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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: ILLINOIS, Petitioner

V. LLOYD PERKINS

CASE NO: 88-1972

PLACE: Washington, D.C.

DATE: February 20, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

-----x
ILLINOIS, :
Petitioner :
V. : No. 88-1972
LLOYD PERKINS :
-----x

Washington, D.C.
Tuesday, February 20, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:54 p.m.

APPEARANCES:

MARCIA L. FRIEDL, ESQ., Assistant Attorney General of
Illinois, Chicago, Illinois; on behalf of the
Petitioner.

PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; as
amicus curiae, supporting the Petitioner.

DAN W. EVERS, ESQ., Mt. Vernon, Illinois; appointed by
this Court on behalf of the Respondent.

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P R O C E E D I N G S

(1:54 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-1972, Illinois v. Lloyd Perkins.

Ms. Friedl, you may proceed whenever you're ready.

ORAL ARGUMENT OF MARCIA L. FRIEDL

ON BEHALF OF THE PETITIONER

MS. FRIEDL: Mr. Chief Justice, and may it please the Court:

This case comes from the Illinois Appellate Court which upheld the suppression of Defendant's murder confession on the Miranda grounds.

The ruling precludes the use of undercover agents to in any way question incarcerated suspects concerning criminal offenses that they may have committed and it ironically arises on facts which affirmatively establish that Defendant Perkins in this case perceived no pressures whatsoever to speak when making his incriminating statements, but, rather, he was simply killing time with boastful admissions to those whom he believed to be co-conspirators in a jail break.

After detailing how the privilege against self-incrimination is seriously threatened whenever a suspect is subjected to the inherently compelling pressures of

1 custodial interrogation, this Court in Miranda developed
2 prophylactic warnings and rules to provide practical
3 reinforcement for the Fifth Amendment privilege.

4 However, because the Miranda safeguards of a
5 protective Fifth Amendment, and because they markedly
6 decrease the number of wholly-reliable statements that are
7 available to law enforcement for both investigation and
8 prosecution purposes, this Court has characterized those
9 safeguards as extraordinary and has consistently refused
10 to apply them outside the context of the inherently
11 compelling custodial interrogations for which they were
12 designed.

13 The Miranda's principal concern was that
14 mutually reinforcing manifestations of police dominance
15 arising from custodial interrogation will inevitably exert
16 significant pressures on an accused to speak.

17 This concern is entirely inapposite to
18 undercover elicitation statements. A suspect who is in
19 immediate and non-transit control of a non-governmental
20 authority who also at the same makes its interest at
21 eliciting a statement apparent, might naturally believe
22 that he has no right to speak because the -- the
23 authorities' power to eventually get what it wants is
24 immediately suggested by its power of restraint.

25 And even if the subject is not subjected to any

1 further incarceration, additional incarceration, above and
2 beyond that of general incarceration itself, other
3 potential pressures remain because the suspect will still
4 -- the inmate will still understand that speaking will
5 accommodate an inquiring government that not only has the
6 proven power of incarceration but also has future control
7 over his physical environment, his prosecution and other
8 aspects of his life.

9 Now, where a suspect doesn't know that he's
10 encountering a governmental agent, he can feel absolutely
11 none of these pressures, and any concern in Miranda for
12 perceived governmental domination by the questioner which
13 could even conceivably be reinforced by the governmental's
14 power of incarceration is dispelled by the deception
15 itself.

16 QUESTION: Well, Ms. Friedl, now, if the
17 undercover agent had physically beaten the prisoner up in
18 order to obtain the information, do you think the Fifth
19 Amendment might preclude the use of that information?

20 MS. FRIEDL: Clearly the due process clause test
21 for that would be available in the --

22 QUESTION: Do you think the Fifth Amendment
23 would preclude it?

24 MS. FRIEDL: This Court has never held the Fifth
25 Amendment to specifically apply. In Hoffa the Court

1 assumed that the Fifth Amendment applies in undercover
2 contacts. This Court has never specifically held the
3 Fifth Amendment to apply in the undercover context.

4 But the due process test is precisely the same
5 as the Fifth Amendment. So, the due process clause for
6 certain would be available to remedy that.

7 QUESTION: But there is a concern in the Fifth
8 Amendment for voluntariness, isn't there?

9 MS. FRIEDL: For compelled -- the privilege
10 against self --

11 QUESTION: Right.

12 MS. FRIEDL: -- self-incrimination.

13 QUESTION: And you think if the undercover agent
14 beat it out of him, it might be considered compulsion?

15 MS. FRIEDL: Oh, of course.

16 QUESTION: Uh-huh.

17 MS. FRIEDL: Of course.

18 QUESTION: Now, was there a lawyer appointed
19 here --

20 MS. FRIEDL: There's nothing in the record --

21 QUESTION: -- for the Defendant in the
22 aggravated battery charge?

23 MS. FRIEDL: There's nothing in the record to
24 indicate whether a lawyer was appointed or not. The
25 Defendant Perkins had not yet appeared before the court.

1 QUESTION: There had been no initial appearance
2 for the aggravated battery --

3 MS. FRIEDL: Correct.

4 QUESTION: -- when this occurred?

5 MS. FRIEDL: He first appeared on that -- the --
6 this questioning took place on a Sunday evening and he
7 appeared on Monday morning for the first time on the
8 aggravated battery charge, and it was at that time --

9 QUESTION: I see.

10 MS. FRIEDL: -- that he was arrested for the
11 murder.

12 QUESTION: Uh-huh.

13 MS. FRIEDL: Not only Miranda's concern for
14 governmental domination doesn't exist in undercover
15 context, and the goal of deception further renders under
16 -- other forms of pressure less likely since neither the
17 undercover agent nor identified police personnel are going
18 to act in a manner that would risk disclosure of their
19 identity.

20 QUESTION: Just one point. This man wasn't an
21 undercover agent, he was a policeman, wasn't he?

22 MS. FRIEDL: Correct. He -- the -- Agency
23 Parisi --

24 QUESTION: Isn't there a difference?

25 MS. FRIEDL: -- was an undercover police officer

1 and then Charlton was --

2 QUESTION: Don't you draw a line between
3 policemen and undercover agents?

4 MS. FRIEDL: There's no reason to -- in the
5 context of this particular case there is really no
6 difference between the way Agent Parisi was acting and the
7 way Informant Charlton was acting. There's -- that the --
8 focus has got to be on the perceptions of the suspect, and
9 the suspect -- if the suspect doesn't believe -- perceive
10 that someone is a governmental agent, then it makes no
11 difference if he really is a police officer or just an
12 informant, like Informant Charlton in this case.

13 QUESTION: You don't see any difference between
14 a policeman and an informer?

15 MS. FRIEDL: No, Your Honor. Not if they --

16 QUESTION: I thought -- I thought a policeman
17 represented the state, officially sworn to duty, and an
18 informer was not.

19 MS. FRIEDL: Well, the informer in this case was
20 clearly --

21 QUESTION: Is that -- is that correct? That a
22 policeman represents the state as an officer of the state,
23 sworn as an officer of the state to uphold the
24 Constitution of the United States? Is that correct?

25 MS. FRIEDL: Yes, Your Honor.

1 QUESTION: And this man was sworn to uphold the
2 Constitution of the United States?

3 MS. FRIEDL: Yes.

4 QUESTION: And violated it?

5 MS. FRIEDL: Your Honor, we -- it's not our
6 position that the Fifth -- either the Fifth Amendment or
7 due process clause could have conceivably been violated,
8 and certainly even -- even Miranda, of course, has not
9 been violated here because the suspect, Defendant Perkins,
10 in no way could perceive the governmental dominance, the
11 -- in his speaking with Agent Parisi and Informant
12 Charlton.

13 There was no -- there's no purpose for -- reason
14 to apply Miranda in this context and most certainly the
15 Constitution of the United States has not been violated
16 vis-a-vis either the Fifth Amendment or the due process
17 clause.

18 QUESTION: Well, do you think that trickery can
19 ever amount to coercion?

20 MS. FRIEDL: There could be situations where
21 trickery amounts to coercion. My point is that in your
22 normal everyday undercover situation the deception itself
23 is going to actually take away the coercion that -- that
24 the police domination type coercion that Miranda was
25 concerned with.

1 QUESTION: Well, did you -- I would have
2 answered that question from Justice O'Connor perhaps a
3 little differently. Do you think trickery is a subspecies
4 of coercion?

5 MS. FRIEDL: There -- trickery can constitute --
6 it would be trick and not merely trickery. For the most
7 part, trickery will never come close to any kind -- even
8 present pressure. And, again, in this -- the undercover
9 context here the very trickery of not allowing the suspect
10 to know that you are acting as a governmental --
11 governmental agent -- that very trickery takes away all of
12 the concerns that Miranda had for police domination.

13 QUESTION: I would think trickery might pose
14 other questions. But it certainly doesn't -- it isn't the
15 same thing as coercion.

16 MS. FRIEDL: Certainly not, and Hoffa made that
17 clear. In Hoffa, which was not -- did not occur in the
18 prison -- but this Court stated that because an undercover
19 agent was involved, there was absolutely no potential for
20 coercion at all.

21 QUESTION: Why did they give this man Miranda
22 rights afterwards?

23 MS. FRIEDL: Because afterwards --

24 QUESTION: Well, I mean, if they didn't have to
25 give them before, why -- what -- what period was there

1 when they decided they gave him Miranda rights?

2 MS. FRIEDL: Well, when -- after the -- after
3 the questioning occurred in this case on a Sunday evening
4 and he went to court. Then he was charged with the murder
5 to which he had confessed the evening before.

6 QUESTION: And then they gave him Miranda
7 rights?

8 MS. FRIEDL: They gave him his Miranda rights
9 because --

10 QUESTION: After.

11 MS. FRIEDL: -- at that point he was having an
12 encounter with the police officer.

13 QUESTION: They gave him Miranda rights after he
14 was brought to court?

15 MS. FRIEDL: Yes.

16 QUESTION: Is there any case that supports that?

17 MS. FRIEDL: There's the -- Miranda has never
18 been applied outside the context for which it was
19 designed, and this case certainly -- and any undercover
20 case -- does not present those inherently compelling
21 circumstances that require the prophylactic Miranda
22 warning.

23 QUESTION: What was the difference between the
24 conditions in Miranda and the conditions here?

25 MS. FRIEDL: The conditions in Miranda were --

1 were -- you had -- you have -- Miranda contemplated a
2 police officer interrogating a suspect in custody and
3 there is -- there is a potential interplay there between
4 the perception of the suspect in terms of the government
5 -- the governmental power of incarceration and the
6 governmental power --

7 QUESTION: Well --

8 MS. FRIEDL: -- over future events which there
9 is that very distinct interplay that does --

10 QUESTION: The governmental --

11 MS. FRIEDL: -- not exist in --

12 QUESTION: -- power of incarceration was the
13 same in both, wasn't it? He was in jail.

14 MS. FRIEDL: But he didn't perceive the
15 government's power --

16 QUESTION: It wasn't -- it wasn't the same jail,
17 but it was a jail.

18 MS. FRIEDL: It was a jail. But where the
19 suspect doesn't perceive that he's being incarcerated by
20 -- where he doesn't perceive a connection between the
21 governmental power of his questioner and the government's
22 power of incarceration, then there's no interplay. And
23 without that interplay Miranda is wholly unnecessary.

24 The entire basis of Miranda is to provide -- was
25 to give directions --

1 QUESTION: Well, in -- in case you don't know
2 it, incarceration is incarceration.

3 MS. FRIEDL: Yes, but it --

4 QUESTION: You are in jail --

5 MS. FRIEDL: -- of course, and we are --

6 QUESTION: And I don't -- I don't know of any
7 difference. Jails are jails.

8 MS. FRIEDL: We aren't disputing the fact that
9 the Defendant Perkins in this case was incarcerated. The
10 question is whether he was -- whether he was in custody
11 for purposes of Miranda, interrogated for purposes of
12 Miranda and whether in general he was subjected to any
13 kind of --

14 QUESTION: Well, what was the difference between
15 the interrogation here and in Miranda?

16 MS. FRIEDL: The difference is the suspect was
17 able to -- that in Miranda, Miranda contemplated the
18 situation where the police officer is a known police
19 officer -- is interrogating a suspect.

20 QUESTION: Is there any -- is there any
21 difference between the known police officer and the
22 unknown police officer?

23 MS. FRIEDL: Absolutely. A world of difference.

24 QUESTION: Is that -- well, what is the other
25 difference?

1 MS. FRIEDL: The -- the difference is that when
2 a suspect doesn't perceive that he's speaking to a
3 governmental agent then the -- those pressures that
4 Miranda was talking about, the pressures of police
5 domination, can't occur.

6 QUESTION: Well, why did they insist that he be
7 in custody in Miranda?

8 MS. FRIEDL: Because -- because interrogation is
9 not sufficient. It's clear that -- that it's not an
10 inherently -- although it does create pressures for a --
11 for an individual to go into the police station and speak
12 with the police officer. That's going to always create
13 pressure.

14 But it's not the type of inherently compelling
15 pressure that Miranda is talking about. I mean, that's
16 why Miranda also requires, and this Court has subsequently
17 interpreted Miranda to require both custody and
18 interrogation.

19 The -- the -- the -- the only risk of pressure
20 that is -- necessarily accompanies undercover questioning
21 in the jailhouse arises from the psychological -- that --
22 that was noted by this Court in Henry -- the psychological
23 need to reach for aid when a person is in confinement.

24 Now, even in the Sixth Amendment context where
25 the very concern of -- is interference with an indicted

1 suspect's right to protection from his own ignorance in
2 confrontations with the government. Even there, this
3 Court in Coleman v. Wilson held it permissible for an
4 undercover cellmate to be placed in a cell to act as a
5 listening post.

6 Now, for an undercover agent to further guide
7 that conversation by crafty questioning would establish a
8 confrontation in which the suspect's Sixth Amendment right
9 to counsel would be violated -- would be -- clearly have
10 been circumvented.

11 But that same conduct, this guiding of the
12 conversation which occurred in this present case, can't --
13 doesn't place any pressure whatsoever on the suspect and
14 much less the inherently compelling pressures that were
15 contemplated by Miranda.

16 I'd like to reserve the remainder of my time for
17 rebuttal.

18 QUESTION: Thank you, Ms. Friedl.

19 Mr. Evers. No, I'm sorry. Mr. Larkin. I
20 should have resorted back to my chart. I'm sorry.

21 MR. EVERS: He's a government agent.

22 QUESTION: Yes.

23 (Laughter.)

24 ORAL ARGUMENT OF PAUL J. LARKIN, JR.

25 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

1 MR. LARKIN: But the question is are you going
2 to interrogate me.

3 QUESTION: Well, we know you're a government
4 agent.

5 MR. LARKIN: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 As my colleague has pointed out, the police
8 practice at issue in this case is categorically different
9 from the one that the Court addressed in Miranda.

10 Miranda addressed and was primarily concerned
11 with the classic police stationhouse interrogation. And
12 the later cases have also been concerned with the
13 functional equivalent of that -- interrogation in the
14 squad car or at the scene of the crime after a person has
15 been arrested and handcuffed.

16 QUESTION: How about Mathis?

17 MR. LARKIN: Mathis involved the situation in
18 which the person was in custody and questioned by a known
19 government agent. It's the latter fact that is absent
20 here.

21 Now, we've also taken the view in Point A in our
22 brief that the mere fact that someone is in jail does not
23 automatically mean he must be given Miranda warnings
24 because the context in which there is some type of
25 questioning should also be considered.

1 But in this case the primary difference between
2 the factual situation we have and what you had in Mathis
3 was this was an undercover agent. As my colleague has
4 pointed out, that really distinguishes this case greatly.

5 In fact, the fact that Respondent was in jail
6 was really significant in this case for only two reasons.

7 One, it allowed the police to find him. After
8 all, the police tried to put Charlton and Respondent
9 together outside of jail, at a motel, in order to find out
10 if Respondent was responsible for the Stevenson murder,
11 but Respondent was nowhere to be found. They found him in
12 a jail and then they had to try something else.

13 Secondly, the fact that Respondent was in jail
14 meant that Officer Parisi could approach him with a phony
15 escape plan rather than use some other type of ruse, such
16 as the ruse they would have used if they had found
17 Respondent at the motel.

18 But the fact that he was in jail did not in any
19 way coerce him into confessing.

20 Look at the case from his perspective and look
21 at the setting in which he found himself. Did Respondent
22 confess in order to avoid having the book thrown at him by
23 a known police officer? No. Respondent thought he was
24 hatching an escape plot with two fellow prisoners.

25 Did Respondent confess because he believed that

1 the agent had some authority to force him to confess? No.
2 Respondent confessed because he believed that the agent
3 was in fact vito bianco, a fellow hit man, who could be
4 trusted with Respondent's secret.

5 QUESTION: Mr. Larkin, let me give you another
6 hypothetical.

7 Supposing he's in the interrogation room and
8 they brought in a police officer and they passed him off
9 as a newspaper reporter. So this newspaper reporter, he
10 wants to interview you for some future story, and they
11 sold him a bill of goods in selling the book rights, or
12 something, to his story.

13 Would that be permissible?

14 MR. LARKIN: It would -- it would depend because
15 it's -- it's the part of your hypo that would have to be
16 elaborated.

17 If you don't have any real break, unlike here
18 where you really do, then, as a practical matter, you
19 could say that some of the intimidating presence of the
20 police officer would immediately carry over.

21 I mean, for example, if they brought a police
22 officer disguised as a reporter in immediately after the
23 defendant --

24 QUESTION: Oh, no. I say before any of that
25 happens. So, there's -- there's no -- no -- they just --

1 he's in custody. The only -- he's, as a matter of fact,
2 in custody but he's not been threatened in any way or no
3 intimidating circumstances other than the fact that he's
4 in custody, just as this man is in custody.

5 And you just -- instead of using a fellow
6 inmate, you just use somebody dressed up as a reporter or
7 a -- or a -- how about a priest? And say he's -- come in
8 and say, I'd like you to tell me what really happened.

9 MR. LARKIN: Well, those are two different --

10 QUESTION: A police -- a police officer dressed
11 as a priest, I mean.

12 MR. LARKIN: Yeah. They're two different hypos
13 and I would give different answers to each one.

14 I would say that Miranda wouldn't apply to
15 either one, but the latter one, with the priest, would
16 violate due process. Not the newspaper reporter. And so
17 for purposes of this case, they would -- since this
18 involves only Miranda, they would be treated the same.

19 There's no intimidating presence there. I mean,
20 in that sort of circumstance, unlike -- you know, unlike
21 this case --

22 QUESTION: But why is the -- why is the priest
23 -- phony priest a violation of due process?

24 MR. LARKIN: Well, it would be a violation of
25 due process because it would be -- it would fit within one

1 half of the two concerns the Court has in confession
2 cases. One half on the due process is whether or not the
3 police practice is likely to elicit a false confession.

4 QUESTION: Well, but that certainly wouldn't
5 elicit false confessions.

6 MR. LARKIN: That's right.

7 QUESTION: You don't --

8 MR. LARKIN: This fits in the second half --

9 QUESTION: No.

10 MR. LARKIN: -- which is whether or not the
11 practice is one that is offensive to civilized standards
12 of decency.

13 QUESTION: Well, why is that so offensive? I
14 mean, why is that any more offensive than sending in
15 another fellow saying, I want to -- let's go out and
16 escape together?

17 I mean, why -- I don't know why a phony priest
18 is any more offensive than a phony prison break.

19 MR. LARKIN: Well, there are -- one, dealing
20 with someone who's about to commit a crime isn't one that
21 society is unwilling to allow the police to do. It's an
22 essential part of law enforcement. It's like sending in
23 an undercover officer to -- to purchase narcotics in a
24 crack house.

25 In the case of a priest, society, I think, is

1 unwilling to allow the police to do that because it may
2 prey on a person's peculiar sensibilities. It's one that,
3 you know, society has always recognized. That's why, for
4 example, society generally would, I guess, recognize a
5 communication in confidence in that context.

6 But communications, like the ones here that are
7 designed to put together an escape plot and to beat up an
8 elderly prison guard in the process, don't even remotely
9 fall into that for the circumstance. So I don't think
10 society would put this type of practice that we have here
11 out of bounds.

12 In fact, but for the fact that this was a jail
13 cell --

14 QUESTION: Well -- well, the fact -- the fact,
15 Counsel, that he agreed that he was going to beat up a
16 prison guard -- your case really doesn't turn on that.

17 MR. LARKIN: Well, --

18 QUESTION: Your case turned on the fact that
19 he's not in custody.

20 MR. LARKIN: Well, it --

21 QUESTION: Or that -- that he -- that there is
22 no coercive environment.

23 MR. LARKIN: It doesn't turn on the fact that he
24 agreed to -- to beat up a prison guard. What it does, I
25 think, is add a little context to what happened.

1 QUESTION: It adds a little color, but it adds
2 nothing legally significant, correct?

3 MR. LARKIN: Well, the coloring is important. I
4 mean, after all, the reason for having a police officer
5 there is a big distinction, a crucial one, we believe --
6 is that it was essential to Miranda that the suspect would
7 know that the person sitting across the table from him in
8 a police interrogation room was a police officer.

9 The police officer is the one who holds the
10 suspect's fate in his hands. The police officer is the
11 one who may instill in the suspect the belief that unless
12 he confesses he'll never be released, or that if he is
13 silent and stands on his rights, he is likely to pay a
14 very dear price for it.

15 So there -- that -- these sort of facts are
16 important. And undercover officer, by definition, can't
17 use the fact that he's a police officer as a means of
18 intimidation. An undercover officer obviously can't
19 threaten someone who is already in jail when the officer
20 is posing as a fellow prisoner, with having the authority
21 to keep that other person in custody until he confesses.

22 The only weapon open to an undercover officer is
23 guile. And that, as the Court has recognized in cases
24 such as Hoffa, in cases such as Atchley, in cases such as
25 Frazier v. Cupp --

1 QUESTION: There was another difference in
2 Hoffa. Hoffa was not in custody.

3 MR. LARKIN: Correct. This --

4 QUESTION: Well, why say it's the same as Hoffa?

5 MR. LARKIN: Well, at the -- at that level that
6 doesn't distinguish this case from Atchley. It --

7 QUESTION: (Inaudible.)

8 MR. LARKIN: Well, in Atchley --

9 QUESTION: Just ignore the fact that Hoffa was
10 not in custody.

11 MR. LARKIN: Hoffa was not but Atchley was.
12 Atchley was questioned by an undercover, by an insurance
13 agent who was wired.

14 QUESTION: And in custody.

15 MR. LARKIN: No, Atchley was in prison and he
16 was questioned by --

17 QUESTION: He was in prison?

18 MR. LARKIN: Yes. Prison or jail. He was
19 questioned by an insurance --

20 QUESTION: Hoffa was in his office in his home.

21 MR. LARKIN: No, no. I didn't say Hoffa. I
22 said Atchley. In --

23 QUESTION: Well, I'm talking about Hoffa.

24 MR. LARKIN: No, I agree. There's that
25 difference between this case and Hoffa.

1 QUESTION: Well, why do you keep bringing it up?

2 MR. LARKIN: Well, because --

3 QUESTION: Do you promise not to bring it up
4 again?

5 MR. LARKIN: I promise I won't bring it up
6 again.

7 (Laughter.)

8 MR. LARKIN: But that -- that sort of fact --
9 even though I won't mention the name of the case -- is --
10 is crucial to looking at this sort of problem.

11 As we've explained in our brief and as the state
12 has explained in its brief and at oral argument, the fact
13 is really that he was not subject to a custodial
14 interrogation, which is a concept. It's not simply
15 custody, it's not simply an interrogation in its entire
16 concept.

17 This scenario here doesn't engage the types of
18 concerns that gave rise to Miranda, and obviously it can't
19 be regulated by the same ground-rules without simply
20 forbidding it altogether.

21 For the reasons we've given in our brief and
22 that I've tried to summarize here, because this is not the
23 same type of setting and can't be regulated in the same
24 way, the police shouldn't be made to try to act in the
25 same way.

1 Unless the Court has any further questions --

2 QUESTION: Let me just summarize it. Your --
3 your basic position is this is not a Miranda case, this is
4 a due process case, and there's nothing offensive about
5 the practice?

6 MR. LARKIN: Correct.

7 QUESTION: That's your -- yeah, okay.

8 QUESTION: Thank you, Mr. Larkin.

9 Now it's your turn, Mr. Evers.

10 ORAL ARGUMENT OF DAN W. EVERS

11 APPOINTED BY THIS COURT

12 ON BEHALF OF THE RESPONDENT

13 MR. EVERS: Mr. Chief Justice, and may it please
14 the Court:

15 I represent the Respondent, Lloyd Perkins, in
16 this case.

17 We come before this Court today requesting Your
18 Honors to affirm the judgments of the courts below. The
19 judgment of the Appellate Court of Illinois, Fifth
20 Judicial District, which affirmed the order of the Circuit
21 Court of St. Clair County suppressing statements made by
22 my client, Lloyd Perkins, to the undercover agent, John
23 Parisi.

24 It is our contention that the well-settled law
25 and principles of Miranda apply to this case.

25

1 QUESTION: Well, what's your closest case?

2 MR. EVERS: Our closest case?

3 QUESTION: What's -- what's -- what case here
4 gives you most support do you think?

5 MR. EVERS: I believe almost every Miranda case
6 decided by this Court --

7 QUESTION: Well, which one -- which one is
8 closest?

9 MR. EVERS: In terms of the facts of the case, I
10 would have to say Mathis, followed by United States v.
11 Henry.

12 QUESTION: Well, Mathis -- you don't think it
13 makes any difference that the person being interrogated
14 didn't know that -- that there was -- that he was dealing
15 with a police officer in this case, whereas in Mathis he
16 did?

17 MR. EVERS: No, Your Honor. I don't believe it
18 makes any difference because the Fifth Amendment is not
19 only a right to the people, but a limitation upon the
20 government and it's directed as a limitation to the
21 government --

22 QUESTION: Yeah, but what --

23 MR. EVERS: -- government, and --

24 QUESTION: What was Miranda aimed at anyway?
25 Was it a prophylactic rule against coercion?

1 MR. EVERS: It's a prophylactic rule against
2 coercive governmental action. In our case here we will
3 contend, and we do contend, that there is governmental
4 action which can be coercive. And that coercion is found
5 in the trickery, deceit, cajoling or the ruse used by the
6 undercover agent here, John Parisi.

7 QUESTION: Well, but coercion -- if you look up
8 coercion in the dictionary, it means something quite
9 different from trickery or ruse or deceit. Coercion
10 means, you know, overwhelming the person with the threat
11 of government force in some way.

12 Trickery or deceit may have equally significant
13 consequences for his decision, but they're -- they're not
14 the same thing.

15 MR. EVERS: Well, I would suggest that trickery
16 and deceit is a subspecies of coercion.

17 QUESTION: Are you --

18 QUESTION: But it's -- but it's not true.

19 QUESTION: I recommend you to the nearest
20 English dictionary.

21 (Laughter.)

22 QUESTION: It's the difference between the con
23 man who tricks you out of the money and somebody who says,
24 give me your money or I'll break your leg. I mean, you
25 don't see the difference between those two? You consider

1 both of those to be -- to be coercion?

2 MR. EVERS: Well, in --

3 QUESTION: I mean, one --

4 MR. EVERS: -- terms of how you present the
5 trickery, I think that it can be coercion because if --

6 QUESTION: In one case you give your money over
7 voluntarily. In the other case it's exacted under --
8 under threat of harm.

9 MR. EVERS: The form of the trickery can lead
10 towards the coercion by compelling the person to believe
11 that he has to do something when his free will would not
12 so incline him to do.

13 I believe that you're looking at coercion as
14 merely physical force. I would suggest that coercion can
15 be psychological and mental force also.

16 I believe that it's important to look at this
17 case in terms of what the procedural posture of it is and
18 what happened in the courts below because the facts of the
19 case are this. The Defendant Lloyd Perkins was charged
20 with murder in the Circuit Court of St. Clair County.

21 QUESTION: Where --

22 MR. EVERS: He filed --

23 QUESTION: Where is that? Belleville.

24 MR. EVERS: That's Belleville, East St. Louis.

25 QUESTION: It isn't -- it isn't Mt. Vernon?

1 MR. EVERS: No, Your Honor. Mt. Vernon is
2 Jefferson County and it's several miles to the east.

3 After the charge was made, the Defendant filed a
4 motion to suppress the confession. A hearing was held
5 before the Circuit Court of St. Clair County at which
6 evidence was presented. This evidence is the facts upon
7 which the circuit court based its decision.

8 Its decision was to take those facts and apply
9 the settled law of Miranda to it and conclude whether
10 Miranda had been violated or whether it had not been
11 violated.

12 The circuit court determined as a factual matter
13 that Miranda had been violated. It concluded that the
14 Defendant was in custody, he was in jail. It concluded
15 that he'd been interrogated or questioned. Parisi and
16 Charlton specifically questioned the Defendant, Lloyd
17 Perkins. And it concluded that Parisi and Charlton were
18 law enforcement agents and they initiated that
19 questioning. Those are the facts found by the circuit
20 court.

21 When the state filed the notice of appeal from
22 that decision, it went to the Appellate Court of Illinois
23 and in the Appellate Court of Illinois the state had to
24 bear the burden of showing that those factual
25 determinations were incorrect, were manifestly erroneous.

1 The decision of the Appellate Court of Illinois
2 is nothing more than a statement that those facts were not
3 manifestly erroneous.

4 And I would suggest that before this Court --
5 after the state loss in the Fifth District Appellate
6 Court, a petition for leave to appeal to the Illinois
7 Supreme Court, and that court denied leave to appeal and
8 the state brought this cert petition which this Court
9 grated -- I would suggest that this Court also look at
10 what happened below as findings of fact which need to be
11 given due deference because they are not manifestly
12 erroneous.

13 QUESTION: Mr. Evers, if trickery is just as bad
14 as -- as - as what -- what we normally call coercion, why
15 -- why should Miranda only apply to trickery when -- when
16 the person tricked is in custody? Why -- why isn't it
17 just -- why isn't the trickery just as offensive, and why
18 isn't there just as much coercion, if you want to call
19 trickery coercion?

20 If Parisi had -- had approached your client in
21 the hotel room instead of in jail, would you apply Miranda
22 to that as well?

23 MR. EVERS: I would agree that Miranda --

24 QUESTION: You would?

25 MR. EVERS: -- would not apply for the very

1 important reason --

2 QUESTION: Would -- would not apply? Would not
3 apply?

4 MR. EVERS: Miranda would not apply to the hotel
5 situation --

6 QUESTION: Why?

7 MR. EVERS: -- because he is not in custody. He
8 is where he can leave. He is where he has control to get
9 up and leave whenever he wants.

10 QUESTION: But he's being tricked. That's just
11 to say that he isn't being coerced. But he's being
12 tricked just as much.

13 You say trickery is coercion. He's being
14 tricked just as much whether he's tricked in the jail or
15 out of the jail.

16 MR. EVERS: I would agree with that.

17 QUESTION: What's the difference?

18 MR. EVERS: But I believe the key difference is
19 that in a jail he is in a police-dominated, police-
20 controlled, government institution that --

21 QUESTION: That has nothing to do with this
22 case.

23 MR. EVERS: -- would keep him from --

24 QUESTION: He was tricked. He wasn't coerced,
25 he was tricked. But you say that's enough, tricking is

1 enough. But it seems to me it follows from -- from what
2 you want us to -- to hold here that you should apply
3 Miranda everywhere when -- when there is trickery.

4 MR. EVERS: I would not say that, Your Honor. I
5 would say that jails are different. Jails are where
6 people are incarcerated, they're deprived of their
7 liberty, and the government has an obligation to treat
8 them with due respect towards constitutional principles.

9 And one of those principles, I would suggest, is
10 that they not be compelled to be witnesses against
11 themselves and --

12 QUESTION: I think it's worse --

13 MR. EVERS: -- against their free will.

14 QUESTION: -- worse to be tricked in my home
15 than I do in jail. I would -- I would get much more
16 annoyed at a government that comes to my house and tricks
17 me than -- than one that tricks me when I'm -- when I'm in
18 the police custody. You just feel differently about it?

19 MR. EVERS: I would, Your Honor.

20 In line with this discussion, I would like to
21 point out to the Court that this case does not involve a
22 non-custodial setting. And I believe that's important
23 because I believe the jail setting is the most important
24 point.

25 This -- this case does not involve simply an

1 informant who hears something in the jail and then goes
2 tells the government. This case involves a specific
3 designed plan to elicit incriminating remarks from the
4 Defendant, Lloyd Perkins.

5 And this is not just something that was on the
6 spur of the moment by the police. This is a thought-out
7 plan to get at Lloyd Perkins. It's been thought out for
8 several weeks. And when they discovered that he was at
9 the Montgomery County Jail in which he was incarcerated at
10 the time for aggravated battery, they made the specific
11 decision to get Agent Parisi.

12 And I think that if you look at the plain
13 holding of Miranda, you will see that this case falls
14 squarely within the plain holding of Miranda in which Your
15 Honors stated that these confessions or statements cannot
16 be used unless there is demonstrated a knowing waiver of
17 the Fifth Amendment privilege against self-incrimination.

18 It's not that they were not able to go and talk
19 to the Defendant Lloyd Perkins. They were able to go and
20 talk to him. It's that they were not able to use that
21 information unless they got a valid voluntary waiver.

22 I don't think the state would contend at all
23 that if a uniform police officer went to Lloyd Perkins in
24 his cell and said, I want to talk to you, that he had to
25 give Miranda to the Defendant. We see no difference

1 between the uniformed police officer and the undercover
2 agent. They are both agents, law enforcement agents of
3 the state. They both have to follow the dictates of
4 Miranda.

5 Under Miranda there has to be questioning or
6 interrogation. I would suggest to this Court that that is
7 amply demonstrated by the record. What happened is that
8 Charlton and Parisi went to Lloyd Perkins, spun this tale
9 and then started asking him questions specifically
10 designed to grab the information that they wanted.

11 They did not sit around and just talk about the
12 weather or talk about anything that was of no consequence
13 and Lloyd Perkins blurted this out. They talked about and
14 they questioned specifically to get to what they wanted.
15 And when Lloyd Perkins might become quiet, they would
16 chime in and ask another question designed specifically to
17 bring something else out, something to be more
18 incriminating.

19 And, of course, Miranda is concerned with their
20 being a law enforcement agent involved. It's not just the
21 Fifth Amendment that is important because there was
22 questioning and there was custody. It's important because
23 there's a governmental agent involved, not some private
24 citizen.

25 The key concern in Miranda is that the

1 government has to be circumscribed in its conduct towards
2 its citizens. Here we definitely do have a law
3 enforcement agent. He was an undercover agent in the
4 narcotics trade. He was a police officer, and he was
5 sworn to uphold the laws of the State of Illinois and the
6 Constitution of the United States.

7 The former Department of Corrections inmate,
8 Charlton -- by this time he had become a law enforcement
9 agent because he was working hand-in-hand with the police.
10 He was following the dictates and plans of the police and
11 his only purpose within this ruse was to trick and cajole
12 Lloyd Perkins into the confidence of Agent Parisi.

13 We would also suggest that the concerns of the
14 Court in Miranda, concerns that powered the decision of
15 that Court, are present in this case. In Miranda this
16 Court was concerned about trickery. It was concerned
17 about deceit. It was concerned about the police-dominated
18 atmosphere of custody and jails.

19 In Miranda this Court talked about the
20 psychological ploys that could be employed and was very
21 concerned about the psychological coercion exerted by the
22 environment in custody.

23 To touch upon a concern of Justice Marshall a
24 little while ago, if this case is ripped out from the
25 cover of Miranda, then you will simply have the police

1 circumventing Miranda by using undercover agents in the
2 old Mutt and Jeff technique in which now, instead of Jeff
3 being the good cop, he has become the good companion, the
4 good inmate, while Mutt is the terrifying police officer
5 who sets up and produces the mental coercion in the
6 defendant, in the accused, in which he becomes susceptible
7 to the ploys and trickery of the undercover agent.

8 If this Court removes the protections of Miranda
9 from these situations, then you will simply have the forms
10 of psychological coercion being moved into this arena.

11 Finally, I'd like to note that this Court has
12 noted that this is a factual matter. In Patterson v.
13 Illinois, this Court noted that surreptitious
14 conversations between an undercover police agent could be
15 interrogation under Miranda and Miranda would apply.

16 Under footnote 9 of Patterson, the issue is not
17 whether Miranda applies. The issue is the factual
18 question of whether there is custody, whether there is
19 interrogation and whether there is a police officer. We
20 have all three elements in this case.

21 And that's what this Court has to focus upon, is
22 those three elements of Miranda. Custody, interrogation
23 and questioning, and the law enforcement officer
24 initiating that questioning.

25 Consequently, if Your Honors do not have any

1 other questions --

2 QUESTION: Let me ask you just one question, if
3 I may.

4 Would the case be different in your view if the
5 law enforcement officer said nothing and the other inmate
6 did all the questioning?

7 MR. EVERS: Charlton?

8 QUESTION: I don't have the names in my --

9 MR. EVERS: In my view it would not because
10 under my view of the case Charlton is a law enforcement
11 agent by this. He is acting under the authority and
12 orders of the police.

13 If you're asking whether the undercover agent is
14 sitting around with somebody who was not working with him
15 and he just listened to a conversation between those two,
16 I would say that would be different, that there was no
17 interrogation between the police officer, the law
18 enforcement agent, and these two inmates.

19 I think that would be the difference between a
20 listening post and an interrogator.

21 QUESTION: Thank you.

22 MR. EVERS: Consequently, Your Honors, we would
23 ask that you affirm the judgments below and affirm the
24 suppression of the statements.

25 QUESTION: Thank you, Mr. Evers.

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Ms. Friedl, you have six minutes remaining.

REBUTTAL ARGUMENT OF MARCIA L. FRIEDL
ON BEHALF OF THE PETITIONER

MS. FRIEDL: Well, Your Honors, if there aren't any questions, for all the reasons presented by the State of Illinois and by the Solicitor General's Office, we request that the Illinois Appellate Court's extension of Miranda be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Friedl. The case is submitted.

(Whereupon, at 2:36 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#88-1972 - ILLINOIS, Petitioner V. LLOYD PERKINS

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