is a case where clearly only impeachment was involved and not rebuttal, because the evidence was evidence of a prior crime which was inconsistent with his denial that he had ever had drugs before, not admissible at all on the issue of guilt or innocence in that case but admissible only on the question of the defendant's veracity.

QUESTION: But Agnello speaks in terms of rebuttal.

MR. FREY: Well, I guess my view is that it -- there are some circumstances in which the distinction is, while it exists is more technical than substantial in terms of the use, because in a case where the evidence, be it impeachment or rebuttal, relates directly to the guilt or innocence and not to any collateral question in order for a jury to conclude that the defendant's testimony has been impeached, that is that he was not telling the truth, they will presumably by virtue of that very conclusion determine that the opposite of what he was saying

was the truth or was likely to be the truth.

QUESTION: Well, but the fact of the matter is that if the Government were -- in a civil case, the plaintiff or the defendant feels that they have successfully impeached the credibility of a principal opponent, they may choose not to put on any rebuttal; whereas, if they think the matter is still hanging in the minds of the jury, they may call two or three more witnesses. And that would be rebuttal but not --

MR. FREY: That would be rebuttal but where the witness is called to contradict a specific statement that the defendant made in his direct or cross-examination is where the distinction begins to pale, I think.

QUESTION: Mr. Frey, let me pursue my point with you a moment. Suppose at this bench conference the objection was made that this question was not proper cross-examination and the judge said it doesn't have to be within the scope and he said, "You may ask that question." And if he says, "Yes," that is the end of it; and if he says "No," then you may introduce the T-shirt.

MR. FREY: Well, my --

QUESTION: You would have a little problem, wouldn't you?

MR. FREY: Yes, but it wouldn't be the problem -- it wouldn't involve the issue that is presented in this case. Our problem in that case would not depend on the fact that the shirt

had been illegally seized but on the fact that the Court had allowed improper cross-examination --

QUESTION: And that you were manufacturing an opportunity to impeach.

MR. FREY: I don't know that that would --

QUESTION: Well, if you ask him the question, I suppose if you just ask him on cross-examination: "By the way, five years ago did you have a T-shirt in your bag," and he said "No," then you could prove he did, that would be improper. It is completely irrelevant.

MR. FREY: I am not sure what the rule would be if the Court --

QUESTION: On page 43 of the appendix at this bench conference, Mr. McCain -- I take that is the defendant's counsel --

MR. FREY: Yes, sir.

QUESTION: "How can he be impeached, Your Honor, if it was not covered on direct, whether or not he had --

"THE COURT: It does not have to be covered on direct. If he denies something under oath, which is --"

Well, without even deciding that it was covered on direct or was proper cross-examination, this question was permitted to be asked and then the opposite of the question was permitted to be proved.

MR. FREY: I think what is submerged in that is that the defendant's attorney was suggesting that he never talked

about the T-shirt that was found in his bag, which of course he wouldn't since the tendency was purely inculpatory and it wouldn't help him to talk about it at all, what the Court I think was saying is it doesn't have to be covered with that degree of specificity on direct in order to justify cross-examination. And if he gives a false answer on cross-examination, then the Court went on to say that if he says, yes, that shirt was in my bag and it had pieces missing, there would be no testimony about the discovery of the shirt and no actual introduction of the shirt.

But as I see the scenario, and it seems clear to me, the question you ask is: Is this proper cross-examination? And in this case, I don't think, leaving aside the illegal nature of the seizure of the shirt, would be any doubt about the propriety of the cross-examination.

If he answers falsely in response to a question asked on proper cross-examination, that answer can be impeached by contradictory testimony.

QUESTION: Do you think that -- you don't think in your colloquy with Mr. Justice Rehnquist -- do you think the Government just on rebuttal without having gone through this thing could have introduced a shirt found in a bag, called the agent and said we have found this in his bag, because arguably you would say that is absolutely contradictory to his direct testimony.

MR. FREY: My position is that the Court does not have to go that far to decide this case but I think if it had such a case the Government should be permitted to do that and indeed I think that is the --

QUESTION: May I ask: If he had been asked, which he was, did you have this shirt in your bag? And he had said, "Yes," then I suppose the Government would have argued that that is quite inconsistent with his direct testimony. At least --

MR. FREY: What happened then was that his answer might be further explored. I mean then the next question would be: Well, how do you explain the fact that you have in your bag a shirt that was used in connection with the cocaine smuggling?

And then he would give some explanation or no explanation. And then that matter would be probed. But it would never be necessary to introduce the shirt separately from his own testimony. And he must give that testimony on cross-examination because he chose to get up under direct examination to deny his guilt, to deny his involvement with the smuggling, to deny his involvement with the preparation of the shirt.

QUESTION: Mr. Frey, in a case like this is it accurate that the only way to keep out illegally seized evidence is to give up his right to testify?

MR. FREY: In a case like this I think it is clear that if he chose to get on the stand and testify and deny any

involvement in the cocaine he would --

QUESTION: The only way he could do that is give up his right to testify?

MR. FREY: Well, his right to testify, I think it is clear that his right to testify is not a right to get on the stand and give false testimony and --

QUESTION: Didn't we say precisely that in Harris?

MR. FREY: Precisely that in Harris? You said precisely that in Nobles where the question was whether the investigators -- the Court, I use you in the plural sense -- where the question was whether they had to turn over the investigators' notes and the Court said that the Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system, one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half truth.

And in United States v. Grayson where the defendant claimed that his right to get on the stand would be inhibited by a possible effect on his sentence of the judge's conclusion that he had lied, the Court said assuming arguendo that the --

QUESTION: But the answer is still the same, the only way for him to do it is to not testify?

MR. FREY: Well, that is correct. But he does not have a right; he does not have a right in our view, and I think the Court's cases make that clear, to get on the stand and

present a false defense. If he does that, then he has forfeited the benefits of suppression in so doing, because the purposes of the exclusionary rule --

QUESTION: He forfeited his rights when he got arrested.

MR. FREY: Well, I am not sure what his rights were but they didn't include smuggling cocaine.

QUESTION: Let me assume a hypothetical to you: Suppose he, as here he was trying in his testimony to disassociate himself from McLeroth completely; suppose his testimony had gone so far as to say that he had never seen McLeroth in his life and didn't know him, had never had a conversation with him. And then they brought the stewardess of the airline and he insisted on that in his cross-examination. Could he be impeached by bringing in the stewardess of the airline who said they sat together and were engaged in animated conversations throughout the entire flight from Peru to Miami?

MR. FREY: Certainly. That would both be impeachment and rebuttal, although whether or not it would be rebuttal would depend on whether the evidence went to guilt or innocence in the case or to a collateral question.

QUESTION: Well, this doesn't -- my hypothetical doesn't go to guilt or innocence, it goes to whether this fellow --

MR. FREY: Would be impeached.

QUESTION: -- was a reliable witness.

MR. FREY: In that context it would be impeachment and there is no question this could be done.

QUESTION: Is this T-shirt fundamentally in terms of the law of evidence different from the testimony of the stewardess on the airline?

MR. FREY: Not in our view. And certainly it involves no more smuggling in. The suggestion that something insidious is being done by the prosecutor, it is no more smuggling in to cross-examine about the T-shirt in view of its high relevance to the defendant's testimony than it would be in the stewardess example.

QUESTION: Well, couldn't they have used the stewardess in the original part of the trial?

MR. FREY: Yes, and in this case --

QUESTION: They are not the same, are they?

MR. FREY: That is why the position for which --

QUESTION: But they are not the same.

MR. FREY: They are not the same in that respect. And that is why the position for which we are contending does not do damage to the objectives of the exclusionary rule. Because the prosecution still must make its case against Respondent without using the illegally seized evidence. Only if it can get to the jury does this question -- without the illegally seized evidence does this question even arise.

QUESTION: Mr. Frey, may I ask you one question. I

may have misunderstood you but putting to one side for the moment the fact that the evidence was seized in violation of the Fourth Amendment. I understood you to say that whenever a defendant makes a statement on cross-examination that the prosecutor believes to be false, the prosecutor has a right to impeach that statement. It is my understanding that there are certain collateral areas that are sometimes developed on cross-examination as to which the judge in his discretion may say, "Even if it is false I am not going to allow it to further impeach"?

MR. FREY: Yes.

QUESTION: You would agree with that?

MR. FREY: Yes. But it would have to be collateral and in this case it is not collateral. The testimony goes directly to --

QUESTION: Well, you have said that it might have well been within the trial judge's discretion in this case to say, "Well, I think we have gone far enough with this matter and I won't allow the impeachment."

I am not suggesting that -- for him to allow it but I think perhaps the converse is also true.

MR. FREY: My view is that in this case it would have been error for him not to permit the impeachment. I think there is an area of cross-examination which goes to the issue that must be decided by the jury and within that area the judge does not have discretion to cut off cross-examination or impeachment.

Then there are areas that are collateral to the basic inquiry and in those areas I believe the judge does have discretion to let it in or let it out.

This, however, I think was central because the shirt was evidence.

QUESTION: If he had answered "Yes" to that question, "Yes, it was in my bag," and the Government -- tell me why the Government is entitled to use that information against him, that answer in argument to the jury. Obviously they obtained -- they were put onto the question by an illegal act of theirs.

MR. FREY: Well, not solely in this case, since they also had testimony of McLeroth about the T-shirt and about --

QUESTION: Well, they didn't -- yes, but the question was did they have it in his bag.

MR. FREY: I understand.

QUESTION: And he answers, "Yes, I had it." Now, tell me why you are entitled to affirmatively use that answer against him.

MR. FREY: Because we are entitled to cross-examine him when he takes the stand and the policies of the exclusionary rule are not sufficiently advanced by restricting the traditional and essential right of cross-examination.

QUESTION: Even though the question you asked has its source in an illegal search?

MR. FREY: Because that was true in Harris and that

was true in Hass, the questions that were asked and then impeached, asked on cross-examination had their source in an illegal search. It is true that the defendant adverted to the matter in his direct testimony but they never would have been able to ask him about the statements if they hadn't procured the statements. So I don't think this case is different in that regard. The Court would have to go back and reconsider Harris and Hass in order to rest a decision on the impropriety of the question itself.

QUESTION: I know, but you are not exactly saying, using this answer as you were in these other cases you referred to. In the other cases you say the man should not be permitted to lie on the stand. And here he lied and we are just going to impeach him.

MR. FREY: Yes.

QUESTION: And here if you ask him the question and he answers "Yes," you aren't impeaching him at all. All you are saying is we now have a piece of evidence --

MR. FREY: I understand that.

QUESTION: -- that may be a critical piece of evidence in convicting him. Not just to show that he is dishonest. But it is a critical piece of evidence that goes to --

MR. FREY: Well, it happens to show both at the same time.

QUESTION: Well, why does it?

MR. FREY: Why does it show he is dishonest?

QUESTION: Yes.

MR. FREY: It doesn't show that he is dishonest in answering our last question but he shows that -- it shows that he was dishonest in answering the questions on direct examination.

QUESTION: On like what?

MR. FREY: Like he had no involvement in the cocaine smuggling, he had nothing to do with McIeroth and he had nothing to do with preparing the shirt. Those answers are inconsistent with --

QUESTION: So your argument is that any illegally seized evidence that the Government has should be -- you should be able to introduce in rebuttal in order to counter -- if it goes to prove that what he said on direct examination was dishonest.

MR. FREY: Well, I don't know whether it is rebuttal or impeachment. I mean we are back in that -- a narrow position in this case --

QUESTION: At least, then, on cross you are entitled to say, by the way on such and such a date did you have this gun in your house; and go through a whole list of things that you illegally seized from his house. And if he says "yes" to everyone of them, you are home free. And if he says "no," you can introduce them.

MR. FREY: I suppose that is right, assuming that they

are within this realm of cross-examination that we are entitled to conduct. I mean I think the Court has made it clear that the existence of -- for instance the defendant can't invoke his Fifth Amendment privilege against self-incrimination to resist cross-examination. Once he elects to take the stand there are consequences that flow from that and I think the Court has been steadfast in its adherence to the policy that the truthfulness of his testimony can be explored. And cross-examination is the primary instrument. Impeachment is secondary, when cross-examinatio fails.

And our position --

QUESTION: To Mr. Justice White you said that it would be impeaching of his direct testimony that he had nothing to do with the T-shirts. But that was cross-examination testimony.

MR. FREY: No. Well --

QUESTION: The only thing he said on direct was that he said "no" to "Did you ever engage in that kind of activity with these two people."

MR. FREY: Well --

QUESTION: That kind of activity, saying he had the T-shirt in his bag wouldn't have been impeaching of that, would it?

MR. FREY: Well, first of all it impeaches his denial of any involvement with the cocaine. He had nothing to do with McLeroth. He testified he had nothing to do with importing the

cocaine. Now, if he had nothing to do with those things what was his T-shirt doing in his luggage? It certainly demanded an explanation.

Now, it is also our view, we argue in our brief that his testimony about draping and taping the material on the fourth trip, he was a lawyer, I think it is clear that he was trying to tailor his testimony to between the Walter-Agnello-Harris line. But in our view, and we analyze it in our brief, that testimony amounted to the jury, it communicated a denial of any involvement in preparing the shirt in which the cocaine was secreted.

QUESTION: Well, I suppose if he had simply said, "I am not guilty, I had nothing to do with this transaction," you could impeach him in the same way?

MR. FREY: I think --

QUESTION: Under your analysis.

MR. FREY: Under our first position that is right, if it is legitimate cross-examination.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Lee.

ORAL ARGUMENT OF WILLIAM C. LEE, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I would like to comment on the statement of facts first

because I think there are some expansion there that is useful to put the issues in the context of this case and show also the pernicious influence of the principle for which the Government is arguing.

The prosecution was based exclusively on the testimony of the co-defendant McLeroth. McLeroth's liability as a general proposition can be gained by the fact that he testified that he had been forced into this by the Respondent because he was penniless, he had no income for several years and had not filed any Federal income tax returns.

Evidence showed that he had run a quarter of a million dollars through one bank account that was admitted into the evidence upon his cross-examination. It showed in fact that he had telephone bills of --

QUESTION: That was developed by impeachment of McLeroth?

MR. LEE: Yes, that was developed through cross-examination of McLeroth. Plus the fact that he had --

QUESTION: No one questions that that is perfectly valid cross-examination.

MR. LEE: That is correct. Likewise --

QUESTION: Do you think there is any difference between cross-examining a witness in chief to undermine credibility and to do the same thing to a defendant who takes the stand?

MR. LEE: Not as to the scope of the question, I do not,

Your Honor. I think the distinction here is based upon the Fourth Amendment problem that this cross-examination has, that is the cross-examination of the Respondent.

QUESTION: Then you are questioning Harris v. New York?

MR. LEE: No, Your Honor. No, I am simply saying that Harris is distinguishable because in that instance the defendant offered the testimony on his direct examination.

QUESTION: Well, what Fourth Amendment problem is there?

MR. LEE: The Fourth Amendment problem which we contend is raised by Agnello. We think Agnello is virtually on all fours with this case because in Agnello the --

QUESTION: Agnello and Silverthorne are pretty shaky, aren't they?

MR. LEE: Well, I think Silverthorne and Agnello are thoroughly distinguishable. What the Government has consistently referred to as the doctrine of Agnello that improperly seized evidence cannot be used at all is not the doctrine of Agnello. That is the doctrine of Silverthorne. Agnello in fact dealt specifically with cross-examination, a denial of a prior event and then the use of that on rebuttal to try to impeach Agnello. It is on all fours with this case.

And one of the points that I wish to leave with the Court is that if you are going to sustain the Government's

position on this matter of the propriety of using this improperly seized evidence on cross-examination you must overrule Agnello. You cannot fit the Government's argument into Agnello as they argued in their principal brief. They make the --

QUESTION: You don't want to share Mr. Frey's analysis of Agnello?

MR. LEE: No, I do not. I think the holding of Agnello was narrower than the Government attributes to it. Whereas they say that Agnello hols that improperly seized evidence may not be used at all, I think it clearly holds as we have quoted in our brief from it. In his direct examination Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination in answer to a question permitted over his objection he said he had never seen it. He did nothing to waive his constitutional protection or justify cross-examination in respect of the evidence claimed to have been obtained by the search.

So we think Agnello is confined to the inadmissibility of improperly received evidence through cross-examination.

QUESTION: Well, in your view is this proper cross-examination?

MR. LEE: I think yes, I think that given the broad latitude that would normally be permitted a cross-examiner, it is obviously a judgment call, but I think that one could

argue that the cross-examination per se may have been proper in an effort to impeach the defendant.

QUESTION: You are saying even if the question arose out of even taint of the Government's mind because they had seized the --

MR. LEE: No. I mean --

QUESTION: I would suppose you would take the position that this question that they asked about --

MR. LEE: No.

QUESTION: -- the possession of this T-shirt was, however otherwise it might be proper cross, it was improper here because it was related to illegally seized evidence?

MR. LEE: Precisely. What I meant to say was it would have been proper but for this defect.

Do I make myself clear?

QUESTION: Yes.

I suppose you would say that if they had had a warrant and had seized the shirt properly and then on cross-examination had asked him this question, you would say that would have been a proper --

MR. LEE: Absolutely.

QUESTION: -- question within the scope of direct examination?

MR. LEE: Yes; absolutely.

QUESTION: Do you think your response is in conflict

with the Court did in Walter?

MR. LEE: No, Your Honor.

QUESTION: Cross-examination in Walter was that he had never -- Walter was asked: Have you ever sold narcotics? And he said, no, he hadn't. And then the Government introduced narcotics which had been suppressed in another totally independent transaction years before.

MR. LEE: But, Your Honor, the testimony to which you refer in Walter was elicited on his direct examination. That is the distinction.

You see, this is the first instance in which the Government has sought to use cross-examination -- that is to say the first instance which has been presented to this Court -- it has sought to use improperly seized evidence on cross-examination to impeach a defendant or to rebut his testimony in some particular.

Walter, Harris, Hass are all cases --

QUESTION: You mean it is the first time where the statement "to impeach" comes out first on cross-examination?

MR. LEE: Yes.

QUESTION: Because it was on cross that he was impeach in Walter.

MR. LEE: Exactly. I beg your pardon. That was --

QUESTION: He was cross-examined in Walter by the prosecutor when he said he had never engaged and never had in

his possession any narcotics.

MR. LEE: Yes, but Mr. Justice White assisted me to point out that what we are really talking about is the statement "sought to be impeached." The statement "sought to be impeached" in Walter was given by the defendant in his direct testimony.

QUESTION: And then it was repeated on cross, like you would have to.

MR. LEE: Yes.

QUESTION: Like you would have to. You said on direct --

MR. LEE: Sure.

QUESTION: -- so and so, and he repeats it.

MR. LEE: In this case the statement "sought to be impeached" was first elicited on cross-examination and therefore it is clearly distinguishable on the facts from Walter, Harris and Hass. And falls, we believe, within the four corners of Agnello and requires this Court to overrule Agnello if it is going to grant the Government the relief that they seek.

Just to continue on briefly with the facts I want to pursue this because it shows the significance of this issue in a given fact situation.

McLeroth in addition, as I have pointed out to having been shown to be untruthful on the matters of his

income was shown by his own banker who was called to put his bank records in to have told him that in this instance he was importing cocaine for the Government. A Government agent was quickly called to the stand and denied that that was the fact.

The Respondent Havens testified in his own behalf, was never shown to have any prior involvement in criminal activities, was shown to have traveled abroad on the same kind of export-import business that he testified he was on in Peru. His partner in that business was called to corroborate that. He put character witnesses into evidence and that did not elicit any response from the Government to show anything negative about him.

And, in short, it was the T-shirt, this cut up T-shirt that was the only piece of corroborative evidence that corroborated --

QUESTION: Why did he keep that cut up T-shirt?

MR. LEE: We respectfully submit, Your Honor, that the evidence does not establish that he did, and let me pursue that point.

The Government in its argument, Your Honor, clearly inferred that McLeroth's testimony was that this shirt manufacturing process took place in connection with the trip upon which these two were arrested. That is not true. McLeroth's testimony is that this shirt manufacturing process

took place earlier in September in Fort Wayne, Indiana.

QUESTION: Well, the jury convicted him, didn't they?

MR. LEE: I understand that, Your Honor, and my point is that with this one piece of corroborative evidence which we contend was improperly submitted, this jury was out nine hours and finally convicted the Respondent in a case which, contrary to the Government's Footnote 1, can most charitably be described as a very skinny case.

QUESTION: But there are skinny cases and fat cases.

MR. LEE: I understand that.

QUESTION: All we look at is jury verdicts when we are talking about sufficiency of the evidence.

MR. LEE: I understand that. But what I am trying to point out is that this piece of evidence, for which there is no logical connection, why would the Respondent have transported a cut up T-shirt that was manufactured weeks earlier from Fort Wayne, Indiana to Peru and then transport it back to Miami International Airport?

And furthermore, he was not --

QUESTION: They were traveling together, weren't they?

MR. LEE: They were traveling on the same plane. They were not down there on the same business, according to

the Respondent's testimony.

QUESTION: Do the records show who financed McLeroth's four trips to South America?

MR. LEE: The records show, I think, he substantially financed it himself, although I believe in one instance he said that he ran out of money while they were there and that Havens helped pay his hotel bill and/or some other expenses.

But the point is there is no logic to the Government's position that he would have transported a T-shirt remnant from Fort Wayne, Indiana to Peru and back to Miami International Airport where it would have been in his luggage when he was arrested on October 2.

The conflict which the Government elicited on cross-examination was when Havens was asked did you have this cut up remnant in your baggage when you were arrested on October 2, he said, "Not to my knowledge."

Then he went on to explain at some length that he did acknowledge that when his luggage was returned to him the next day Agent Martinez in a very elaborate process went through his luggage mirabili dictu discovered the T-shirt and gave him a receipt for it.

Martinez testified when he put the shirt in that in fact he went through the luggage on October 2, found the T-shirt, disclosed it to Havens and talked to him.

Martinez never denied the conversation on October

3 and the question I would raise just as a practical matter since there has been a lot of discussion of credibility, why would an experienced drug agent discover a T-shirt which was patently related to, according to the Government's position, the courier that they had arrested four hours earlier and not take it into their custody at that time? Why would they leave it in the luggage after having first discussed it with Havens, allegedly, on October 2, to rediscuss it with him on October 3 and give him the receipt for it at that time.

QUESTION: Did you show that to the jury?

MR. LEE: I did not personally, Your Honor. But I presume that trial counsel did.

QUESTION: And the jury said "No."

MR. LEE: I think that is correct,because they had the T-shirt in evidence and in the jury room with them.

I would like to touch on the matter of the two sub arguments.

First I have discussed the matter of the alleged perjury. The Government of course has maintained throughout in its principal brief that the reason that Agnello needs to be overruled is to protect the trial process from perjury by the defendant on cross-examination. And they stoutly insist throughout their principal brief that that is clearly what we have here.

I think a fair reading of the evidence demonstrates that it is not perjury. There is a conflict between whether Havens admitted that he first became aware of the T-shirt on October 2 or October 3.

QUESTION: Well, it doesn't make any difference as to a credibility attack whether there is outright perjury or whether there is faulty recollection. You can undermine credibility of a witness by showing much less than perjury, can't you?

MR. LEE: But the question then becomes, Your Honor, do we overrule, in effect, as Mr. Justice Marshall pointed out, his Fourth Amendment right because of a mere conflict that you want to impeach him on vis-a-vis the opportunity to demonstrate that he has committed perjury. In other words the Government takes the position that it needs this extraordinary remedy in order to curtail or prevent perjury. And that is what they talk about in their principal brief.

And then when they filed their brief after we had taken them to task to some extent, they say, well, maybe it was just a matter of credibility and we ought to be permitted to do it anyway.

And it is our position that simply impeaching someone or attacking their credibility in some particular may be appropriate but it doesn't justify doing away with

their Fourth Amendment right.

Now, pursuing a point that Mr. Justice Marshall raised and of course the Court of Appeals of the Fifth Circuit saw this very clearly when it said as we quote in our brief, according to the view of the trial judge and the prosecutor the defendant could be asked on cross-examination a question which, answered affirmatively, would admit the incriminating tendencies of the illegal evidence; and answered negatively, would allow the subsequent introduction of the illegal evidence for the purposes of impeachment.

What the Government is really asking this Court to do by overruling Agnello is to do away with the Fourth Amendment right of any defendant who elects to testify on his own behalf, because if any prosecutor or deputy prosecutor or United States Attorney isn't clever enough to devise a line of cross-examination which would bring within the scope of the direct some object or fact which is in fact somehow connected with the event, he is going to get it in.

QUESTION: You can't have everything. I mean you have always got the right to remain silent.

MR. LEE: I understand, Your Honor.

QUESTION: Well, isn't --

MR. LEE: But I think as we point out in our brief, and I want to look at this from a practical standpoint, and

we cite an authority in a footnote for this proposition, a defendant who goes to trial before a jury and does not testify on his own behalf has, in my experience of some duration as a prosecutor, almost no prospect of acquittal. It is absolutely essential for a criminal defendant to testify on his own behalf in a criminal jury trial.

QUESTION: Why shouldn't he be subjected to the same process of cross-examination as any other person who elects to testify?

MR. LEE: I think he should but for the fact that here we are saying that there is some evidence that has been constitutionally impermissibly obtained and that simply that should not be used. We are not saying that the cross-examination process should be impaded in any way, we are simply saying that evidence which has been unconstitutionally seized should not be used in that process.

QUESTION: Well, then you are quarreling with Walter and Harris.

MR. LEE: I --

QUESTION: Let me remind you what Mr. Justice Frankfurter said:

"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which the

evidence in the Government's possession was obtained to his own advantage and provide himself with a shield against contradiction of his untruth."

MR. LEE: Yes.

QUESTION: Now, you are really arguing with that proposition.

MR. LEE: Well, not really, Your Honor, because you see in that case --

QUESTION: How are you not arguing with that?

MR. LEE: Pardon me?

QUESTION: Tell me how you do not argue with that.

MR. LEE: In that case the defendant offered the testimony in question on direct examination. He was in fact, as Justice Frankfurter pointed out, on direct examination trying to build a defense, affirmatively, and shield himself from this impermissively seized evidence. And I think the Court there -- and we concede in our brief, we don't have any quarrel with that.

QUESTION: What do you say Havens was doing when he said he didn't know McElroth and never had anything to do with him?

MR. LEE: He didn't say that. No. Oh, no. He didn't say that at all. In fact I think it is important to analyze carefully --

QUESTION: What did he say about that?

MR. LEE: The only thing that he said that they were relying upon on direct examination is that -- and Mr. Frey read it:

"And you heard Mr. McElroth testify earlier as to something to the effect that this material was taped or draped around his body and so on."

"A. Yes, I did.

"Q. Did you ever engage in that kind of activity with Mr. McElroth and Agousto or Mr. McElroth and anyone else on the fourth visit to Lima, Peru?

"A. I did not."

We contend under the Weeks case that that is simply a general denial of his involvement in the crime. And I would suggest to the Court that if you would get to the point where you would rule that this direct testimony, which I consider to be attenuated, to use a word that was used in earlier argument, in its relationship to the T-shirts, I submit that you are going to have all sorts of cases in which you are going to be asked then to examine the specific phrasing and context of attenuated answers like this to try to tie them up to something specific like a T-shirt or a gun or the cocaine capsule and Agnello, or whatever.

But I do think that there is a distinction between

Walter and this case, and a very important one, because in Walter the defendant on his own initiative attempted to build a defense and shield himself from the improperly seized evidence. And the Court there said he couldn't do that.

Here it is the Government that is trying to get into the evidence the impermissibly seized evidence by, I think, what can charitably be described as an attenuated line of questioning.

QUESTION: What if the Government attorney had asked on cross-examination of the defendant who had voluntarily elected to take the stand: "Are you guilty of this offense?"

MR. LEE: Yes.

QUESTION: Anything wrong with that?

MR. LEE: No, I presume he would have said "No" and then the question occurs to me, as has occurred I believe to Mr. Justice White and others, would that standing alone be a competent basis to admit the T-shirt? And apparently the Government's position is that it would be.

QUESTION: I take it they would say that the T-shirt being in the bag, finding a T-shirt in the bag, a T-shirt like this is inconsistent with his testimony on direct?

MR. LEE: Sure.

QUESTION: It is just plain inconsistent and just introducing it tends to impeach --

MR. LEE: Yes.

QUESTION: -- the statements on his direct examination.

MR. LEE: And if the T-shirt had been properly available to be admitted, no question that they could do that. But here --

QUESTION: Well, suppose they had gotten it by a warrant.

MR. LEE: Yes.

QUESTION: And they just had not introduced it on the direct side of their case.

MR. LEE: Yes.

QUESTION: I suppose they could introduce it in rebuttal.

MR. LEE: There might be some technical -- it would depend of course on the line of questioning, because it would have to be, you know, related to --

QUESTION: Well, I --

MR. LEE: I think they probably could as a general matter.

QUESTION: You thought the question about it was perfectly --

MR. LEE: Yes.

QUESTION: The question whether he had it you thought was perfectly good cross-examination if they had had

a warrant?

MR. LEE: That is correct.

QUESTION: All right. And so I suppose on rebuttal it would have been perfectly proper to introduce the T-shirt?

MR. LEE: Yes.

QUESTION: If there had been a warrant?

MR. LEE: Yes.

QUESTION: Why is it arguable then that the T-shirt -- as far as the exclusionary rule is concerned you aren't doing any more to the exclusionary rule by permitting the T-shirt to be introduced on rebuttal, because it is inconsistent with his direct examination.

MR. LEE: I think you are abolishing the exclusionary rule for a defendant who takes the witness stand, because by hypothesis if the object is closely enough related to the general subject matter of the case or the event that they want to bring in, then a line of cross-examination could be devised to bring it in.

QUESTION: If somebody had asked him on his direct, "Did you have a T-shirt in your bag?" and he had said "No," you could introduce the T-shirt.

MR. LEE: Yes. That is right.

QUESTION: Well, now I suggest you could introduce the T-shirt because it is sufficiently inconsistent with

his direct testimony that it would tend to disprove his direct testimony.

MR. LEE: I think it would. And if it weren't under this constitutional burden, I think I think it could be admitted.

QUESTION: I must confess I am a little puzzled. I think you are changing your position a little bit and maybe you intend to. But you are acknowledging then that it is admissible under Harris and Walter?

MR. LEE: No, no. I am admitting that -- I am sorry, this was the distinction we had to try to derive before. I am admitting that it would be admissible but for the constitutional defect.

QUESTION: But still I think you are saying then it is impeaching of direct testimony, putting aside the Fourth Amendment argument. If you admit that, then I would think it is admissible under the rationale of Harris and Walter.

MR. LEE: Well, I think --

QUESTION: That was my suggestion to you.

MR. LEE: I see.

Well, no, I disagree with that.

I think the real issue, and I think something has been lost in the case and it is a point that I am glad that you reminded me of, is that the impermissible activity here

really is the line of questioning, more so perhaps than the admission of the physical evidence.

For example, in Agnello, there they did not offer the physical evidence because, I presume, it had long since been destroyed. What they offered in Agnello was the agent who had seized the prior drug and the laboratory chemist who had analyzed it.

I really think -- a question was raised earlier that perhaps the objection should have been more vigorously and timely made when the line of questioning was brought up. But I think if you read the transcript you will see that trial counsel there was confronted with a typical dilemma and that is that as soon as the T-shirt is mentioned if he pops up in front of the jury and makes an objection, immediately he has highlighted that evidence and the jury concludes either: if he is successful, that he has kept something out that he shouldn't have; or if he is unsuccessful, he has highlighted it.

What he did was to ask to approach the bench as soon as he could gracefully do so and he did raise it then in the bench conference.

QUESTION: That is true in almost any case you try, though.

MR. LEE: Yes.

QUESTION: Counsel wishing to object has to think

over quickly in his mind by objecting do I call the jury's attention to the fact more than if I just sit there and would stoically act as if it didn't make any difference.

MR. LEE: But my point simply is, Your Honor, that I think that from a theoretical standpoint it was the line of questioning that was really impermissible. And I can concede that perhaps a more timely objection could have been made but obviously if you read the record, that is what happened, he did get up to the bench very shortly after that issue was raised and did take it up with the judge at that time.

QUESTION: Not at the moment it was raised.

MR. LEE: No. He did not in response to the initial reference to it in the cross-examination; that is correct.

QUESTION: One of the English judges who is often quoted in American opinions, Mr. Lee, said something to the effect that cross-examination is the greatest tool ever invented for the exposure of falsehood.

I take it you generally agree with that?

MR. LEE: I do and I think in this case one has to read very carefully the questions and answers given and put them in the context of some of the other facts that I have pointed out.

QUESTION: Necessarily that makes cross-examination

pretty rough business.

MR. LEE: Yes, sir.

QUESTION: Does it interfere with the -- does allowance of cross-examination interfere with the right to testify?

MR. LEE: I think if you are going to overrule Agnello --

QUESTION: Well, just -- no, just in the abstract.

MR. LEE: In the abstract it --

QUESTION: It is a hazard.

MR. LEE: It is a hazard of testimony. It is a hazard of testifying.

QUESTION: To take the stand in a criminal case for a defendant is hazardous.

MR. LEE: That is correct.

MR. CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock.

(Whereupon, a luncheon recess was taken.)

AFTERNOON SESSION

(1:00 P.M.)

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Lee?

MR. LEE: Yes, Your Honor.

Mr. Chief Justice, and members of the Court:

Very briefly, to conclude, having take the position and I hope supported it, that if the Government is to be granted its relief it will require the reversal or the overruling of Agnello, I would like to discuss very briefly the policy considerations which have been touched on in the briefs about whether or not the abolition of the exclusionary rule in these situations would be appropriate.

I think that there are some real problems in that, as I have already suggested, first I think any prosecutor who is competent to be in a courtroom could have in this case or in many other cases where there is a piece of evidence that has been improperly seized which can be related to the transaction at issue can surely develop a line of cross-examination to cause the admission of that evidence. If that is the case and if you accept the premise that it is very important --

QUESTION: Is that fundamentally different from many tactical choices and options that are available in the trial of a lawsuit?

MR. LEE: No, that except in this instance it is our position that it is violative of the Fourth Amendment.

QUESTION: Well, of course that was argued in Walter and in Harris.

MR. LEE: Not where, as I have stated earlier, the issue was first raised upon the cross-examination of the defendant.

QUESTION: Well, as someone suggested before, that is a line that is sometimes difficult to identify.

MR. LEE: It may be but I think it happens to exist; yes,Your Honor, I agree.

QUESTION: And sometimes it is a mutable line?

MR. LEE: Perhaps.

QUESTION: It is not immutable.

MR. LEE: All right.

The second point that I wish to make to relate to that is that because of the interest in the prosecution in keeping defendants off the stand and the opportunity to use improperly suppressed evidence to do so, there would be an incentive, in fact, to gather evidence, properly or improperly seized, with the thought that as long as we have it in the file we can use it to keep the defendant from the witness stand and therefore it will serve a very useful purpose in the prosecution of the case.

QUESTION: More important than that, the greatest

hope that a prosecutor has in any case is that the defendant will take the stand.

MR. LEE: I -- well --

QUESTION: It is hardly persuasive to suggest --

MR. LEE: We have cited at Footnote 13 of our brief an authority for the converse of that, so I will have to let the Court evaluate that point.

QUESTION: Does it cite some substantial supporting data?

MR. LEE: It is a handbook on criminal procedure which says that you should do everything you want to keep the defendant off the witness stand.

QUESTION: Yes, that is why I suggested that the prosecutor's greatest hope is that the defendant will take the stand. The prosecutor can't lose by that, can he?

MR. LEE: I don't think I can pursue that any further, Your Honor, I think I am at an impasse there.

QUESTION: Handbook for use by prosecutors ?

MR. LEE: Yes.

QUESTION: That is what I thought you meant.

MR. LEE: Yes.

QUESTION: So you have prosecuted quite a few people?

MR. LEE: Yes, I have. And today I am here on the other side of the case.

I thank you very much for your attention.

QUESTION: Mr. Lee, your last discussion pertained to so-called policy considerations.

MR. LEE: Yes.

QUESTION: Would you think it to be well weighed in the balance that there is presumably a multibillion traffic in illegally smuggled cocaine coming in from Colombia through Miami and that a truth finding trial least impeded by exclusionary processes is desirable?

MR. LEE: With all due respect, Your Honor, I wouldn't think that a policy consideration dealing with a substantive area of offense would be a competent basis for doing away with this constitutional protection.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Frey?

MR. FREY: A couple of points, Mr. Chief Justice.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: First of all, I want it to be clear with regard to the question that Justice White asked earlier about whether the interrogation itself is a fruit of the illegal seizure, that that was true in Walter, that was true in Harris, that was true in Knox. And therefore in order to base a decision affirming the Court of Appeals in this case

on that ground you would have to retrace steps that you have already taken in those cases.

Now, it seems to me that what we have here is basically the straightforward exclusionary rule policy case with which the Court has often been confronted, balancing the values of accurate trial outcomes and particularly the value of exposing false testimony on the one hand against the deterrent values of the exclusionary rule. And I think that the balance has already been struck in Harris and in Hass. The Court made clear there, it stated explicitly that keeping the evidence out of the prosecution's case in chief is sufficient deterrent.

We are now in the area of speculation, which Respondent engages in, about whether the distinction between impeach and cross-examination answers and impeach and direct examination testimony, and as we have seen earlier it the argument in this case that can be a very fuzzy distinction. It will materially alter the behavior of police officers and secure a greater degree of compliance with the dictates of the Fourth Amendment.

Essentially the argument that the prosecution will arm itself with means of keeping the defendant off the stand was an argument that was equally applicable in Harris and in Hass and, indeed, in Hass that was the very argument that was made, that the prosecution, that the police there

having given Miranda warnings and the defendant having asked for a lawyer, they could do nothing to get a statement that would be admissible under Miranda at that point. Therefore they had every incentive to go ahead and collect this evidence for possible use for impeachment purposes. And the Court refused to --

QUESTION: But Mr. Frey, if they had answered his question "yes" and you would say it would be substantive evidence, wouldn't it?

MR. FREY: Yes, in the same sense -- substantive and impeaching.

QUESTION: Well, substantive evidence. And you would use it because it is arguably inconsistent with his direct testimony on his side of the case. And so if the reason for the exclusionary rule is deterrence, I would think it could be foreseen that almost any piece of relevant evidence, if you could get a hold of it, is very likely to turn up to be somewhat inconsistent with the defendant's testimony if he takes the stand.

MR. FREY: Well, it can --

QUESTION: And in which event you could always use it.

MR. FREY: Well, it can be foreseen in many circumstances. I mean many of the exceptions to the exclusionary rule, take the standing requirement for instance,

if I can use that word --

QUESTION: Well, the problem with the exclusionary rule here is what are its limits.

MR. FREY: Well, that is the question that we have before the Court and --

QUESTION: Exactly. And one of the relevant questions to that is whether or not the amount of deterrence is worth the candle.

MR. FREY: Well, but the basis of the Court's continued adherence to the exclusionary rule is that the fundamental deterrence of keeping the evidence out of the prosecution's case in chief is still judged sufficiently worth the candle to retain the rule. The question --

QUESTION: With challenges to credibility, the jury may be instructed, on request, that the jury is to consider that evidence only with respect to credibility. Now, I emphasize for whatever that is worth, the jury may treat it as substantive evidence. But that instruction, cautionary instruction is given, is it not?

MR. FREY: It was given in this case and --

QUESTION: It must always be given on request.

QUESTION: Well, it wouldn't have been if he had answered "yes."

MR. FREY: No, but our position of course is that we are entitled to cross-examine him and we are entitled to

have truthful answers from him. And of course the answers he gives on cross-examination are as much substantive evidence as the answers he gives on direct.

QUESTION: You are saying on the chance that he will lie I am entitled to ask this question based on illegally seized evidence?

MR. FREY: We are saying that we are entitled to ask the question in the hope that he will tell the truth. If he does not tell the truth, then we are entitled to impeach his false answer.

QUESTION: And if he tells the truth you are entitle to use it as substantive evidence?

MR. FREY: That is correct.

QUESTION: Even though the source of your question is illegally seized evidence?

MR. FREY: That is correct. And that was --

QUESTION: That is not any prior case.

MR. FREY: Oh, yes, that would have been true in Walter as well if he had --

QUESTION: You don't know that would have been true. There may still have been a question.

MR. FREY: But suppose in Harris on cross-examination they had said, "Didn't you make these statements," and he had said "Yes, they are true, my testimony on direct examination was wrong. I now correct it in this

manner," that would be used as direct evidence.

QUESTION: Well, I know you keep saying that but conceivably the instruction could be consider this only for purposes of impeachment.

MR. FREY: Well, I do -- I don't want to recede in any way from my argument that this is also impeachment, his answers on direct, his denials on direct of his complicity in the crime. If you had a bank robber and you found ski masks in the loot in his apartment in an illegal search and he got on the stand and said, "I had nothing to do with the bank robbery, nothing whatsoever," the ski masks and the loot would clearly impeach that denial of guilt as well as contradict it.

QUESTION: What about just pleading not guilty, that is a denial of guilt. Then can you use it?

MR. FREY: I don't --

QUESTION: That is exactly what Walter says you cannot do.

MR. FREY: If he just pleads not guilty, you clearly could --

QUESTION: That is a denial of guilt.

MR. FREY: But it is not the denial of guilt in that form that is the focus of the Court's attention. First of all, you have the policy of the exclusionary rule which is inconsistent to some degree with the truth-seeking function

which has been limited before to the direct case of the prosecution, the prosecution can't use it. Now, the question is what uses can it make for impeachment or rebuttal and the cases that the Court has decided since Agnello have all allowed that impeachment or rebuttal use of the evidence. It is a matter of what deterrence you feel will be accomplished and it is a matter of the policy that he is entitled to plead not guilty, even if he is guilty of sin. But he is not entitled, in this Court's view, to get on the stand and testify falsely and that policy comes into play once he does it.

Thank you.

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

* * *