

ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

CAPTION: NEW YORK, Petitioner V. BERNARD HARRIS

CASE NO: 88-1000

PLACE: Washington, D.C.

DATE: January 10, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK, :
Petitioner :
V. : No. 88-1000
BERNARD HARRIS :
- - - - -x

Washington, D.C.
Wednesday, January 10, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:06 a.m.

APPEARANCES:

PETER D. CODDINGTON, ESQ., Assistant District Attorney,
Bronx County, New York, Bronx, New York; on behalf
of the Petitioner.

BARRINGTON D. PARKER, JR., ESQ., New York, New York, by
invitation of the Court as amicus curiae, in support
of judgment below; on behalf of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

PETER D. CODDINGTON, ESQ.

On behalf of the Petitioner

3

BARRINGTON D. PARKER, JR., ESQ.

By invitation of the Court
as amicus curiae, in support
of judgment below; on behalf
of the Respondent

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REBUTTAL ARGUMENT OF

PETER D. CODDINGTON, ESQ.

On behalf of the Petitioner

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1 PROCEEDINGS

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 88-1000, New York v. Bernard Harris.

5 Mr. Coddington.

6 ORAL ARGUMENT OF PETER D. CODDINGTON

7 ON BEHALF OF THE PETITIONER

8 MR. CODDINGTON: Mr. Chief Justice, and may it
9 please the Court:

10 Your Honor, I know you're all aware of the facts
11 in this case so I'm not going to dwell on them.

12 Rather, we believe the New York Court of Appeals
13 erred on four fronts in this case. And, if I may, I'd
14 like to concentrate on our first two arguments primarily
15 while I'm at this podium.

16 We believe that the New York Court of Appeals
17 misunderstood Brown and its progeny by holding that a
18 precinct confession, totally voluntary, given outside of a
19 man's house, should be suppressed because the police
20 arrested him in his home without a warrant.

21 Now, I believe they misapplied Brown. Brown
22 merely holds that Mirandas will not attenuate a Fourth
23 Amendment violation in every case. The opinion says so,
24 that Miranda warnings by themselves will not always
25 attenuate.

1 However, Brown also did not adopt any "but for"
2 standard -- but for a Fourth Amendment violation a
3 confession so be suppressed.

4 Brown, Taylor and Dunaway, the three cases on
5 which the court of appeals relied, hold merely that when
6 the confession is the product of prolonged involuntary
7 detention without probable cause, then a confession should
8 be suppressed.

9 In those cases, the confession comes as a result
10 of the Fourth Amendment violation. That is, holding a man
11 without probable cause in violation of his Fourth
12 Amendment rights.

13 Where, however, in a case like this where there
14 is ample probable cause, I submit that the vice that led
15 to the Brown, Dunaway and Taylor holdings is absent. Once
16 this man was taken outside of his house, the detention was
17 completely lawful for Forth Amendment purposes.
18 Therefore, the perfectly voluntary confession given later
19 at a public place, the police precinct, I submit should
20 have been admissible.

21 Now --

22 QUESTION: Without regard to any other factors?
23 What I mean is do you agree with what I think is the
24 Solicitor General's position in his brief that the vice of
25 -- going inside the house in this case to arrest the

1 person was that you might have seen things inside the
2 house that could be used as evidence, not the mission to
3 -- to arrest him?

4 MR. CODDINGTON: Yes, sir.

5 QUESTION: And, therefore, so long as you're not
6 using any evidence that you saw inside the house to prove
7 your case, the arrest itself is okay?

8 MR. CODDINGTON: That's -- that's precisely --
9 that's my second point, Chief Justice Rehnquist. We
10 believe also that the --

11 QUESTION: Well, but just -- but just on the
12 first point, to follow-up to the Chief Justice's question.
13 If you assume that the rule is you must exclude the
14 statement that's given in the house, then do you make the
15 same argument here? Or is it just a factual inquiry as to
16 whether or not there's -- the taint's been attenuated?

17 MR. CODDINGTON: Well, I believe we get into
18 attenuation. With respect to the Brown holding, my
19 position is that if there is probable cause, Miranda
20 warnings by themselves should attenuate and there's no
21 need to go through the three-fold factors. Okay?

22 But I also agree that the Payton rule -- I think
23 there should be a bright-line rule here that Payton
24 applies to evidence that is seized or perhaps observed in
25 the home, and that evidence that is taken outside the home

1 should not be suppressed as a violation of Payton. If
2 that answers Your Honor's question.

3 QUESTION: So your first point is that probable
4 cause plus Miranda warnings attenuate without more?

5 MR. CODDINGTON: That's right. That's right.
6 And my second --

7 QUESTION: And your second point is what?

8 MR. CODDINGTON: My second point is that Payton
9 applies only to evidence seized in the house, and that
10 evidence seized outside the house should not be suppressed
11 under Payton.

12 QUESTION: That's the Solicitor General's
13 argument.

14 Go back to your first point a minute. I'm not
15 sure I understood your response to Justice Kennedy. Under
16 your first point, you would say the first confession in
17 this case is also admissible, wouldn't you?

18 MR. CODDINGTON: Well, if there is a Payton
19 violation, and as you --

20 QUESTION: Well, we're assuming there is. I
21 mean --

22 MR. CODDINGTON: Okay.

23 QUESTION: -- isn't that where we start? At
24 least for purposes of decision we assume violation, don't
25 we?

1 MR. CODDINGTON: Well, as you know, my fourth
2 point is that the entry was consensual, and if so, there
3 would be no Payton violation.

4 QUESTION: Well, if you're right on that --

5 MR. CODDINGTON: If you -- for the moment --

6 QUESTION: -- there's not -- then we didn't
7 really need to take the case.

8 MR. CODDINGTON: Okay. Assuming there is a
9 Payton violation, I believe -- and we've agreed in the
10 state courts -- that the confession in the apartment
11 probably should be suppressed.

12 QUESTION: Why? Under your first argument --

13 MR. CODDINGTON: That's right.

14 QUESTION: -- there was probable cause and they
15 got Miranda warnings. Didn't he?

16 MR. CODDINGTON: Well, that's an extension that
17 I was not -- did not make in my brief. However --

18 QUESTION: I know. But it seems to me it's a
19 logical -- a logical conclusion --

20 MR. CODDINGTON: I would -- I would certainly
21 adopt that --

22 QUESTION: -- for your argument.

23 MR. CODDINGTON: -- here. But --

24 QUESTION: And maybe you're right, but I don't
25 know why you'd differentiate between the first and the

1 second confessions.

2 MR. CODDINGTON: Because that's the way it was
3 litigated in the state courts. But, however, I'm
4 perfectly willing to adopt that position here.

5 QUESTION: Well, you might -- you might consider
6 that confession to be evidence seized in the house.

7 MR. CODDINGTON: That -- that was the point I
8 was making. But --

9 QUESTION: (Inaudible).

10 MR. CODDINGTON: Well, I think Wong Sun answers
11 that. Evidence, I believe, of confession.

12 QUESTION: Wong Sun?

13 MR. CODDINGTON: Well -- that's what this all
14 stems from. Actually, in Wong Sun, by the way, the amicus
15 makes the point Wong Sun is completely different. Wong
16 Sun was released on his own recognizance by a magistrate.

17 QUESTION: Yeah.

18 MR. CODDINGTON: Which is quite different than
19 the facts of this case. The amicus argued as -- against
20 one of our arguments that perhaps the police should have
21 released this man and then rearrested him. I submit that
22 would have been inappropriate and would not follow under
23 Wong Sun.

24 Back to Justice Stevens' question. I do submit
25 that probable cause plus Mirandas under normal

1 circumstances should be enough to render a confession
2 voluntary. And if we can get over the Payton violation,
3 then I submit the confession in the apartment actually
4 should have been admissible.

5 However, as I say, that was suppressed by the
6 state court, and we only admitted the precinct confession.
7 The man was convicted with it. So, that's not really a
8 question that's before the Court.

9 QUESTION: Did the police have the drawn guns
10 when they went in there?

11 MR. CODDINGTON: That's a close question, Your
12 Honor. The testimony was that one officer had a gun in
13 his pocket; one had a gun down by his leg. The defendant
14 was looking through a peep-hole in the door. So I don't
15 think that he ever saw the guns when he opened the door.

16 QUESTION: Do you think that was consensual? Do
17 you think that to admit somebody with a gun is consensual?

18 MR. CODDINGTON: If he sees the gun, perhaps
19 not. But I don't think there is any evidence that this
20 man saw the guns when he opened the door. And the police
21 testified they holstered their guns as soon as they went
22 in.

23 When he opened the door -- you know, they
24 knocked on the door. They said police. I mean, this is
25 not Gulag. This is not Johnson.

1 QUESTION: Well, then he was in. Then he could
2 do whatever he wanted to do.

3 MR. CODDINGTON: Well, I think he said, "I'm
4 glad you're here. Come on in." I mean, I think there --

5 QUESTION: What else do you do with a man with a
6 gun?

7 (Laughter.)

8 MR. CODDINGTON: Well, I think you can shut the
9 door. That's what I'd do.

10 QUESTION: You -- you would shut a door with a
11 man with a gun?

12 MR. CODDINGTON: Shut the door and duck, yes.

13 QUESTION: Try it sometime.

14 (Laughter.)

15 MR. CODDINGTON: No, I think you can do that,
16 Your Honor.

17 QUESTION: You won't be around to talk about it.

18 (Laughter.)

19 MR. CODDINGTON: Well, I don't know, Judge --
20 Justice.

21 QUESTION: But, I mean, this rule in New York to
22 me is not proper under the Constitution. That you don't
23 get a warrant of arrest.

24 MR. CODDINGTON: Well, let me touch on that,
25 Your Honor.

1 QUESTION: There's nothing. There were five
2 days --

3 MR. CODDINGTON: That's right. Okay, let me --

4 QUESTION: And there was -- there was no reason
5 at all except the rule.

6 MR. CODDINGTON: Well, under New York, law, as
7 Your Honor knows -- as Your Honor knows, the police cannot
8 question a defendant without an attorney once they have an
9 arrest warrant. But as I read these --

10 QUESTION: There's nothing wrong with that.

11 MR. CODDINGTON: Well, I have no quarrel with
12 that either. But there's nothing in any of this Court's
13 decisions that says that the Sixth Amendment requires the
14 police to file charges so the man has an attorney just
15 when they have probable cause.

16 QUESTION: Well, Mr. Coddington, is it the
17 policy then in New York that arrests are made without
18 warrants to avoid that problem?

19 MR. CODDINGTON: No, Your Honor, it's not. It's
20 not.

21 QUESTION: Well, that certainly is -- is the
22 argument made in part by the other side.

23 MR. CODDINGTON: It certainly is and --

24 QUESTION: Do you think that's the custom or
25 practice in any agencies in New York?

1 MR. CODDINGTON: It may have been the custom of
2 this particular police officer. But, as I deal with at
3 length in my reply brief, it certainly is not the policy
4 of the New York City Police Department.

5 I mean, I'm not going to say that some police
6 officers don't delay arrests so they can obtain
7 confessions. But I submit that that's perfectly proper.
8 I mean, there's one thing to flagrantly disregard a
9 constitutional right. It's another to tailor your conduct
10 in conformance with the Constitution.

11 QUESTION: Yes, but to make an arrest without a
12 warrant in a home certainly violates the Constitution,
13 does it not?

14 MR. CODDINGTON: If that was their intent when
15 the entered --

16 QUESTION: I mean, you -- you concede that the
17 arrest without a warrant was unlawful inside the house?

18 MR. CODDINGTON: I agree that if it was non-
19 consensual, it violated Payton. But I submit to Your
20 Honor that -- I mean, the record here shows that these
21 police were not --

22 QUESTION: Well, do you think Payton was
23 articulating a constitutional requirement?

24 MR. CODDINGTON: I think so. Yes.

25 QUESTION: Uh-huh.

1 MR. CODDINGTON: Yes, I agree.

2 QUESTION: So you would agree there was a
3 constitutional violation?

4 MR. CODDINGTON: Well, understand, in Payton the
5 police broke in the door when the man wasn't there and
6 searched the apartment. Here, in this case, at page 380
7 of the record, the detective, Detective Rivers, went to
8 this man's apartment --

9 QUESTION: Do you think Payton was determined
10 only because the door was broken in?

11 MR. CODDINGTON: Well, there was no warrant and
12 it was a forceful entry.

13 QUESTION: Uh-huh.

14 MR. CODDINGTON: So far as I know, none of this
15 Court's opinions deal with anything like the circumstances
16 of this case. In Welsh v. Wisconsin they came late at
17 night. The same is true of Riddick. In Payton and in
18 Brown the police broke in the door.

19 Here, there is a knock on the door and an
20 apparently consensual entry.

21 QUESTION: Well, are you suggesting there's some
22 sort of halfway house between consent to entry and a
23 violation of Payton?

24 MR. CODDINGTON: No, I'm not. I'm just
25 suggesting that on this record it's a most unclear

1 question.

2 QUESTION: But the New York Court of Appeals
3 found there was no consent, didn't they?

4 MR. CODDINGTON: That's correct, and that was a
5 factual finding that was binding on them which I do not
6 believe binds this Court. At least, not as to the legal
7 conclusion.

8 QUESTION: No, but we --

9 MR. CODDINGTON: Which is why --

10 QUESTION: -- didn't grant certiorari on any --
11 on any question like that, did we?

12 MR. CODDINGTON: No. No. I think --

13 QUESTION: I think you might be well-advised to
14 assume that we're very unlikely to relitigate that
15 question here.

16 MR. CODDINGTON: Okay. So then we will assume a
17 Payton violation. Okay.

18 Assuming a Payton violation, I believe, again,
19 that -- okay, back to Justice Stevens' question. Assuming
20 a Payton violation, I believe probably that the confession
21 in the apartment should be suppressed. I submit that the
22 confession at the precinct should --

23 QUESTION: Well, the only issue we've got is the
24 station house.

25 MR. CODDINGTON: That's just what I'm getting

1 to.

2 QUESTION: So we don't need to argue anything
3 else.

4 MR. CODDINGTON: I was just trying to follow --
5 follow-up on Justice Stevens' question.

6 I believe the confession at the precinct should
7 not be suppressed. One, that was taken outside of the
8 house. I believe that Payton should extend no farther
9 than the house.

10 This is a night bright-line rule that the Court
11 can enact. I think it has an ease of application that
12 will aid police, prosecutor, defense counsel and state
13 courts in application.

14 I believe -- touching back to Justice Marshall's
15 question -- that the police behavior here was not designed
16 to violate the Constitution. In Hoffa and in Levasco,
17 which I believe Your Honor wrote, the Court has held that
18 the police do not have to file charges at the moment they
19 have probable cause.

20 The Court has recognized that it is perfectly
21 reasonable for police to go to a man's house, knock on the
22 door, and attempt to question him before they make an
23 arrest. This is perfectly reasonable behavior. And, as
24 the Court knows, reasonableness is the test under which
25 all Fourth Amendment decisions are rendered.

1 I submit that the conduct here was perfectly
2 reasonable. So, I submit that the confession at the
3 precinct --

4 QUESTION: Well, let me just stop you on this.
5 Don't you have to assume that a police officer's version
6 of the arrest, rather than the defendant's version, in
7 order to reach that conclusion?

8 MR. CODDINGTON: Oh, yes, but --

9 QUESTION: But were there findings that they
10 told the truth and he was lying --

11 MR. CODDINGTON: Yes.

12 QUESTION: -- when he said they barged into the
13 apartment with their guns drawn?

14 MR. CODDINGTON: Yes, there was.

15 QUESTION: Oh.

16 MR. CODDINGTON: When the court rendered its
17 verdict, it expressly discounted -- discredited -- the
18 defendant's version.

19 I can get the cite for that. It's -- I believe
20 it's -- well -- it is at -- it would be page 27, I
21 believe, of the joint appendix. No, excuse me, page 29 of
22 the joint appendix. "I cannot accept the defendant's
23 version with respect to the course of nature in this
24 statement or that his statement was other than voluntary
25 or true."

1 QUESTION: Well, that's not -- that's not with
2 regard to how -- what the behavior was at the time they
3 entered.

4 MR. CODDINGTON: No, but I think --

5 QUESTION: That's the course of --

6 MR. CODDINGTON: I think that's the court's
7 ruling on the entire testimony of the defendant.

8 QUESTION: I see.

9 MR. CODDINGTON: And I think the defendant's
10 testimony at trial started with an involuntary entry,
11 gunpoint questioning, so on and so forth, culminating in
12 an involuntary confession at the precinct. I submit the
13 court specifically rejected --

14 QUESTION: What did the court of appeals say
15 about it? What did the court of appeals say about it?

16 MR. CODDINGTON: The court of appeals didn't
17 precisely reach that issue. The court of appeals applied
18 the Brown factors, which is the next point I'd like to get
19 to.

20 QUESTION: The court of appeals did -- said that
21 Payton applied, didn't it?

22 MR. CODDINGTON: Oh, yes. Yes. We -- we agreed
23 on that now.

24 QUESTION: And you agree that Payton applied?

25 MR. CODDINGTON: I agree now. Yes, I do.

1 QUESTION: Well, I wonder why we're sitting her
2 for.

3 MR. CODDINGTON: I'm sorry, Judge, I didn't hear
4 you.

5 QUESTION: I wonder what's up left. Once you
6 agree on Payton, aren't you in trouble?

7 MR. CODDINGTON: Well -- no. Okay. Excuse me.
8 I -- I agree that the police violated Payton here.
9 However, I do not agree that the precinct confession
10 should be suppressed. I think that Payton should not
11 apply to a precinct confession. I submit that because
12 there was probable cause Brown does not apply the way the
13 court of appeals applied it.

14 I submit that because there was probable cause
15 and Miranda warnings that should attenuate the precinct
16 confession. And in any event, I believe that the court of
17 appeals misapplied the Brown factors in finding this
18 confession was --

19 QUESTION: (Inaudible) New York ever approved
20 this rule of the police department that you did not need a
21 warrant?

22 MR. CODDINGTON: Oh, yes. In People v. Lane,
23 which is cited in my brief -- I believe it's 64 N.Y. 2d.

24 QUESTION: I only saw one case. Is that the
25 one?

1 MR. CODDINGTON: Yeah, Lane. Now, see, in New
2 York -- under New York law one has to file --

3 QUESTION: This rule is a rule of the police
4 department, not the New York courts.

5 MR. CODDINGTON: Well, okay. I don't believe
6 it's --

7 QUESTION: Well, this opinion says that.

8 MR. CODDINGTON: Yeah, that's true. I think
9 that was an unfortunate mistake, frankly. As you notice
10 in my reply brief -- I mean, the policy of the department
11 is emphatically to the contrary.

12 QUESTION: Well, what does the policy of the New
13 York Police Department have on us?

14 MR. CODDINGTON: Absolutely not --

15 QUESTION: Are we bound by it?

16 MR. CODDINGTON: Oh, no, no, no, no. But I
17 don't want to leave the Court with the impression that the
18 policy is other than it is. I mean, I would not like a
19 factual mistake to color this Court's judgment.

20 But with respect to New York law, a search
21 warrant can only be obtained once the police have filed an
22 accusatory instrument. This commences the action. It
23 triggers the New York right to counsel.

24 In Lane the felony complaint had been signed but
25 had not been filed, and the court of appeals approved an

1 admissible confession there. The action hadn't commenced.
2 So, that is the law of the State of New York.

3 Now, back to the Brown standards. For the
4 reasons I'm arguing, I don't believe that the police
5 conduct here was purposeful or flagrant. In Brown, after
6 all, they broke into the man's house and arrested him at
7 gunpoint as he was coming home.

8 Here, the Payton violation was of the most
9 minimal nature. It was nothing like Payton, where they'd
10 broken the door. This is a knock on the door, we're the
11 police. He says, "Come on in. I'm glad you came for me."

12 Now, had the hearing court found a consensual
13 entry, which what we'd argued below, there would have been
14 no Payton violation at all. The Payton --

15 QUESTION: (Inaudible) hopeless case?

16 MR. CODDINGTON: Oh, yes. Yes.

17 QUESTION: You know, there is no consensual
18 entry even if you just walk up to the -- knock on the door
19 and show your badge.

20 MR. CODDINGTON: They said they had a warrant,
21 or misrepresented they had a warrant, if I'm not mistaken,
22 and the court held that where there's a warrant there
23 can't be consent. If I'm not mistaken, that's Bumper's.

24 You know, here -- I mean, had the court found
25 its facts a little bit differently, there would have been

1 no Payton violation. My point is the Payton violation
2 occurred here, or was found here at the hearing, some
3 months after the entry.

4 As Justice Stevens said in the Garrison case --
5 I mean, we have to judge these circumstances as they
6 appear to the cops at the door. Knock on the door, come
7 on it, I'm glad -- glad you came for me. I mean, I submit
8 that on an objective view to any reasonable police officer
9 that would sound like an invitation to enter.

10 That's certainly the way it appeared to these
11 police officers.

12 QUESTION: That's why they had their guns drawn.

13 MR. CODDINGTON: Their guns were down where the
14 defendant couldn't see them. I -- I would admit that, you
15 know, if they were pointing them at his head, it would be
16 different. But the record is clear that he could not see
17 the guns and the guns were holstered as soon as they went
18 into -- went into the defendant's apartment.

19 QUESTION: I know, but even if they had them
20 unholstered and concealed, they weren't entirely convinced
21 that they would be welcome, were they?

22 MR. CODDINGTON: Well, they were prepared. This
23 -- this was, after all, a homicide investigation and there
24 were three knives within easy reach, as it appears once
25 they got into the apartment.

1 But the defendant was completely congenial. I
2 mean, as soon as they saw each other, any coercive
3 atmosphere disappeared. They holstered their guns. They
4 immediately read him his Miranda rights.

5 QUESTION: Again, that's -- that's if you accept
6 the police officer's testimony.

7 MR. CODDINGTON: Well, that was the -- yeah, the
8 testimony --

9 QUESTION: And as I read over the trial -- what
10 the trial court said, he really was concentrating on the
11 second confession, not what went on at the time of the --
12 the entry.

13 MR. CODDINGTON: Well, I submit, though, that in
14 order to find attenuation --

15 QUESTION: And also it's also clear that all the
16 courts in the New York system agreed that the entry was
17 not consensual. So, I think that means we have to accept
18 at least some degree of credibility to the other side's
19 version of the facts.

20 MR. CODDINGTON: Well, okay. But, I mean, in
21 terms of the flagrancy of the police conduct here, I think
22 it militates on my side towards that. I mean, this is
23 clearly not, you know, a flagrant violation as has
24 occurred in Brown. This is --

25 QUESTION: Well, of course, it depends on what

1 one means by the word flagrant. If there is a deliberate
2 policy to violate the Constitution in order to avoid the
3 effect of a New York rule that would make it improper to
4 interrogate the person, one might say that's flagrant
5 too --

6 MR. CODDINGTON: Well, there's --

7 QUESTION: -- if that's the case.

8 MR. CODDINGTON: There are two answers to that.
9 One is California v. Greenwood, of course, in which the
10 Court held that notions of state law should not control
11 for Fourth Amendment purposes.

12 And also -- I mean, the flagrancy -- at least as
13 I understand the case, it has to be flagrant violation of
14 the Federal Constitution. I mean, a state rule of law, I
15 submit, probably is not a flagrant violation within the
16 meaning of the Fourth Amendment.

17 QUESTION: But this is not state law we're
18 talking about.

19 MR. CODDINGTON: Well, the --

20 QUESTION: This is the police department of a
21 city's law.

22 MR. CODDINGTON: To avoid --

23 QUESTION: They are -- aren't they different?

24 MR. CODDINGTON: Well, yeah. To avoid a New
25 York state constitutional requirement, not a Federal

1 constitutional requirement. Patterson v. Illinois,
2 that's --

3 QUESTION: -- police procedure is wrong.

4 QUESTION: Yeah.

5 MR. CODDINGTON: I am not trying to condone the
6 police procedure, Your Honor. I am merely saying that it
7 is not a flagrant disregard of the Federal Constitution.
8 This Court has recognized --

9 QUESTION: (Inaudible) flagrant and violations
10 of my Constitution.

11 MR. CODDINGTON: Well, the difference has to do
12 with the police officers' intent.

13 QUESTION: Well, what would have made it
14 flagrant? For them to have cursed him or something?

15 MR. CODDINGTON: No. What would have been
16 flagrant would have been what happened in Brown.

17 QUESTION: If they'd hit him in the head with a
18 blackjack, would that have been it?

19 MR. CODDINGTON: That sure would have been
20 flagrant.

21 QUESTION: Would that -- well, what -- what
22 below that is flagrant?

23 MR. CODDINGTON: Below that would be the facts
24 as in Brown, where they break into the man's apartment,
25 wait for him to come home. As he walks up to the door,

1 arrest him at gunpoint. That's flagrant. That's clearly
2 flagrant.

3 QUESTION: I guess shooting him would be
4 flagrant too, wouldn't it?

5 MR. CODDINGTON: It sure would. But, I mean,
6 here --

7 QUESTION: Well, are we obliged to find what is
8 flagrant what in this circumstance? Because the City of
9 New York -- I mean, the State of New York in its opinion
10 has already said it was a violation. They didn't need to
11 say flagrant, I didn't think. They said it was a
12 violation.

13 MR. CODDINGTON: Well --

14 QUESTION: Now, why can't we say the same thing?

15 MR. CODDINGTON: Well -- okay. I do believe if
16 you are going to apply the Brown attenuation standards,
17 you do have to come to grips with the question of whether
18 or not it's flagrant.

19 As I read the Court's opinions, the flagrancy of
20 the police conduct is one of the most important
21 considerations. So, I submit the Court is going to have
22 to answer that question.

23 I mean, there are violations. For example, take
24 United States v. Leon where the taint is the good-faith
25 reliance on what turns out to be an invalid award. There

1 should be no suppression at all. I mean, now, there is a
2 violation that's not flagrant.

3 The same may be said of Crews and Ceccolini and
4 in Michigan v. Tucker where the Fourth Amendment violation
5 leads to the testimony of a live witness. Again we have a
6 violation that's not flagrant.

7 I submit the same thing should be said here.
8 Here there is a Payton violation, but under the
9 circumstances of the entry and the police behavior and the
10 fact that they can go to a man's apartment and attempt to
11 gain entry to question him, plainly the violation is not
12 flagrant.

13 Your Honors, if there are no further questions,
14 if I may, I'd like to reserve the remainder of my time for
15 rebuttal.

16 QUESTION: Very well, Mr. Coddington.

17 Mr. Parker, we'll hear now from you.

18 ORAL ARGUMENT OF BARRINGTON D. PARKER, JR.

19 BY INVITATION OF THE COURT AS AMICUS CURIAE

20 IN SUPPORT OF JUDGMENT BELOW

21 ON BEHALF OF THE RESPONDENT

22 MR. PARKER: Mr. Chief Justice, and may it
23 please the Court:

24 On January 16th, 1984 three New York City police
25 officers, each with 18 years experience on the force, went

1 to Bernard Harris' home both to question him and to arrest
2 him in connection with a homicide five days earlier.

3 Five days earlier, on the 11th, the police
4 officers, specifically Detective Rivers who was in charge
5 of the investigation, had probable cause to arrest Harris.
6 In addition, they knew on that day, the 11th, where he
7 lived.

8 The officers were apparently not concerned that
9 Harris was a threat to anybody else, nor were they
10 concerned that he might flee because between the 11th and
11 the 16th, insofar as the record shows, they made no effort
12 at all to apprehend him.

13 Now, the specific purpose in going to Mr.
14 Harris' house was to question him. Both officers
15 testified to that. McCarthy and his partner, Rivers.
16 Both of these were 16-year detectives.

17 The officers did not have a warrant, no effort
18 had been made to obtain a warrant.

19 Furthermore, the record shows -- excuse me --
20 the record does not suggest that the arresting officers in
21 connection with their efforts to arrest Mr. Harris went
22 anywhere other than to his house.

23 Now, obviously the police officers in this case
24 are presumed to have knowledge of and be bound by the
25 district court's decision in Payton, a decision which, of

1 course, in the first instance talked directly to New York
2 City Police Department.

3 In addition, there is a memorandum which is not
4 part of the record but which is quoted in the state's
5 reply brief. That memorandum apparently was circulated to
6 all police department -- all police force members and
7 specifically to detectives at about the time Payton was
8 decided. So, I think the record is clear that these
9 officers knew what Payton required.

10 So, it was after dark. There were no exigent
11 circumstances at all. And although the arrest took place
12 four years after this Court's decision, Detective Rivers,
13 the 18-year veteran, testified that it was not the custom
14 in his department to comply with what this Court said the
15 Fourth Amendment required in Payton.

16 He was asked by the court if it was the custom
17 in his department to get warrants. Detective Rivers said
18 no. And I suggest to this Court that there is nothing in
19 the record which contradicts or qualifies Detective
20 Rivers' admission about the existence and the application
21 of the custom.

22 QUESTION: Was he -- can you tell from the
23 question and answer whether he was referring to search
24 warrants or arrest warrants?

25 MR. PARKER: The questioning -- it was not

1 specific, but in context they were talking about arrest
2 warrants.

3 I think the -- there are several important
4 things about --

5 QUESTION: The police here would have been no
6 better off with an arrest warrant, would they?

7 MR. PARKER: Pardon me?

8 QUESTION: The police here would have been no
9 better off with an arrest warrant than with probable
10 cause, would they?

11 MR. PARKER: They would have been -- they would
12 have been better off -- they could have lawfully arrested
13 him at home with an arrest warrant. A simple -- simple
14 probable cause would not have done that.

15 I think one of the ironies of this case is that
16 the petitioner could have been arrested anywhere except in
17 his home. The police made no effort to arrest him
18 anywhere except in his home.

19 Now, Rivers' testimony and --

20 QUESTION: But do you think that makes the
21 person arrested somehow more likely to confess than if he
22 were arrested outside his home? Is there something about
23 that fact that enhances the exploitation of that
24 illegality?

25 MR. CODDINGTON: Well, I -- I don't think the --

1 I think they are obviously both -- potentially --
2 potentially coercive events. I think the fact that he was
3 -- that an arrest in the home is not for Fourth Amendment
4 purposes of any less significance than an arrest on the
5 street. We're not making that argument.

6 But to return to Detective Rivers --

7 QUESTION: Or any more significant?

8 MR. PARKER: I'm sorry?

9 QUESTION: Or any more significant?

10 MR. PARKER: Or any more significant.

11 To return to --

12 QUESTION: Well, but -- but that is the point --
13 that is the point of your case, isn't it? Because I -- I
14 take it you would concede -- maybe you wouldn't --- I take
15 it you would concede if there is an arrest outside and the
16 warrant is somehow defective, that the statement is
17 nevertheless admissible.

18 MR. PARKER: I think this Court's decisions
19 indicate that that's -- that's -- that rule -- that result
20 would obtain, Your Honor.

21 QUESTION: Well, then it is the fact that he was
22 arrested in violation of Payton in his home that
23 establishes the invalidity that you must rely on here, is
24 it not?

25 MR. PARKER: The -- it's our position that the

1 statement -- the statement given later at the station
2 house must be suppressed as a result of the illegal arrest
3 in the home as a result of a Payton violation.

4 QUESTION: And why is it that a statement taken
5 at home is deemed to be more coercive than a statement
6 taken someplace else?

7 MR. PARKER: Well, I'm not saying that's a per
8 se rule. I think you have to look at all of the facts.
9 It --

10 QUESTION: You're -- you're not saying it's a
11 per se rule --

12 MR. PARKER: I'm sorry, I --

13 QUESTION: -- that a -- that a statement taken
14 at home in violation of Payton is -- is inadmissible?

15 MR. PARKER: No, no. I'm not saying that a
16 statement taken at the home is necessarily more coercive
17 than a statement taken somewhere else.

18 I am saying, of course, that a statement taken
19 at the home or a statement taken as a result of a Payton
20 violation becomes inadmissible.

21 QUESTION: Well, suppose there hadn't been any
22 statement taken at the -- in the house at all but there
23 was an entry without a warrant, without an arrest warrant.
24 And you go to the station house, give him the Miranda
25 warnings and then you get a statement. Would you be here

1 then?

2 MR. PARKER: Yes, I would, Your Honor.

3 QUESTION: You would say it's just the fact that
4 there was an illegal entry that's coercive?

5 MR. PARKER: Well, I think in those
6 circumstances the -- the -- the rule that applies is that
7 a confession obtained through custodial -- interrogation
8 after an illegal arrest should be suppressed unless the
9 state shows sufficient attenuation.

10 QUESTION: Uh-huh.

11 QUESTION: That's the Brown --

12 MR. PARKER: That's the Brown rule, Your Honor.

13 QUESTION: -- v. Illinois rule?

14 MR. PARKER: And it's --

15 THE WITNESS: So we need -- you needn't focus on
16 the statement taken at the house at all, as to whether it
17 might contribute to the coerciveness?

18 MR. PARKER: Well, I think that's not in this
19 case. I believe this Court granted certiorari only with
20 respect to the station house statement. But there
21 obviously are circumstances where the -- a statement given
22 earlier might be one of the factors considered under Brown
23 that made the second -- second statement less attenuated.
24 But I don't believe that's something that is presented for
25 this Court's decision here.

1 QUESTION: The Solicitor General in a brief
2 filed in this case suggests that we shouldn't -- we should
3 limit Brown v. Illinois and its rules on attenuation to
4 circumstances of arrests without probable cause.

5 MR. PARKER: Two things about that, Your Honor.
6 First of all, I do not adopt and I do not believe that
7 what this Court was concerned about in Brown and Dunaway
8 and Taylor were arrests without probable cause.

9 I believe that in those cases what the Court
10 wrestled with was the notion of how best, how most
11 efficiently to deter an illegal arrest.

12 Arrests can be illegal for a variety of reasons.
13 They can be illegal because there is no probable cause.
14 They can be illegal because there happens to be no
15 warrant.

16 I believe that there is no good policy reason to
17 focus on one type of arrest and exclude another type of
18 arrest that because of the circumstances might be more
19 flagrant. What you have in the usual circumstance of no
20 -- what it seems to me complicates the cases involving
21 arrests without probable cause is this Court's recognition
22 of the difficulties police officers have in making
23 spontaneous or difficult on-the-spot judgments.

24 But here we don't have that situation. This
25 case, I suggest, is far more flagrant than Dunaway or

1 Brown. It -- it, I would suggest, creates a substantially
2 more compelling justification for the absence -- excuse
3 me, for the application of an exclusionary rule than
4 Brown, Taylor and Dunaway.

5 It was a home arrest. They knew they had to get
6 a warrant. The policy manual told them. Five days, no
7 effort to get the warrant. They could have arrested him
8 anywhere. They intended to arrest him without a warrant.
9 The officers made no effort to look for him anywhere but
10 in the home.

11 And as the New York Court of Appeals found, this
12 series of steps by the police was intended to avoid
13 restrictions on interrogation -- custodial investigation
14 imposed by the New York State Constitution --

15 QUESTION: Well, why should that interest us,
16 what the New York Constitution imposes on the New York
17 state police officers?

18 MR. PARKER: Well, I -- it -- I think it -- it
19 adds -- what it does, simply, Your Honor, is it -- it -- I
20 think it makes more plausible the existence of the custom.
21 It indicates why that custom probably arose, and why it is
22 plausible to assume in New York -- to assume, as the court
23 of appeals did in New York, that the custom was followed.

24 QUESTION: But you're saying is that it rules
25 out other possible explanations.

1 MR. PARKER: It tends to rule out --

2 QUESTION: Yeah.

3 MR. PARKER: -- other possible explanations.

4 QUESTION: If the -- if the reasoning behind
5 Payton is that the wrong there is the entry of the home
6 without a warrant, why -- why isn't that wrong
7 satisfactorily compensated for or protected against by
8 simply excluding whatever the police might have seen or
9 seized when they came into the home?

10 MR. PARKER: It does not do that, Your Honor,
11 because in many instances what the police officers are
12 likely to be looking for when they go to make a Payton --
13 to make an arrest is not simply tangible or testimonial --
14 excuse me -- is not simply tangible evidence, but they go,
15 as they did here, to try to get some sort of statement.

16 And the Solicitor General's approach to the
17 problem doesn't address that concern.

18 QUESTION: But -- but they can get that by
19 arresting him on the street, can't they?

20 MR. PARKER: They could have arrested him on the
21 street. No question about that.

22 QUESTION: But --

23 MR. PARKER: But they chose to -- but it --
24 excuse me. I'm sorry.

25 QUESTION: If -- if you're trying to figure --

1 as I take it all of us are trying to figure out exactly
2 what happened here and why it happened, it seems to me the
3 only -- the most logical explanation for why the police
4 did this at home rather than on the street -- if they were
5 trying to pull something off -- was to get inside the
6 house and see something. That they could do inside the
7 house, and they couldn't do it on the street.

8 They could talk to the talk to the fellow on the
9 street just as they could inside the house.

10 MR. PARKER: Well, I -- I cannot really fully
11 reconstruct what the thinking of the police officers was
12 here, but if you look at the kind of information they had
13 when they went to his house and what may have been
14 missing, I think it's -- what it looks like they, as we've
15 said, had probable cause but may not have had enough to
16 convict this man.

17 And what they needed was a statement. And maybe
18 after -- based on their experience they thought the best
19 way, the easiest way to get the statement was to confront
20 him at home. I -- I don't know. I'm speculating about
21 that. But the record certainly doesn't definitively
22 answer that.

23 But if you assume that in some instances -- for
24 example, in this instance -- the police wanted to get a
25 statement, then they would not be deterred from Payton

1 violations by the Solicitor General's rule.

2 QUESTION: May I ask a question of New York
3 practice? As I understand it, if they had gotten a
4 warrant, that would be an accusatory instrument which
5 would have required the appointment of counsel and
6 precluded questioning until the lawyer was appointed.

7 But without going -- without getting a warrant
8 -- say, they just picked up a man on the street on
9 probable cause -- would they -- would that same
10 prohibition against questioning apply?

11 MR. PARKER: They could have arrested him on the
12 street without a warrant. The accusatory instrument would
13 not have had to have been filed on the --

14 QUESTION: At what --

15 MR. PARKER: Excuse me.

16 QUESTION: At what point in the process would
17 there have been -- would it have been necessary as a
18 matter of New York law to file something that would have
19 terminated their ability to go ahead and question him?

20 MR. PARKER: I believe he would have been
21 arrested, he would have been arraigned, and at arraignment
22 -- or shortly after arraignment some kind of information,
23 a felony complaint or a misdemeanor complaint --

24 QUESTION: I see.

25 MR. PARKER: -- would have had to have been

1 filed and at that point, at arraignment, the right to
2 counsel would have attached.

3 QUESTION: So that until they either get an
4 arrest warrant or some kind of a formal complaint is filed
5 leading to an arraignment they could go ahead and question
6 him?

7 MR. PARKER: That's correct, Your Honor.

8 QUESTION: I believe that the -- the really
9 principal difference that separates the prosecutor's and
10 our position is whether a Brown attenuation analysis
11 really applies in these circumstances.

12 It's our argument that it certainly does because
13 if the primarily rule of the -- primary thrust of the
14 exclusionary rule is going to be deterrence, stopping a --
15 not applying it to a -- not applying to a situation here
16 where you have an arrest that is -- has been found to be
17 purposefully flagrant is not going to -- is -- is not
18 going to deter police or eliminate this custom.

19 In view of the Court's position on consent, I
20 will not address that. I believe I've covered most of the
21 -- covered the main points I have.

22 I will -- if there are no questions, I will
23 surrender the balance of my time.

24 QUESTION: Mr. Parker, maybe -- maybe you can
25 explain to me what I really don't understand. What --

1 what is attenuated under Brown? I -- I -- if the object
2 of excluding the confession was to exclude something that
3 has been coerced, I could understand that you would look
4 for attenuation of coercive impact.

5 But that's not the -- that's not the -- the
6 object of the exclusion, as I understand it, is it?

7 MR. PARKER: I think the object of the exclusion
8 in Brown is to eliminate the incentive to violate the
9 Fourth Amendment. Brown wrestled -- in addition to
10 wrestling with the issue of how Miranda warnings fit in
11 there, also following Wong Sun and the older cases,
12 wrestled with the -- a notion of where you draw the link
13 following an illegal event in order to bring about
14 deterrence.

15 QUESTION: So you think the most significant
16 factors are how flagrant was the -- was the event which
17 ought to be sanctioned by the exclusion and -- it's just
18 sort of strange to refer to that as attenuation. I -- I
19 -- that's -- that's what --

20 MR. PARKER: I'm not sure -- I'm not sure I
21 could think of a better term. It's a -- it's a shorthand
22 that we're all familiar with.

23 QUESTION: Well, you -- yeah.

24 QUESTION: Doesn't -- doesn't it mean in part
25 letting the defendant get back to normal from whatever

1 effect the wrongful action might have had on him?

2 MR. PARKER: It means that in part, I believe,
3 and that's why it looks to the temporal factors. But it
4 -- it's complicated because I believe this Court's
5 opinions have now indicated that as far -- insofar as
6 attenuation analysis is concerned the most important
7 factor is the flagrancy of the police misconduct.

8 QUESTION: Haven't we said that it's not a Fifth
9 Amendment principle?

10 MR. PARKER: It's a Fourth Amendment principle.

11 QUESTION: It's a Fourth Amendment principle so
12 really what we're looking to is not how coerced was the
13 confession. And that's what gives me the difficulty in --
14 in conceptualizing it as attenuation.

15 MR. PARKER: Well, I -- I realize that the --
16 that there are gray areas around these principles, but I
17 think that in terms of setting doctrine that courts can
18 apply and have now experience with applying and are
19 comfortable with applying, the attenuation analysis seems
20 to be working. There is no indication here, in the record
21 here -- in this case that it's not.

22 QUESTION: Well, the question is whether -- I
23 suppose in general whether this statement at the station
24 house was a product of the arrest in the house without a
25 warrant.

1 MR. PARKER: Well, I believe under this Court's
2 controlling doctrine that burden --

3 QUESTION: Yeah, well isn't that -- isn't that
4 the issue or not?

5 MR. PARKER: Yes, I would agree. Yes.

6 QUESTION: Yeah.

7 MR. PARKER: But it --

8 QUESTION: Are you sure you would agree? I
9 think that makes it a Fifth Amendment principle. I think
10 when you say a Fourth Amendment principle, you --

11 MR. PARKER: Well, that's a factual question
12 certainly. But --

13 QUESTION: Well, would you -- if you say it is a
14 product there of the illegal entry, I would suppose it
15 would be the same product if a statement was taken two
16 weeks later.

17 MR. PARKER: But there it might be -- there
18 might be other intervening factors. And, of course,
19 they'd begin to implicate Fifth Amendment concerns.

20 But here, of course, the police went to Harris'
21 house for the purpose of getting a statement and -- and
22 they got a statement.

23 QUESTION: Well, but -- they got a statement in
24 the house and they got one at the station house. But the
25 issue is the one -- is about the one at the station house.

1 MR. PARKER: That's correct.

2 QUESTION: Mr. Parker, can I ask you -- are you
3 through? -- another question about New York law that I'm
4 just not entirely clear on?

5 This rule about the accusatory instrument makes
6 it impermissible to question the suspect without a lawyer
7 until a lawyer is -- and he can't waive that right except
8 in the presence of a lawyer which, as I understand it, is
9 a holding in your Samuels case in 1980.

10 Was that the law prior to Samuels?

11 MR. PARKER: Oh, I --

12 QUESTION: Is this an old New York rule or is
13 this kind of a by-product of Payton is what I'm really
14 asking, I suppose.

15 MR. PARKER: Now, I believe this body of law
16 existed before Payton. It went back to some decisions in
17 I believe the mid to early '60s.

18 QUESTION: I see.

19 MR. PARKER: And, of course, when Payton came
20 along the body of law imposing the restrictions was
21 suddenly confronted with this new element, this
22 requirement that this Court set in Payton.

23 I think what is significant there is that
24 following Payton the legislature was asked to reconsider
25 the requirement of accusatory instrument filing as a

1 predicate to an arrest warrant. And the argument was made
2 that some difficulties might be created -- some
3 difficulties had been created because of this Court's
4 Payton decision, and the legislature rejected it.

5 So here we have a case where the New York
6 legislature -- it's not -- of course, the legislative
7 history is not as complete as you would have for a
8 congressional action. But there is some indication that
9 the legislature in New York was aware of this position --
10 aware of this situation and did not change -- did not
11 change the law having been advised of these concerns.

12 QUESTION: Thank you, Mr. Parker, and thank you
13 for serving as an amicus curiae for the Court in this
14 case.

15 MR. PARKER: Thank you.

16 QUESTION: Mr. Coddington, you have eight
17 minutes remaining.

18 REBUTTAL ARGUMENT OF PETER D. CODDINGTON

19 ON BEHALF OF THE PETITIONER

20 MR. CODDINGTON: Thank you, Your Honor. I have
21 no intention of taking all eight minutes. I expect to be
22 very brief.

23 If I may, I'd like to begin by answering Justice
24 White's question. I submit that the precinct confession
25 here is by no means the product of the entry at all.

1 I think the Payton violation here is completely
2 addressed the seizing whatever evidence might have been
3 found in the house, and to extend it further than that I
4 think would be to apply a "but for" rule which this Court
5 in Brown said was not the law. So, I submit that it is
6 not a product whatsoever of the entry.

7 And I think in terms of attenuation you can look
8 to the second statement for evidence of attenuation. It
9 was much more -- much more detailed than the first. The
10 first statement essentially said, I killed her because she
11 was an unfit mother.

12 The second statement, about an hour later, went
13 through the detail of the prior affair with her, the
14 abduction, that she lied to him, so on and so forth, and
15 none of these details were given to the defendant by the
16 police.

17 This all came from his own recollection, his own
18 independent act of free will. That's what I believe
19 attenuates this confession.

20 With respect to the time factor, here it's about
21 an hour. In Rawlings I believe it was about 45 minutes.
22 So, I mean, there is precedent in this Court's opinions
23 for the time factor serving the effects of attenuation.

24 Finally, back to the non-policy -- I'll call it
25 -- of the New York state police department. Remember, in

1 the record only one police officer testified that it was
2 the custom to not get warrants.

3 McCarthy at joint appendix page 8 said that if
4 the defendant hadn't opened the door, he'd have left.

5 Rivers himself at page 380 of the record testified that
6 he'd been there once before. Nobody was home. He left.

7 And why they went to this man's house?

8 QUESTION: This isn't really the issue where you
9 say there is a Payton violation and whether it's a product
10 of a policy or not.

11 MR. CODDINGTON: Okay. Fine. Good. Then
12 that's --

13 QUESTION: Isn't that right?

14 MR. CODDINGTON: That's the point I'm trying to
15 make. And if this goes to the flagrancy of the police
16 conduct, which is what most of the thrust of the amicus'
17 argument was. That's what I'm responding to. It is not
18 flagrant. I believe it was -- had the facts been found
19 slightly differently, it would have been in all respects
20 lawful.

21 It was not flagrant. This is, frankly, I think
22 a clean case. This is a case where a hearing court with
23 the benefit of hindsight found the facts differently than
24 they appeared to the police. And that's why we're here.

25 For all of these reasons, Your Honors, I think

1 that the court of appeals misapplied this Court's
2 precedence and I ask you to reverse their judgment.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Coddington.

5 The case is submitted.

6 (Whereupon, at 11:55 a.m., the case in the
7 above-entitled matter was submitted.)

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CERTIFICATION

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#88-1000 - NEW YORK, Petitioner V. BERNARD HARRIS

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